

civil procedure
only study guide for CIP3701



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Orientation

Getting started

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

Module outcomes

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

In Module 1 (CIP2601), you learnt that a court of law will not entertain legal proceedings unless it has the necessary jurisdiction to do so. In this module, you are taught that a judicial order will be neither granted nor enforced unless the proceedings have been instituted in the proper form and conducted in the proper manner. Therefore, in order to litigate successfully, various procedural obstacles, such as determining the correct form of proceedings, the correct documents to be prepared and filed with the court, their method of service, the conduct of proceedings in court, whether an order is subject to an appeal or a review, etc, have to be faced. This module seeks to prepare you to meet and overcome these obstacles in practice.

Once you have finished studying this module, you should

- know and understand the rules and principles of civil procedure
- explain the choice of appropriate procedures
- demonstrate the ability to meet and overcome various procedural obstacles in practice
- demonstrate your ability to present solutions to problems through theoretically founded arguments

Structure of the study guide

The tutorial matter for CIVIL PROCEDURE MODULE 2 (CIP3701) has been divided into Part 1: Selected legislation influencing civil procedure, Part 2: Civil proceedings in the High Court, Part 3: Procedure in the magistrates' court, and Part 4: Variation of judgments, review and appeals. Where necessary, the study units have been further subdivided into subunits and points. The study units form the core of this study guide. Each study unit forms a complete whole and deals with a specific aspect of the tutorial matter.

Structure of a study unit

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

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

Numbering of study units

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

To illustrate the interrelatedness of the study units, consider part 3 which deals with procedure in the magistrates' courts, and in which numerous cross-references are made to the study units in part 2 that relate to procedure in the High Court. This is the case because the procedure in both courts is so similar. Therefore, it is important that you follow up the cross-referencing in order to place the subject matter of a specific study unit in its general procedural context. However, be aware that different rules apply in the High Court and the magistrates' court.

LEARNING OUTCOMES

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

PRESCRIBED CASES

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

You are not required to memorise all the case names mentioned in the study guide. However, **you are expected to acquaint yourself with the cases, and the principles of those cases, which have been set out in the study guide.** Ensure that you acquaint yourself fully with these cases and principles, and you should present and/or apply them in your examination answers if appropriate.

Note that names of important cases appear in the margin.

ACTIVITIES AND FEEDBACK

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

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

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

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

PRESCRIBED TEXTBOOK

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

Faris and Hurter *The Student Handbook for Civil Procedure* LexisNexis (2012) Sixth Edition soft cover

Please note: Further editions of the textbook during the currency period of this guide are a possibility. Therefore, consult Tutorial Letter 101 for a particular year for the appropriate edition.

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

The prescribed textbook, *The Student Handbook for Civil Procedure* (“*Student Handbook*”), contains the Rules of Court and the relevant statutes that relate to civil procedure.

COMPULSORY READING MATERIAL

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

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

However, this does not mean that you need to memorise the court rules and sections or even the rule and section numbers. The **content** is what is important, and a good summary of the content will generally suffice. You should be guided by the instructions in the study guide and in the activity questions: for example, sometimes you will be required to note the procedure as prescribed by the rules, and, at other times, you will simply need to write down the types of claims which could give rise to the use of a particular procedure. However, what is important is that you integrate the reading material with the study guide contents.

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

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

In order to prepare yourself for the study of this module, we advise you to read study units 5 and 6, Module 1 (CIP2601), attentively in conjunction with the remarks which follow.

The High Court

One should distinguish between the law of procedure which applies to the High Court and the law of procedure which applies to other courts, such as magistrates' courts, certain indigenous courts, and other bodies vested with judicial and quasi-judicial powers which were established by virtue of particular legislation. The reason for this is that the civil procedure of the High Court does not consist solely of statutory provisions and court rules; a substantial part of it consists of common law rules. Because of this, the High Court is sometimes said to have "inherent jurisdiction" (as opposed to the other courts). "Inherent jurisdiction" simply means that the High Court derives its powers from the common law, and not from a statute (although a statute, in certain cases, may limit or increase this jurisdiction). The High Court is empowered, for example, to condone noncompliance with procedure in appropriate circumstances, even where the provisions of a particular rule are binding (see Rule 27(3) of the Uniform Rules of Court). Inherent jurisdiction will be exercised to prevent abuse of the judicial machinery that was established to facilitate good administration of justice. However, please note that, with the advent of the Constitution, 1996, the inherent jurisdiction of the courts has now been subsumed under section 173 of the Constitution, which means that a court cannot exercise its jurisdiction beyond the ambit of section 173. Therefore, a court may not regulate its processes by assuming powers which it does not have, for example by creating a right (see e.g. *Oosthuizen v RAF* 2011 6 SA 31 (CC) para [15]–[26]).

The Superior Courts Act, 2013 was passed to rationalise, consolidate and amend the law relating to the Superior Court of South Africa. In terms of section 29(1) of this Act, the Chief Justice can make rules regulating the conduct of proceedings in the Constitutional Court and, in terms of section 30(1), rules for the Supreme Court of Appeal and the High Court are made in accordance with the Rules Board of Law Act, 1985.

In terms of section 43 of the repealed Supreme Court Act 59 of 1959, Uniform Rules were promulgated on 12 January 1965, regulating, with effect from 15 January 1965, "the conduct of the proceedings of the provincial and local divisions of the Supreme Court of South Africa", and are still known as the "Uniform Rules of Court". They still ensure that all proceedings are conducted in a uniform manner in all the various divisions of the High Court. In practice, the only rules of the various divisions which have not been affected are those relating to court terms, vacations, sessions and set-down.

The Rules Board was established in 1985, and its powers and functions are regulated by the provisions of the Rules Board for Courts of Law Act 107 of 1985. The purpose of this Act is to facilitate the making of rules of court for the efficient and uniform administration of justice in the

different divisions of the High Court, the Supreme Court of Appeal and in the various lower courts; hence the competence to make rules for all courts now vests solely in the Rules Board.

Unless expressly stated to the contrary, all subsequent references to “Rule” or “Rules” constitute references to the Uniform Rules of Court, and all subsequent references to “rule” or “rules” constitute references to the Magistrates’ Courts Rules.

NOTE: The Superior Courts Act, 2013 defines a superior court as the Constitutional Court, the Supreme Court of Appeal or a High Court (Afr: “Hooggeregshof”).

The magistrates’ courts

The civil procedure of the magistrates’ courts is governed by the Magistrates’ Courts Act of 1944, as amended. Section 2 of the Magistrates’ Courts Act empowers the minister of justice to create magistrates’ courts by means of a notice in the *Government Gazette*, and to define the limits within which such court may exercise its jurisdiction. Therefore, the Republic is divided into numerous magisterial districts and regional divisions, with each district and division having a magistrates’ court. The name of the district and division does not necessarily coincide with the place in which specific court sessions occur. Section 4(3) provides that every process issued out of the court will apply throughout the Republic. To illustrate this, if the magistrates’ court for the Pretoria district issued a summons, this could be executed by the sheriff of the court for the Durban district if the person named in the summons were resident in Durban.

Magistrates and court officials are involved in the administration of justice in the magistrates’ court. Every magistrates’ court and regional division has one magistrate, one or more additional magistrates, or one or more assistant magistrates. Please note that, although a magistrate usually presides in civil trials in the magistrates’ court, section 34 provides that the court may request the assistance of one or two persons of skill and experience in the matter to which the action relates who may be willing to sit and act as assessors in an advisory capacity. Section 12 provides that only a magistrate whose name appears on the list of magistrates for regional divisions may adjudicate a matter in the regional court.

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

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

- Part I : Courts (chs IV; ss 2–25)
- Part II : Civil Matters (chs VI–XI; ss 26–88)
- Part III : Criminal Matters (chs XII–XVI; ss 89–105)
- Part IV : Offences (ch XVII; ss 106–109)
- Part V : General and Supplementary (ch XVIII; ss 110–117)

However, in this module we shall devote more attention to Part II of the Act. When we refer to the

Magistrates' Courts Act or the Magistrates' Courts Rules, we shall use abbreviations, that is, "Act" or "rules", and when we refer to a particular section or rule in the Act or rules respectively, we shall simply refer to "section X" or "rule Y". This will be done to avoid lengthy repetitions.

A FEW REMARKS ON THE CONDUCT OF PRACTITIONERS

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

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

- 1 Lawyers shall at all times maintain the highest standards of honesty and integrity towards all those with whom they come into contact.
- 2 Lawyers shall treat the interests of their clients as paramount, subject always to their duties to the Court and the interests of justice, to observe the law and to maintain ethical standards.
- 10 Lawyers shall use their best efforts to carry out work in a competent and timely manner, and shall not take on work which they do not reasonably believe they will be able to carry out in that manner.
- 12 Lawyers shall always behave towards their colleagues with integrity, fairness and respect.

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

ENDPLAY

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

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

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

PART 1

Selected legislation influencing civil procedure

OVERVIEW

1. The Constitution, 1996
 - 1.1 General
 - 1.2 Eviction
 - 1.3 Arrest
 - 1.4 Execution
2. The National Credit Act, 2005 (NCA)
 - 2.1 Service and delivery of documents
 - 2.2 Procedures and pleadings
 - 2.2.1 Letter of demand
 - 2.2.2 Notice
 - 2.2.3 Summons
 - 2.2.4 Summary judgment and default judgment
3. Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002
4. The Electronic Communications and Transactions Act 25 of 2002

Learning outcomes

After you have studied this part, you should

- have a background which will prepare you for applying this legislation in later study units in part 2 and part 3
- study the content of the relevant sections of the legislation in order to be able to describe the content
- apply the content of this part to solve set problems

Compulsory reading material

Section 8; section 36; section 39 of the Constitution, 1996
Section 129 of the NCA

1. THE CONSTITUTION, 1996

1.1 General

The Constitution has a significant influence on civil procedure. The purpose of this discussion is not to deal with this topic in a comprehensive manner, but to inform you, in broad terms, that civil litigation can no longer be conducted without considering the values embodied in section 36 of the Constitution.

Section 8 provides that Chapter 2 (Bill of Rights) applies to “all law”, and therefore this chapter also applies to the law of civil procedure. Several of the rights enshrined in Chapter 2 directly

relate to the law of civil procedure, the most important (for our purposes) being equality before the law (s 9); the right to freedom and security (s 12); property (s 25); the right to have access to adequate housing (s 26); and access to courts (s 34).

1.2 Eviction

An owner's common law right to obtain an eviction order is seriously limited by the Constitution and certain land reform legislation. The latter is complex, and the various Acts have divergent procedural requirements for obtaining eviction orders in different courts. For purposes of this module, you need only take cognisance of these Acts in order to be prepared in practice to establish their applicability in a particular instance. The legislation includes the following:

- Restitution of Land Rights Act 22 of 1994
This Act protects the lawful and unlawful occupiers of urban and rural land who **have instituted land restitution claims**.
- Land Reform (Labour Tenants) Act 3 of 1996 (LTA)
This Act protects persons living on agricultural land who, instead of wages, have obtained the right to use land for farming purposes.
- Interim Protection of Informal Land Rights Act 31 of 1996 (IPILRA)
This Act protects **de facto holders of informal land rights** in respect of rural and urban land pending the final determination of the status of such rights. The land concerned is mainly found in the former so-called "independent homelands".
- Extension of Security of Tenure Act 62 of 1997 (ESTA)
This Act protects **former lawful occupiers of agricultural land**.
- Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (the so-called "PIE" Act)
This Act finds application when the eviction of a person from his or her urban home is sought, and applies in respect of land throughout the Republic. If ESTA, IPILRA or LTA do not apply to a particular case, and the occupier falls within the definition of an "unlawful occupier" as defined in section 1 of the Act, then this Act applies. Buildings and structures that do not fulfil the function of a dwelling or a shelter for humans (e.g. commercial property) fall outside this Act. If the land has been occupied for less than six months, the court may grant an eviction order if it considers it just and equitable to do so after considering all relevant circumstances (which include the rights and needs of the elderly, children, disabled persons and households headed by women). If the land has been occupied for longer than six months, the court must in addition consider if land is available for the relocation of the unlawful occupier. This Act suspends the exercise of a landowner's proprietary rights until this determination has been made, and if the procedural requirements of the Act have been met, a landowner may approach the court for an order (*Ndlovu v Ngobo; Bekker and Bosch v Jika* 2003 1 SA 113 (SCA)). This Act clearly confirms certain values such as dignity, equality and freedom, and requires courts to, where necessary, create innovative remedies in order to protect and enforce the constitutional rights of the owner and the occupier (*Transnet Ltd v Nyawuza* 2006 5 SA 100 (D) 105G–107D).

1.3 Arrest

The right to freedom and security (s 12) led to the Supreme Court of Appeal decision in *Bid v*

Industrial Holdings (Pty) Ltd v Strang (Minister of Justice and Constitutional Development, Third Party) 2008 3 SA 355 (SCA), in which it was held that the arrest of a person to confirm or found jurisdiction was unconstitutional.

In *Malachi v Cape Dancing Academy Int (Pty) Ltd* 2010 6 SA 1 (CC) at 19A–B, the court confirmed an earlier finding that the section in the Magistrates' Courts Act, 1944, codifying the common law, and which authorised arrest *tanquam suspectus de fuga*, was unconstitutional. Uniform Rule 9 (regulating arrest) has since been repealed, and arrest *tanquam suspectus de fuga* no longer exists.

1.4 Execution

The Constitutional Court held in *Japhtha v Schoeman; Van Rooyen v Stoltz* 2005 3 SA 140 (CC) that a writ of execution that would deprive a person of “adequate housing” would be in conflict with such person’s right in terms of section 26, and would consequently need to be justified in terms of section 36(1). Mokgoro J explained the position thus:

The interests of creditors must not be overlooked. There might be circumstances where, notwithstanding the relatively small amount of money owed, the creditor’s advantage in execution outweighs the harm caused to the debtor. In such circumstances it may be justifiable to execute. It is in this sense that a consideration of the legitimacy of a sale in execution must be seen as a balancing process.

For this reason, the court held that execution must be subject to judicial oversight. In *Gundwana v Steko Development and others* 2011 3 SA 608 (CC), the Constitutional Court consequently held that (in an instance when it was requested that immovable property be declared specially executable after default judgment) the Registrar may not grant such an order, and that execution may only follow upon judgment in a **court of law**. The court further declared the practice under the rules of court of allowing a Registrar to grant orders declaring immovable property that constitutes a person’s home executable, constitutionally invalid (para [55]; [65]). Read amended Uniform Rule s 45 and 46 which give effect to these judgments.

Judicial oversight will ensure that the impact that the execution may have on indigent debtors who are at risk of losing their homes be considered, as well as any alternative course of action. It is submitted that this amended practice ensures compatibility with section 26 of the Constitution.

Of interest is also *FirstRand Bank Ltd v Folscher and another and similar matters* 2011 4 SA 314 (GNP) in which the court considered the meaning of “primary residence” and “home of a person” (as used in Uniform Rule 46 and *Gundwana*). The court held that execution against a holiday home or a second home that is not usually occupied by the debtor does not trigger the rule requiring judicial oversight. Likewise, the term “judgment debtor” was held to refer to an **individual** who owns the primary residence, and not to immovable property owned by a company, close corporation or a trust, even if the immovable property is the shareholder’s, member’s or beneficiary’s only residence (para [31]–[32])!

Note that the summons initiating an action in which relief is claimed that embraces an order declaring immovable property executable must contain a clause which draws the attention of the debtor to section 26(1) of the Constitution, and which informs the debtor about the need to present information to court supporting his or her claim that an order for execution will infringe his or her section 26 right of access to adequate housing.

2. THE NATIONAL CREDIT ACT, 2005 (NCA)

It is important for lawyers involved in civil litigation to take note of the provisions of the National Credit Act (NCA). The Act regulates, *inter alia*, aspects of consumer credit regarding goods to be purchased, leased or otherwise acquired, services rendered or credit granted. Many of its provisions will have a direct impact on civil procedure. Sections 129 and 130 of the NCA create impediments regarding the enforcement of a credit agreement by means of legal proceedings: the credit provider is required to furnish a notice to terminate a debt review under section 86(10) or a notice in terms of section 129(1) drawing the consumer's attention to his or her default, and proposing that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or an ombudsman with jurisdiction, with a view to resolving any dispute and agreeing on a repayment plan.

The aim of the NCA is to promote and advance the social and economic welfare of all South Africans in a fair, transparent, competitive, sustainable, responsible and efficient manner, and to promote fair and accessible credit-marketing practices. In essence, the Act provides greater consumer protection and debt relief when a consumer is overindebted or in the event of credit having been extended recklessly. For example, if, during proceedings in which a credit agreement is being considered, a court declares that credit agreement "reckless", the court may suspend that credit agreement and other credit agreements may be rearranged (see ss 83, 85 and 87).

2.1 Service and delivery of documents

Section 168 of the NCA regulates service by registered mail or by delivery in person to the last-known address. Section 65 prescribes delivery to a consumer, and expands on the delivery options in instances where no specific method for delivery is indicated, such as delivery in person, by ordinary mail, by fax, by e-mail or by printable web page. See section 65 regarding the various options.

2.2 Procedures and pleadings

2.2.1 Letter of demand

The NCA requires the debt collection process to commence with either a letter of demand or a summons. A section 129(1)(a) demand constitutes a legal notice in terms of section 96(1) of the NCA, and it must be delivered to the consumer at his or her address as set out in the agreement or at the most recent address furnished by the consumer to the credit provider in terms of section 96(2).

2.2.2 Notice

Section 129(1)(b) of the NCA provides that the credit provider may not commence any legal proceedings to enforce the credit agreement before giving notice to the consumer in terms of section 129(1)(a) or section 86(10) and complying with further requirements as set out in section 130 (debt procedures in court). It is important to note that legal proceedings may not commence before a written notice in terms of section 129(1)(a) has been properly served on the consumer. The credit provider must prove delivery of the notice, and the consumer bears the onus to rebut proof of delivery.

Section 129(1)(a) does not indicate the method of delivery or the address where notification is to take place. After several conflicting judgments, it was held in *Rossouw v FirstRand Bank Ltd* 2010 6 SA 439 (SCA) that actual receipt of the default notice by the consumer is not required – despatching the notice in the manner chosen by the consumer to his or her chosen address as set out in the credit agreement is sufficient to establish compliance with this section.

2.2.3 Summons

As the NCA requires many averments to show compliance, a combined summons is preferred in matters relating to the NCA. In addition to the information required by magistrates' courts rule 6(1)(a), a summons for the enforcement of a debt in terms of the NCA must contain sufficient particulars to determine whether the requirements set out in the NCA have been met (in particular those of s 127; s 129 and s 131). A number of allegations may potentially be made in the particulars of claim, but it should contain at least the following averments:

- citation of the parties
- that the NCA applies to the agreement
- type and category of credit agreement
- date when the agreement was concluded
- details regarding the principal debt
- alleged compliance with the Act
- other material terms of the agreement
- *locus standi*: that the plaintiff (or credit provider) is duly registered with the National Credit Regulator in accordance with section 40 (or is exempt from registration) and has paid the renewal fees or has applied for registration, which has not been refused
- that the consumer has been in default under the relevant agreement for a period of 20 business days or longer
- that written notice in terms of section 129(1)(a) has been properly served on the consumer (defendant) (plus proof of delivery of notice: see the *Rossouw* case above at para [38] and [53])
- that ten or more business days have elapsed since the delivery of the notice
- that the consumer either did not respond to the section 129(1)(a) notice or rejected it
- that the consumer has not referred the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or an ombudsman with jurisdiction
- that there is no pending matter before the Consumer Tribunal that relates to the credit agreement
- that the consumer, who concluded an instalment agreement or lease, has failed to surrender the goods voluntarily (if applicable)
- that, where the consumer has returned the goods which are subject to an instalment agreement or lease, the provisions of section 127 have been complied with, and facts to prove compliance have been averred
- that a credit assessment was conducted in accordance with section 81, and that the credit extended to the consumer was not reckless

The following documents should be filed with a request for judgment:

- the original credit agreement
- a copy of the section 129 notice and proof that it has been properly served on the consumer
- a copy of the certificate of registration with the National Credit Regulator

2.2.4 Summary judgment and default judgment

Section 129(1)(b) of the NCA provides that a credit provider may not commence “any legal proceedings” to enforce the agreement before first giving notice to the consumer and meeting any further requirements set out in section 130. This means, first, that “any” proceedings may refer to action as well as application proceedings. Secondly, the provisions of this section also apply to an application for summary judgment and an application for default judgment. When applying for summary judgment, in addition to complying with Uniform Rule 32(2) and rule 14(2) of the Magistrates’ Courts Rules, an application under the NCA must contain the necessary averments required by section 130(3).

3. INSTITUTION OF LEGAL PROCEEDINGS AGAINST CERTAIN ORGANS OF STATE ACT 40 OF 2002

This Act commenced on 28 November 2002 and contains provisions to regulate limitation periods for the institution of legal proceedings for debt recovery against certain organs of state in a uniform manner. In terms of section 3, a person must give written notice of his or her intention to institute legal proceedings within six months from the date on which the contractual, delictual or other debt became due (unless the state organ has consented to the institution of the proceedings without such notice). However, the summons may be served only after expiry of a period of 30 days after the notice (s 5(2)).

Statutory measures which create so-called expiry periods in respect of actions against state organs have been criticised in the past because, *inter alia*, they limit access to justice, because state organs are given special treatment and because the periods are often shorter than the shortest ordinary prescription period (i.e. three years). The following *obiter* observation by the Constitutional Court in *Brümmer v Minister for Social Development* 2009 6 SA 323 (CC) at 342D–343A is relevant:

The principles that emerge from these cases are these: time-bars limit the right to seek judicial redress. However, they serve an important purpose in that they prevent inordinate delays which may be detrimental to the interests of justice. But not all time limits are consistent with the Constitution. There is no hard-and-fast rule for determining the degree of limitation that is consistent with the Constitution. ... Whether a time-bar is consistent with the right of access to court depends on the availability of the opportunity to exercise the right to judicial redress. ... It must allow sufficient or adequate time between the cause of action coming to the knowledge of the claimant and the time during which litigation may be launched.

4. THE ELECTRONIC COMMUNICATIONS AND TRANSACTIONS ACT 25 OF 2002

The electronic era has led to the amendment of the Uniform Rules of Court to provide for service of documents through the electronic medium. Uniform Rule 4A incorporates some of the provisions of the Electronic Communications and Transactions Act 25 of 2002 (specifically

Chapter III, Part 2). This Rule makes provision for service of all documents and notices, **not falling under Rule 4(1)(a)** but subsequent thereto, on a party to the litigation at the address or addresses provided by such party under the rules of court for service of such documents and notices. The documents and notices so excluded refer to processes directed at the sheriff and which initiate application proceedings (thus, in fact, referring to writs; *ex parte* and “ordinary” applications; and the simple and combined summons).

Service may be effected by

- hand
- registered post
- facsimile or electronic mail

and need not be effected through the sheriff. However, the originals of those documents and notices **may not be filed with the Registrar** by way of facsimile or electronic mail.

PART 2

Civil proceedings in the High Court

THE LETTER OF DEMAND AND THE FORMS OF PROCEEDINGS

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

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

Overview

- 1.1 The demand
 - 1.1.1 When necessary
 - 1.1.2 When statutorily required
- 1.2 Proceedings: background
- 1.3 The maxim *audi alteram partem*
- 1.4 The distinction between summons proceedings and application proceedings
 - 1.4.1 The pleading stage
 - 1.4.2 The trial stage
- 1.5 The identification of the applicable form of proceedings
- 1.6 When is there a “dispute of fact”?
- 1.7 Procedure where a dispute of fact arises

Learning outcomes

Once you have finished studying this study unit, you should

- explain the role and function of the demand
- distinguish between the two main forms of proceedings
- explain the practical effect of the *audi alteram partem* maxim on the different forms of proceedings
- have a general background which will prepare you for a more intensive study of the different forms of proceedings in the later study units

Compulsory reading material

None

1.1 THE DEMAND

The start of litigation proceedings is not necessarily preceded by a demand by or on behalf of a person who wishes to institute such proceedings, unless (1) a demand is necessary to complete a cause of action that is relied upon or (2) it is required by legislation. It stands to reason that a litigant having a complete cause of action does not need to issue a demand.

A demand applies to both application proceedings and summons proceedings and can be made either orally or in writing. The purpose of a demand is to inform the prospective defendant/respondent

- that a particular attorney acts on behalf of the prospective plaintiff/applicant
- about the nature and content of the claim against him or her
- that payment or performance of the claim is claimed
- about the time period within which action is required
- about the consequences of failure to comply with the demand

in order to convince such a person to meet his or her obligations to avoid litigation.

1.1.1 When necessary

Where a demand is an essential part or element of the cause of action (in other words, where a demand is a condition precedent to liability), litigation proceedings may not commence until the liability is complete. (It stands to reason that the cause of action must exist at the time proceedings commence.) The rules of substantive law determine whether or not a demand is an essential element of the cause of action. For example: in a contract that stipulates that, if the defendant defaults, a notice must be given to him or her to rectify such default within a certain number of days and such notice is not given, the cause of action is not complete. On the other hand, if a contract stipulates that certain moneys must be paid **on demand**, a summons will constitute sufficient demand (see e.g. *Joss v Barclays Western Bank Ltd* 1990 1 SA 575 (TPD)).

1.1.2 When statutorily required

Often, particular legislation requires a demand or a notice to prospective litigants to notify them about a person's intention to institute action against them, and that stipulates the time period within which the action must be instituted as well as that which must lapse after receipt of the notice and the commencement of proceedings. Examples include the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 (see Part 1) and section 29 of the Small Claims Courts Act 61 of 1984. The legislative provisions in respect of demand or notice are peremptory and strict compliance is essential.

Please note that, where demand is not essential to complete a cause of action, the absence of a demand merely places the plaintiff at risk of not being able to receive his or her costs of the summons should the defendant tender payment within a reasonable time (see e.g. *Bester v Van Niekerk* 1960 2 SA 363 (E) 368).

1.2 PROCEEDINGS: BACKGROUND

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

Civil procedure is characterised by a great amount of documentation which has to be prepared by the various parties before a case can be heard by the court. Parties use this documentation, for example, to formulate their claims as well as to set out their defences against such claims. Depending on the type of action, these documents are called "process documents" or "pleadings" (see study unit 1.4.2 and 8.2).

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

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

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

Example

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

A particular form of proceedings may also be selected because it affords the most inexpensive

means of approaching the court. The litigant can naturally make this choice only if the law allows him or her to do so, that is, if the law does not compel him or her to use a particular form of proceeding or does not prohibit him or her from using a particular form.

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

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

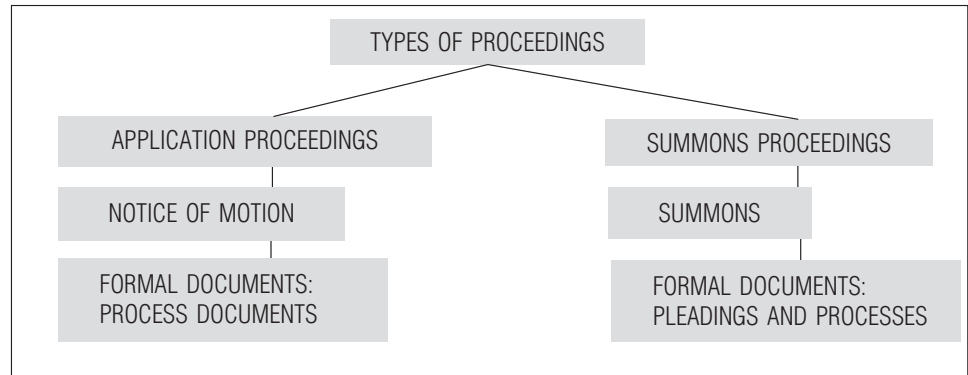


Figure 1.1: Schematic representation of types of proceedings

1.3 THE MAXIM *AUDI ALTERAM PARTEM*

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

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

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

1.4 THE DISTINCTION BETWEEN SUMMONS PROCEEDINGS AND APPLICATION PROCEEDINGS

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

1.4.1 The pleading stage

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

1.4.2 The trial stage

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

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

If the application is not opposed, the facts, as set out in the documents, are accepted. The only question which must be answered is whether a case can be made for granting the requested order (e.g. that the company be liquidated or that X be admitted as an attorney).

1.5 THE IDENTIFICATION OF THE APPLICABLE FORM OF PROCEEDINGS

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

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

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

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

Example

(1) Does legislation, or the Uniform Rules of Court, prescribe whether the application procedure must be used? Examples include applications for liquidation of companies (s 81 of the Companies Act of 2008) and for sequestration of estates, as well as the revision thereof (Rule 53 of the Uniform Rules of Court), applications in respect of marital matters (Rule 43 of the Uniform Rules of Court), and applications for the appointment of curators *ad litem* (Rule 57 of the Uniform Rules of Court).

Example

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

(3) Does the matter fall neither within the ambit of (1) nor (2) above? For purposes of this discussion, this third category, namely cases where application proceedings are neither prescribed nor forbidden, is the most important. In these cases, it is accepted practice that there is a choice between application and summons proceedings, and the following principle is applied:

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

However, it should be borne in mind that, if a party uses application proceedings and ignores the possibility that a factual dispute may arise, such party runs the risk that the application may be dismissed with costs, and may be mulcted in the form of costs even if the matter is referred to trial or to evidence: see *Tamarillo (Pty) Ltd v BN Aitken (Pty) Ltd* 1982 1 SA 398 (A) 430.

Tamarillo (Pty) Ltd v BN Aitken (Pty) Ltd 1982 1 SA 398 (A)

1.6 WHEN IS THERE A "DISPUTE OF FACT"?

There is a dispute of fact when

Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 3 SA 1155 (T)

- (1) the respondent denies material allegations made by the deponents on the applicant's behalf, and produces positive evidence by deponents to the contrary
- (2) the respondent admits the allegations contained in the applicant's affidavit, but alleges other facts which the applicant disputes
- (3) the respondent concedes that he or she has no knowledge of the main facts stated by the applicant, but may deny them, putting applicant to the proof and himself or herself giving, or proposing to give, evidence to show that the applicant and his or her deponents are

biased and untruthful, or otherwise unreliable, and that certain facts upon which the applicant and his or her deponents rely to prove the main facts are untrue

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

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

1.7 PROCEDURE WHERE A DISPUTE OF FACT ARISES

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

Read Rule 6(5)(g)

- (1) dismiss the application (although this happens very seldom, if ever, in practice) (see Rule 6(5)(g))
- (2) order oral evidence to be heard on specified issues (see Rule 6(5)(g))
- (3) order the parties to trial with appropriate directions as to pleadings, the definition of issues, etc (see Rule 6(5)(g))

ACTIVITY

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

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

.....

- (2) What is the reason for your answer?

.....

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

.....

.....

.....

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

.....

.....
.....
.....

FEEDBACK

- (1) There was a dispute in law between the parties. ("Nature" refers to the type of dispute, i.e. a dispute in law or a factual dispute.)
- (2) Abel wants to cancel the contract owing to Jaffa's behaviour. The question whether Abel has grounds for cancellation is clearly a question of law.
- (3) No, the answers would not have differed. In this case, the dispute is in law, despite the fact that the one party makes a number of factual allegations which would indicate that there had indeed been an agreement (e.g. that it had been agreed that Rx would be the price for the specific farm and that the parties had wanted to purchase and sell the farm), while the other party would deny some of these allegations. Since the dispute is about the *essentialia* (see your course on the law of contract) of a contract of purchase, the dispute is a dispute in law. The true state of affairs can be established on hearing the oral evidence. However, if the dispute related to whether or not the seller made a misrepresentation to the purchaser which led to the conclusion of the contract (e.g. regarding the water capacity of the borehole), a real dispute of fact would have arisen. (In practice, damages will also be claimed, and, as you will see later, damages are claimed by way of the combined summons.)
- (4) Application proceedings. We are dealing with a legal dispute and not with a genuine dispute of fact. Consequently, the dispute may be decided simply on the basis of the documents before the court.

THE CONDUCT OF APPLICATION PROCEEDINGS

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

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

Overview

- 2.1 Background
- 2.2 Application forms
 - 2.2.1 *Ex parte* applications (Form 2)
 - 2.2.2 "Ordinary" applications (Form 2(a))
 - 2.2.3 Related forms in which applications can appear
- 2.3 Formal aspects of application proceedings
 - 2.3.1 The form and content of the application proceedings
 - 2.3.2 The different types of affidavits
 - 2.3.3 The proceedings
 - 2.3.4 Remedy in the case of defects: motion to strike out

Learning outcomes

Once you have finished studying this study unit, you should

- distinguish between the two types of applications, as well as identify the circumstances in which each one is used
- explain the operation of application proceedings as a form of litigation

Compulsory reading material

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

2.1 BACKGROUND

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

- *Ex parte* applications

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

- “Ordinary” applications

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

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

The following is a schematic representation of the application forms:

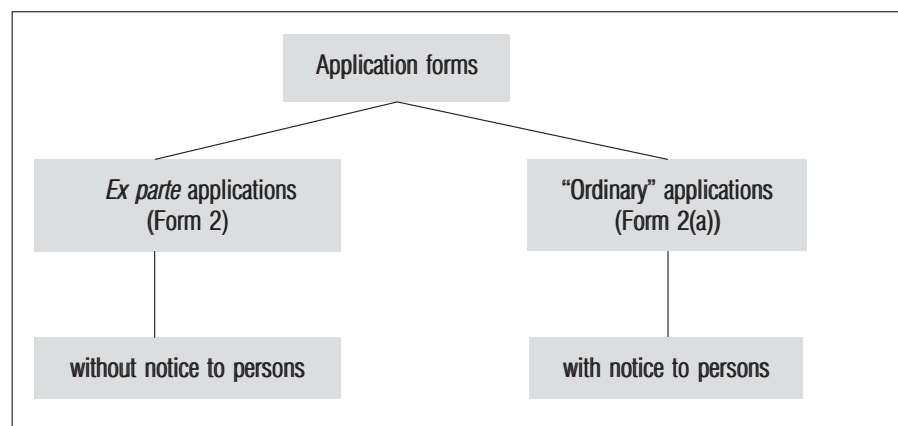


Figure 2.1: Schematic representation of application forms

2.2 APPLICATION FORMS

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

2.2.1 *Ex parte* applications (Form 2)

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

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

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

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

The court may, if it is deemed desirable to do so, order that the *rule nisi* be served on certain interested parties, for example the Master of the High Court, the former Registrar of Companies (now the Companies and Intellectual Property [CIP] Commission), the state, etc. Although these persons or bodies are not parties to the application, the court may, in view of their official capacity, consider it necessary that they receive notice of such an order. For example, where a

company has been deregistered and an order for reinstatement as a registered company is applied for, the court will normally order that the *rule nisi* be served on the CIP Commission by virtue of his or her interest in proceedings which affect companies.

Read Rule 6(2)

Rule 6(4)(a)–(c), read with Rule 6(2), deals specifically with *ex parte* applications. Read this Rule and note Rule 6(4)(b): this rule provides that any person whose interest may be affected by a decision, may deliver notice of an application for leave to oppose.

2.2.2 “Ordinary” applications (Form 2(a))

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

2.2.3 Related forms in which applications can appear

- *Interlocutory applications*

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

Example

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

Study Rule 6(11)

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

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

- *Urgent applications*

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

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

Bandle Investments (Pty) Ltd v Registrar of Deeds 2001 2 SA 203 (SE)

to the life or freedom of a person constitutes a ground for urgency, but the court has held that urgency relating to commercial interests can also lead to urgent relief – see *Bandle Investments (Pty) Ltd v Registrar of Deeds* 2001 2 SA 203 (SE).

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

Rule 6(12) makes provision for this type of application. This does not mean that an applicant may disregard the usual requirements for applications entirely. The principle is that, as far as possible, the normal rules of procedure should be followed, and that any departure from such normal rules of procedure must be justified by the urgency of the matter. In other words, the mere fact that an applicant views the matter as urgent does not mean that he or she may bring the application in any form and at any time and place, or with too short a time limit for responses by the respondent. If a departure cannot be justified, the court may strike the application off the roll with costs or may postpone the matter to afford the respondent more time to respond to the application. In *Luna Meubel Vervaardigers (Edms) Bpk v Makin (h/a Makin's Furniture Manufacturers)* 1977 4 SA 135 (W), it was held that the degree of relaxation of the normal rules should not be greater than the urgency that the case demands. Carefully read Rule 6(12) – you will notice that, in terms of such rule, the normal rules of procedure may be dispensed with.

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

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

ACTIVITY

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

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

.....
.....
.....

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

.....

(3) What documents comprise this application?

.....
.....
.....
.....

FEEDBACK

- (1) To put it simply, they are determined by the questions you must ask yourself if you find yourself in this kind of situation. Thus, the first question you must ask is
- are proceedings being instituted or is the application related to existing proceedings (i.e. proceedings which have already been instituted)?

Logically, the second question which follows is

- whose rights or interests are affected by this application?

- (2) An *ex parte* application: the above questions should have indicated that (independent) proceedings will be instituted and that the interests and rights of no-one other than Sandra will be affected by the application. Therefore, she is not obliged to give notice of the application to anyone else.
- (3) Rule 6(1) determines that an application consists of a notice of motion, supported by an affidavit containing the facts on which the application rests.

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

2.3 FORMAL ASPECTS OF APPLICATION PROCEEDINGS

2.3.1 The form and content of the application proceedings

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

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

Example

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

IN THE (NORTH GAUTENG) HIGH COURT, (PRETORIA)
REPUBLIC OF SOUTH AFRICA

In the *ex parte* application of

JAN PIETER ELS

Applicant

AFFIDAVIT

I, the undersigned

JAN PIETER ELS

hereby declare under oath and say:

1

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

2

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

3

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

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

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

Read Rule 6(5)(b)

Read Rule 6(5)(b) carefully. You will notice that the requirements set for the content of the notice of motion apply only to the "ordinary" application. Naturally, these requirements are set because interested parties must be given notice of the application to make it possible for them to be heard in terms of the *audi alteram partem* principle. In conclusion, you must note that notice is served on the interested parties – see Rule 6(5)(a). Rule 4(1)(a) provides that service must be effected by the sheriff by using any of the methods of service set out in the Rule. (Service ensures that an interested party is put in possession of a copy of the application.) Rule 6(4)(a) regulates the contents of the *ex parte* application.

In both types of applications the notice of motion must be signed by the applicant or his or her attorney. A power of attorney does not have to be filed for purposes of application proceedings. In the case of the *ex parte* application, the application is addressed only to the Registrar, while the “ordinary” application is addressed to both the Registrar and all interested parties.

2.3.2 The different types of affidavits

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

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

- (1) The supporting affidavit of the applicant, which is attached to the notice of motion.
- (2) The answering affidavit by the respondent in terms of Rule 6(5)(d)(ii). In this affidavit, the respondent, supported in so far as may be necessary by other affidavits, deals paragraph by paragraph with the allegations and evidence contained in the supporting affidavit. Compare the general rules relating to pleadings, which are discussed more fully in study unit 8.
- (3) The replying affidavit by the applicant in terms of Rule 6(5)(e), in which the applicant deals paragraph by paragraph, in so far as may be necessary, with the allegations and evidence contained in the respondent’s answering affidavit.

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

2.3.3 The proceedings

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

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

An affidavit may not, save in exceptional cases of urgency, contain hearsay evidence, any other inadmissible evidence or matter which is argumentative, irrelevant, vexatious or scandalous. Where an opposing party wishes to object to such matter, he or she may apply to have the

offending matter struck out. Such application is not brought by means of notice of motion, but merely upon proper notice to the other side (see Rule 6(15)).

ACTIVITY

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

- (1) Advise Paul on the type of application which must be used in his case.
- (2) Advise Paul on the steps which must be followed to ensure that the case serves more quickly than usual before the court.

FEEDBACK

- (1) The “ordinary” application will be used, since Theresa must be given notice of the application in order to have the opportunity to put her side of the story.
- (2) This application can be brought before the court as a matter of urgency in terms of Rule 6(12). The application will be the same as any other application, except that it will be accompanied by a certificate of urgency, and the notice of motion will show that the court is asked for leave to deviate from the prescribed forms of service and that the application be dealt with as an urgent application.

Example

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

<p>(Heading)</p> <hr style="border: 0.5px solid black;"/> <p style="text-align: center; font-weight: bold; margin: 10px 0;">NOTICE OF MOTION</p> <hr style="border: 0.5px solid black;"/>
<p>TAKE NOTICE that applicant intends on or as soon as possible thereafter as applicant's counsel may be heard, to make application for an order with the following provisions:</p> <ol style="list-style-type: none">(a) Leave be given to deviate from the forms and service prescribed in Rule 6 and this application be dealt with as an urgent application in terms of Rule 6(12)(a);(b) An order be given for the Deputy Sheriff of Pretoria to remove the minor child,, from the possession and care of the respondent and return him to the applicant;(c) That the respondent be charged with paying the costs of this application;(d) Further and/or alternative relief. <p>AND KINDLY TAKE NOTICE THAT the affidavit of the applicant,, will be used in support of this application.</p> <hr style="border: 0.5px solid black;"/>

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

THE CONDUCT OF SUMMONS PROCEEDINGS

Overview

- 3.1 An explanation of the way the work is divided
- 3.2 Introduction
- 3.3 A general explanation of the conduct of the proceedings
- 3.4 Additional information
- 3.5 Schematic outline

Learning outcomes

Once you have finished studying this study unit, you should

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

Compulsory reading material

None

3.1 AN EXPLANATION OF THE WAY THE WORK IS DIVIDED

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

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

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

3.2 INTRODUCTION

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

When application proceedings are inappropriate, or when the summons procedure is prescribed, an action is initiated by way of a summons.

The summons proceedings is divided into the illiquid summons **proceedings** and the liquid summons **proceedings** (note: “proceedings”, not “summons”!) The latter is instituted by way of the provisional sentence summons (see study unit 7), whereas the former is instituted either by way of the combined summons or by way of the simple summons (see study unit 6.3 and study unit 6.2 respectively). It can thus be stated that action proceedings (summons proceedings) are **instituted by way of one of three types of summonses**.

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

The following is a schematic representation hereof:

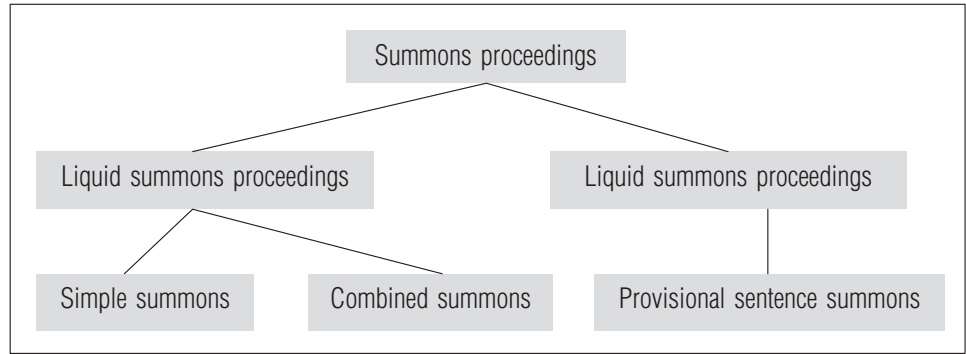


Figure 3.1: Schematic representation of summons proceedings

3.3 A GENERAL EXPLANATION OF THE CONDUCT OF THE PROCEEDINGS

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

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

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

Once a summons has been served (see study unit 5), and, if the defendant wishes to defend the action, he or she must, within the time stipulated in the summons, deliver and file a notice of intention to defend (see study unit 9.2). (At this stage, if the plaintiff has filed a simple summons, he or she will now file his or her declaration.) Thereafter, the defendant must raise his or her defence by filing his or her plea on the merits (see study unit 9.3) to the plaintiff’s declaration or particulars of claim, as the case may be. Alternatively, the defendant

may raise a special plea (see study unit 10.6) to object to an issue not apparent *ex facie* the declaration or particulars of claim, as the case may be.

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

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

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

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

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

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

3.4 ADDITIONAL INFORMATION

You will notice that, in this study unit, we do not again deal with letters of demand (as the precursors to the institution of legal actions). From your studies of study unit 1 and of substantive law, you should by now be aware that the question of whether or not a letter of demand is essential for the completion of a cause of action can be answered only on the basis of the relevant principles of substantive law.

You should bear in mind that, in practice, several statutes provide that a letter of demand is a prerequisite for the institution of an action, and also lay down the period within which legal proceedings must be instituted. For a more detailed discussion hereof, consult Van Loggerenberg and Farlam, *Erasmus: Superior Court Practice* (1994) loose-leaf edition, Appendix E7.

3.5 SCHEMATIC OUTLINE

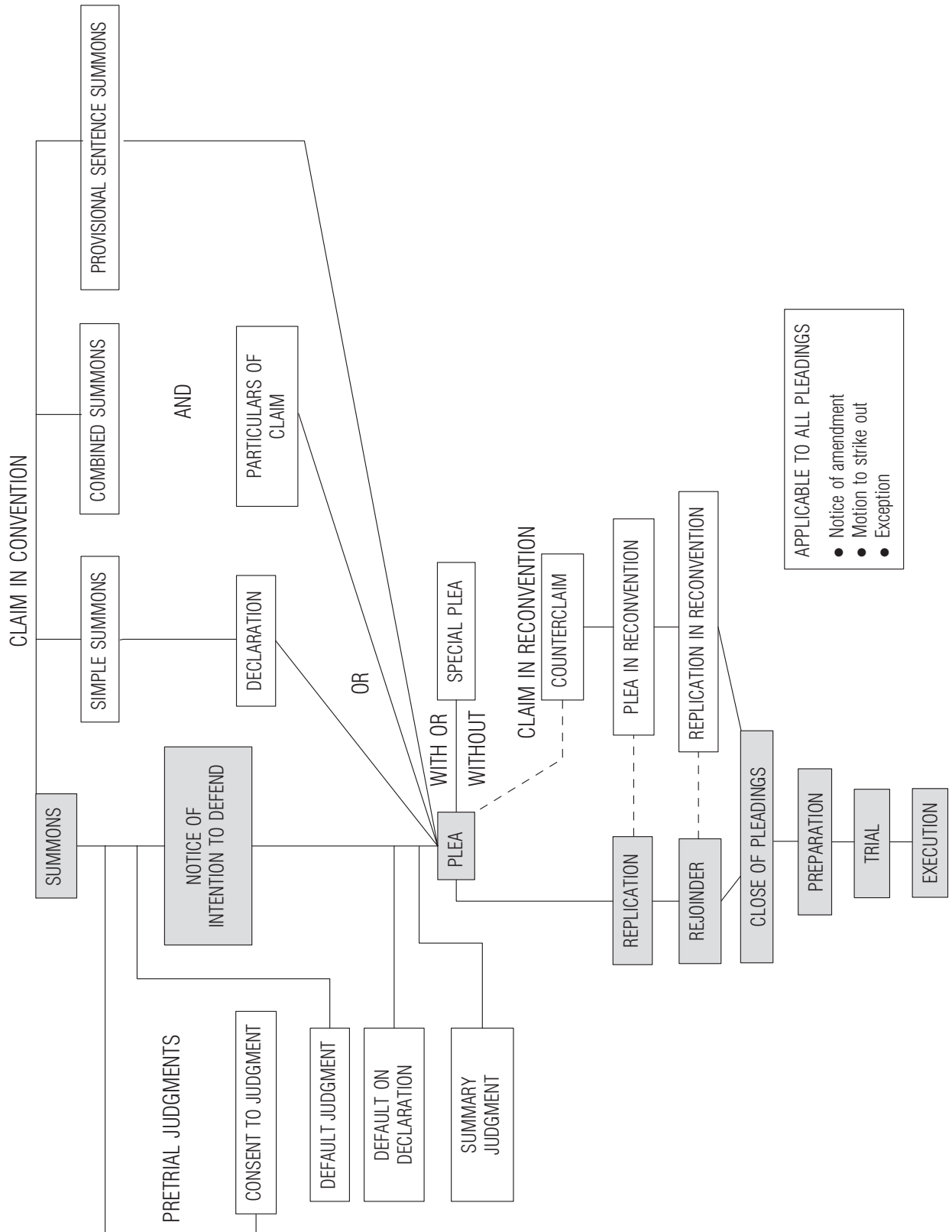


Figure 3.2: Schematic outline of the conducting of summons proceedings

THE PARTIES TO LITIGATION

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

Overview

- 4.1 A description of the parties
- 4.2 Representation by power of attorney
 - 4.2.1 When is a power of attorney required in litigation?
 - 4.2.2 Why is a power of attorney then drawn up?
- 4.3 Joinder
 - 4.3.1 Introduction
 - 4.3.2 Voluntary joinder
 - 4.3.3 Compulsory joinder
 - 4.3.4 Joining of persons as plaintiffs or defendants
- 4.4 Third-party procedures
- 4.5 *In forma pauperis* proceedings

Learning outcomes

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

- who the parties to the litigation are and how they are cited

- how someone can act on their behalf
- what is done when there are several people who can act as parties

Compulsory reading material

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

4.1 A DESCRIPTION OF THE PARTIES

Read section 1 of the
 Superior Courts Act, 2013

In the case of any action instituted by means of summons proceedings, there is a plaintiff and a defendant. The plaintiff is the person who institutes the action to enforce his or her alleged rights, and the defendant is the person against whom the plaintiff's claim is enforced. See, in this regard, the definition clause in section 1 of the Superior Courts Act, 2013.

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

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

Read Rule 17(4)

Read Rule 17(4) and note that the parties must be very well defined in the summons. A female defendant's marital status need not be mentioned, because it has been held that such a requirement is old-fashioned and contrary to the equality provisions in the Constitution (*Nedcorbank Ltd v Hennop* 2003 3 SA 622 (T)). See also Rule 14 (in respect of proceedings against partnerships, firms and associations) which allows these bodies to sue and be sued in their own name. However, this Rule does not endow these bodies with legal personality, but simply provides a procedural benefit by simplifying and streamlining actions.

4.2 REPRESENTATION BY POWER OF ATTORNEY

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

Herbstein and Van Winsen The Civil Practice of the High Courts of South Africa (2009) (Vol 1 267), describe a power of attorney as a written document in which an agent is given the authority

to act on behalf of his or her principal either in a specific situation or to act on behalf of such principal in respect of all actions which the principal could perform himself or herself.

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

4.2.1 When is a power of attorney required in litigation?

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

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

4.2.2 Why is a power of attorney then drawn up?

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

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

Study Rule 7(1)

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

4.3 JOINDER

4.3.1 Introduction

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

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

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

4.3.2 Voluntary joinder

4.3.2.1 Plaintiffs

Read Rule 10(1)

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

- *Requirements*

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

- *Circumstances*

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

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

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

4.3.2.2 Defendants

Read Rule 10(3)

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

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

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

4.3.3 Compulsory joinder

In contrast to the abovementioned position where the party to the proceedings has the option of joinder, there is another situation where the court, irrespective of the wishes of the parties, will not hand down a judgment or make an order unless another (third) party is joined in the action.

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

Example

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

4.3.4 Joining of persons as plaintiffs or defendants

Rule 12 provides that any person who is entitled to join as a plaintiff, or who is exposed to joinder as a defendant in an action, may, after notice to all parties at any stage of the action, apply for leave to join as a plaintiff or defendant. The court may in its discretion make an order upon such a request (also as regards costs) and may lay down the further procedure in the action. However, before leave to intervene is granted, the applicant must show that he or she has a *prima facie* case and that his or her application is made seriously and not frivolously.

4.4 THIRD-PARTY PROCEDURES

Read Rule 13

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

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

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

- he or she is entitled to a contribution or indemnity from the third party in respect of any payment which he or she may be ordered to make
- or
- a question or matter in dispute in the action is substantially the same as that which arose, or will arise, between him or her and the third party, and should be decided not only between the parties to the action (i.e. the plaintiff and the defendant), but also between one or more of them and the third party.

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

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

Example

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

At the trial, there will thus be two matters before the court, namely
B:C (action for damages), and
C:A (claim for a contribution)

The court hears both matters jointly and gives judgment in both.

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

4.5 *IN FORMA PAUPERIS* PROCEEDINGS

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

Study Rule 40

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

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

ACTIVITY

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

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

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.....
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.....

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

.....
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.....
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.....

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

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FEEDBACK

- (1) In terms of Rule 10, the 243 plaintiffs may voluntarily join as plaintiffs, since each of them has a claim against Pegasus (the same defendant) and each of them (i.e. one or more) would be entitled to institute a separate action against Pegasus. In addition, the action would depend on the same legal or factual question (each person is a dependant of one of the deceased and each one's damage is the result of negligence on the part of Pegasus).
- (2) Yes: Rule 12 provides that a person may join as plaintiff to an action. Where, in terms of Rule 12, a person is entitled to joinder, he or she may apply for leave to join as plaintiff. However, such an applicant will have to show the court that he or she has a *bona fide* case and that his or her application is made seriously.
- (3) Answer the question yourself with the help of Rule 7(1).

STUDY UNIT

5

SERVICE

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

Overview

- 5.1 Introduction
- 5.2 Issue and function of service
- 5.3 Manner of service
 - 5.3.1 Normal service
 - 5.3.2 Substituted service
 - 5.3.3 Edictal citation
- 5.4 Service within the Republic, outside the court's jurisdiction

Learning outcomes

Once you have finished studying this study unit, you should

- explain the practical application of the maxim *audi alteram partem*
- identify the appropriate method of service in the case of a particular set of facts
- give a practical illustration of the application of section 42 of the Superior Courts Act, 2013

Compulsory reading material

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

5.1 INTRODUCTION

Now that you have the background to litigation by way of the summons procedure, and are familiar with the *audi alteram partem* maxim, it makes sense to look at the way in which litigation is set in motion. Before we look at the drawing up of a summons, we shall first discuss the issue and service of documents, since this is the method by which notice of proceedings and other legal processes (including notices and documents) is brought to the attention of an opponent.

Notice of legal proceedings is accomplished by service of documentation either personally by a party or his or her legal representative, or by the sheriff. In terms of Rule 4(1), service of any process directed to the sheriff (e.g. summonses and writs), and any document initiating application proceedings, must be effected by the sheriff. “Service” simply means that a copy of the particular document is handed to the person upon whom service is effected, after explaining the nature and contents thereof. Thereafter, the original is filed in the court file. All other documents (such as notices) are served by the party or his or her legal representative.

5.2 ISSUE AND FUNCTION OF SERVICE

One of the fundamental principles of civil procedural law is that the process and documents arising out of any proceedings must be brought to the attention of the opposite party. This requirement may be said to be derived from the *audi alteram partem* rule (see study unit 1.3).

This means that, for example, after issue thereof, a summons must be served on the opposite party. It is by means of service that proceedings are therefore brought to the attention of such party. Proceedings that flow from proceedings that have been initiated without proper notice to a party against whom relief is sought, are null and void.

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

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

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

The return of service serves as proof of service, and the original return of service must be filed in the court file. Section 43(2) of the Superior Courts Act, 2013 provides that the return is *prima*

facie proof of the matters set out therein. This means that the contents may be disputed, but the court will require the clearest of evidence before the return of service will be impeached.

5.3 MANNER OF SERVICE

There are different ways in which a summons may be served, namely by way of

- normal service
- substituted service
- edictal citation

5.3.1 Normal service

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

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

5.3.2 Substituted service

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

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

It is important to bear in mind that substituted service is an extraordinary method of service, since it deviates from the normal method of service provided for in the Rules. Consequently, an application to court must be made on notice of motion seeking the court's permission to serve

the summons by means of substituted service, and requesting the court to give directions as to how the summons must be served. An abbreviated summons must accompany the application for consideration thereof by the court. On hearing the application, and on being satisfied that it is a proper case for substituted service, the court will give directions as to how service is to be effected, for example by registered post, by service on a relative, by publication in the *Government Gazette* or by any combination of these methods.

In *CMC Woodworking Machinery (Pty) Ltd v Pieter Odendaal Kitchens* (unreported case in the KwaZulu-Natal High Court, Durban Case No. 6846/2006 of 3 August 2012), the court gave leave for a notice to discover to be served by way of substituted service, and that service be effected by way of a Facebook message addressed to the defendant. See Rule 4A as well as Part I, and note that this was a highly exceptional application of substituted service, and that its application is not restricted to summonses.

5.3.3 Edictal citation

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

The consent of the court must be obtained to serve

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

Study Rule 5(2)

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

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

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

In terms of section 42(2) of the Superior Courts Act, 2013, the civil process of a division is valid throughout the Republic and may be served or executed within the area of jurisdiction of any division. Thus, summons may be served in any division of the High Court. (Refer to Module 1: “Jurisdiction”, which deals with section 42(2).)

ACTIVITY

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

- (1) Simply identify the appropriate form of service.

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

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

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

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FEEDBACK

- (1) Substituted service.
- (2) E is within the Republic, but personal service will not succeed, since his exact whereabouts are uncertain.
- (3) In the case of substituted service, the defendant is within the borders of the Republic, but his or her exact whereabouts are unknown. In contrast to this, edictal citation is used where the defendant is outside the borders of the Republic, even if his or her whereabouts overseas are known.
- (4) The maxim means that the other party to the litigation must be heard before an order can be granted against such person. The purpose of service is that this party is given notice that an action is being instituted against him or her. In this way, he or she will be able to defend himself or herself against the action (i.e. he or she will be heard).

THE SIMPLE SUMMONS AND THE COMBINED SUMMONS

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

Overview

- 6.1 Introduction
- 6.2 The simple summons and declaration
 - 6.2.1 When is the simple summons employed?
 - 6.2.2 What is meant by the expression "a debt or liquidated claim"?
 - 6.2.3 The procedural events which give rise to the use of a declaration
- 6.3 The combined summons and particulars of claim
 - 6.3.1 When is the combined summons employed?
 - 6.3.2 What does the expression "unliquidated claim" mean?
 - 6.3.3 The combined summons and particulars of claim
- 6.4 The effect of the Constitution, 1996, and of the National Credit Act of 2005 (NCA) on the content of summonses in which execution of immovable property is relevant

Learning outcomes

Once you have finished studying this study unit, you should

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

Compulsory reading material

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

6.1 INTRODUCTION

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

If you refer to Forms 9 and 10 of the First Schedule, you will note that a summons may be defined as a written instruction to the sheriff to notify a person (normally termed “the defendant”) against whom the plaintiff wishes to obtain relief (in the form of an order) to give notice within a specified time (the *dies induciae*) of his or her (the defendant’s) intention to defend the action if the claim is disputed. This description relates to the definition of “action” in Rule 1, which makes it clear that summons proceedings are instituted by way of a summons.

(There are naturally differences between the external appearance of the two forms. Examine these yourself. The reason for the differences will become apparent after studying this study unit, and are associated with the nature and purpose of each type of summons.)

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

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

6.2 THE SIMPLE SUMMONS AND DECLARATION

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

6.2.1 When is the simple summons employed?

When

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

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

Meaning

Unlike the previous Transvaal, Natal and Orange Free State Rules of Court, the Rules contain no definition of what "a debt or liquidated demand" is. As a result, the meaning to be attached to the expression was left to judicial interpretation. In the course of time, the courts assigned reasonably clear interpretations to the expression in various judgments. Some of these interpretations will be indicated below. Naturally, the interpretations are not comprehensive, but they do nevertheless provide clear guidelines.

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

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

From the above, it is therefore clear that the nature of the claim (i.e. whether we are dealing with a debt or a liquidated claim) determines whether a simple summons must be employed.

As regards the form of the summons, such summons must be drawn up so as to correspond as closely as possible to Form 9 of the First Schedule of the Rules. From an examination of Form 9, it clearly appears that only the cause of action need be set out concisely. However, it must be described with sufficient clarity to enable the court to decide whether judgment may be given, and to inform the defendant about the claim against him or her so that the defendant may defend himself or herself against further legal steps. The summons must also indicate that the court has jurisdiction, that the parties have *locus standi*, and the prayers for relief.

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

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

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

or

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

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

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

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

AND

- (2) the defendant has delivered a notice of intention to defend (and there are no grounds for an application for summary judgment)

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

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

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

Read Rule 18(4)

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

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

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

Both the declaration and the annexure to the combined summons are, of course, subject to the general rules governing pleadings – see Rule 18 as well as study unit 8 where the concept "pleading" is explained. The simple summons itself is not a pleading.

Provided that the formal requirements set out above are complied with, a declaration is drawn up in a form similar to that of the "particulars of claim" set out in study unit 6.3 below.

6.3 THE COMBINED SUMMONS AND PARTICULARS OF CLAIM

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

6.3.1 When is the combined summons employed?

When

The combined summons is primarily used where the plaintiff's claim is unliquidated, that is, where it is not a claim for a debt or liquidated demand as defined in study unit 6.1 above. Matters for which a combined summons is used often involve serious factual disputes that require the leading of oral evidence to resolve the issues.

6.3.2 What does the expression "unliquidated claim" mean?

Meaning

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

6.3.3 The combined summons and particulars of claim

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

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

In this regard, study Rule 18(4) and Rule 20(2), and ensure that you are acquainted with the contents thereof. Also see study unit 8 where the term "pleading" is discussed.

This summons, together with the particulars of claim, is known as a "combined summons", since it combines in one document a summons and the equivalent of a declaration. The big difference, however, is that the particulars of claim, unlike the declaration, do not constitute a separate pleading and are inseparably linked to the summons; hence the designation "combined summons". The summons and the particulars of claim thus form a unit. A declaration may therefore never be used in the case of a combined summons.

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

6.4 THE EFFECT OF THE CONSTITUTION, 1996, AND OF THE NATIONAL CREDIT ACT OF 2005 (NCA) ON THE CONTENT OF SUMMONSES IN WHICH EXECUTION OF IMMOVABLE PROPERTY IS RELEVANT

In the judgment delivered in *Standard Bank of South Africa Ltd v Saunderson* 2006 2 SA 264 (SCA) 277 C–E on 15 December 2005, the Supreme Court of Appeal issued the following practice directive with which every summons must comply:

The summons initiating action in which a plaintiff claims relief that embraces an order declaring immovable property executable shall, from the date of this judgment, inform the defendant as follows:

“The defendant’s attention is drawn to section 26(1) of the Constitution of the Republic of South Africa which accords to everyone the right to have access to adequate housing. Should the defendant claim that the order for execution will infringe that right it is incumbent on the defendant to place information supporting that claim before the court.”

This notification is especially important when immovable property is the primary or ordinary residence of the defendant. Consequently, the North Gauteng High Court, Pretoria, issued a practice directive in *FirstRand Bank Ltd v Folscher and another, and similar matters* 2011 4 SA 314 (GNP) in respect of actions instituted to enforce a debt secured by a special hypothec over such property. In terms of this practice directive, if the issue of summons is preceded by a notice in terms of section 129 of the NCA, such notice must include a notification to the debtor that, should action be instituted and judgment obtained against him or her, execution against the debtor’s primary residence will ordinarily follow, leading to eviction from such home. The purpose of these steps is clearly to inform a debtor of his or her rights.

Study the discussion in part 1 of this study guide in respect of the content of a summons when the NCA applies. Also note that rules of practice in respect of actions instituted under the NCA have in the meantime come into force in the KwaZulu-Natal High Courts (Pietermaritzburg and Durban), the Western Cape High Court, Cape Town, and the North Gauteng High Court, Pretoria.

ACTIVITY

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

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

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

.....

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

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.....

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

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.....

FEEDBACK

- (1) The nature of the claim (i.e. the type of claim).
- (2) The simple summons, because the nature of the claim is a “debt” or it is “liquidated”. The reason for this is that the contract price (i.e. the monetary value of the claim) can be established by means of an ordinary mathematical calculation. (Remember, the surface area of the house was given and the building cost was calculated at a specific amount per square metre. In addition, the parties agreed to this.)
- (3) The combined summons, because the nature of the claim is unliquidated. The reason for this is that damages are determined by the court only after hearing evidence – therefore damages can never be liquidated (unless the parties themselves come to an agreement on the *quantum*/monetary value of the claim).
- (4) When a simple summons has been issued and a notice of intention to defend has been filed by the defendant, the plaintiff’s next step is to respond with a declaration.

PROVISIONAL SENTENCE

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

Peter and Sandra get divorced. In terms of the deed of settlement, Peter has to pay R550 000 in cash to Sandra, and agrees to do this out of the proceeds of the sale of their beach house in Hermanus. However, Sandra insists that Peter sign an acknowledgement of debt for this sum. Peter accepts that he is obliged to pay this sum and does so. Interest on this amount is also set out in the acknowledgement of debt. Peter fails to pay the principal debt. Sandra needs this money to buy herself a place to stay. Naturally, she would like to receive payment as soon as possible.

Overview

- 7.1 Introduction
- 7.2 The provisional sentence summons
 - 7.2.1 The form of the provisional sentence summons
 - 7.2.2 The requirements for the use of the summons
- 7.3 Nature and effect of provisional sentence

Learning outcomes

Once you have finished studying this study unit, you should

- describe the nature, purpose and operation of the provisional sentence summons

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

Compulsory reading material

Rule 8; Form 3, First Schedule

7.1 INTRODUCTION

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

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

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

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

7.2 THE PROVISIONAL SENTENCE SUMMONS

This is the third type of summons with which an action can be instituted in the High Court. It can be used only if the cause of action is based on a liquid document. The defendant presents his or her defence by way of affidavit, to which the plaintiff may reply, also by way of affidavit. Provisional sentence may then follow, and after that the defendant may enter the principal case. The principal case follows the course of any other litigation process in the summons procedure. (Please note that the name of the summons has been chosen for the sake of convenience – Rule 8(1) merely refers to “a summons ... in accordance with Form 3” where a person “may be summoned ... for provisional sentence”.)

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

7.2.1 The form of the provisional sentence summons

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

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

7.2.2 The requirements for the use of the summons

When

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

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

- (1) the plaintiff's claim is based on a liquid document
and
- (2) the defendant is not able to provide such counter-proof as to satisfy the court that the probabilities of success in the principal action will probably not be in the plaintiff's favour

These two requirements will now be dealt with separately.

7.2.2.1 A liquid document

Definition

On the basis of *Rich v Lagerwey* 1974 4 SA748 (A) and *Herbstein and Van Winsen The Civil Practice of the Supreme Court of South Africa* (Vol 2 1313–1314), a liquid document may be defined as a document in which the debtor acknowledges, by means of his or her signature (or that of a duly authorised representative), his or her liability for the payment of a certain and ascertainable amount of money, or is legally deemed to have acknowledged such liability without the signature concerned having in reality being appended thereto.

The following points in the above definition merit mention:

- (1) The document must attest to a monetary debt. An obligation to do something other than the payment of a sum of money (e.g. to perform a specific act) constitutes an unliquidated claim.
- (2) The amount of the debt must be certain and ascertainable. Obviously, this amount must be clearly apparent from the document itself. An undertaking in a deed of sale to pay "agent's commission according to the prevailing scale" does not comply with this requirement, for extrinsic evidence must be led in order to determine the amount.
- (3) To constitute a liquid document, the indebtedness must appear unconditionally and clearly *ex facie* the document. If evidence is necessary to establish the indebtedness, the document

cannot be regarded as a liquid document; in other words, the document must contain an unconditional acknowledgment of debt.

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

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

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

- (5) Probably the most common examples of liquid documents are negotiable instruments (bills of exchange, cheques and promissory notes). Another example is an acknowledgment of debt. The following may also be liquid documents in very specific circumstances: an architect's certificate; a taxed bill of costs; a covering bond; and a foreign judgment.

7.2.2.2 Probability of success and onus of proof

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

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

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

and

- (2) the onus in the principal action

a In the provisional sentence case itself

The plaintiff needs to prove nothing initially. He or she merely avers in the summons that he or she is the holder of a liquid document, and the document is handed in. The plaintiff may then ask for judgment. Earlier (see 7.1 above), it was pointed out that judgment is given on the assumption that the documents submitted are authentic and valid. One may therefore state that a presumption of law exists regarding liability.

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

The defendant bears the onus of showing that the probabilities of success in the principal case lie in his or her favour. Even where the defendant raises a defence which is unconnected with the

liquid document (e.g. the defendant acknowledges that the signature is his or hers, but denies liability on the grounds of other facts), the onus on the defendant remains the same.

REMEMBER: The whole purpose of provisional sentence is to benefit a plaintiff (in contrast to the debtor) who is in possession of a liquid document. If the rule had been that the plaintiff in provisional sentence proceedings must show that the balance of probabilities lay in his or her favour, the procedure would have been useless to the plaintiff, and the plaintiff would have been in the same position as that where he or she instituted an ordinary action.

b In the principal case

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

7.2.2.3 The effect of the Constitution, 1996

Read the following so that you are aware of this decision.

Twee Jonge Gezellen (Pty) Ltd v Land and Agricultural Development Bank of South Africa t/a The Land Bank 2011 3 SA 1 (CC)

In *Twee Jonge Gezellen (Pty) Ltd v Land and Agricultural Development Bank of South Africa t/a The Land Bank* 2011 3 SA 1 (CC), the Constitutional Court considered the procedure, and held that it constituted a limitation of the defendant's right to a fair trial in terms of section 34 of the Constitution in **specific instances**. These instances were where

- the nature of the defence raised did not allow the defendant to show a balance of success in his or her favour without the benefit of oral evidence;
- the defendant was unable to satisfy the judgment debt; and
- the court had no discretion, in the absence of narrowly defined special circumstances, to refuse provisional sentence.

Consequently, the court held that the common law had to be developed so that the court would in future have discretion to refuse provisional sentence only in circumstances where the defendant demonstrates:

- an inability to satisfy the judgment debt;
- an even balance of prospects of success in the main case on the papers; and
- a reasonable prospect that oral evidence may tip the balance of prospective success in his or her favour.

In future, when considering the probability of success in order to determine whether or not to grant provisional sentence, this judgment will be taken into consideration.

7.3 NATURE AND EFFECT OF PROVISIONAL SENTENCE

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

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

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

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

- (2) The judgment is provisional, however, in the sense that the defendant may still defend the main action, but only within two months of the granting of provisional sentence, and then only if he or she has paid the judgment debt and costs.
- (3) A defendant who may and who wishes to enter into the principal case must deliver notice of his or her intention (see study unit 9.2) to do so within two months after provisional sentence has been granted, in which case the summons will be deemed to be a combined summons (see study unit 6.3) on which the defendant must deliver a plea (see study unit 9.3) within 10 days. In default of such notice or plea, the provisional sentence automatically becomes a final judgment and the security given by the plaintiff falls away (Rule 8(11)).

ACTIVITY

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

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

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

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

.....
.....
.....

FEEDBACK

- (1) Both types of summonses can be used: the provisional sentence summons can be used because it is specifically designed for the institution of an action where the claim is based on a liquid document. Since the liquid document is evidence of an established monetary debt, the claim that arises also falls within the definition of a “debt or liquidated claim” (see study unit 6.2 above). This means that, in these circumstances, a plaintiff can choose which type of summons will be used. (The fastest, most effective and cheapest type of summons is a question of fact. In theory, it is the provisional sentence procedure.)
- (2) It is a document which evidences a definite and established monetary debt. In addition, the document contains an unconditional admission of debt.
- (3) Although, after the granting of sentence, the plaintiff can immediately go to the enforcement thereof, this can only happen if the plaintiff provides the defendant with the necessary security *de restituendo*.

PRINCIPLES OF PLEADING

The necessity to plead material facts does not have its origin in this rule. It is fundamental to the judicial process that the facts have to be established. The court, on the established facts, then applies the rules of law and draws conclusions as regards the rights and obligations of the parties and gives judgment.

Buchner v Johannesburg Consolidated Investment Co Ltd 1995 1 SA 215 (T) 216

Overview

- 8.1 Basic principles
- 8.2 Function of pleadings
- 8.3 Rules for the drafting of pleadings

Learning outcomes

Once you have finished studying this study unit, you should

- define certain basic concepts in respect of pleadings
- distinguish between pleadings and process documents
- describe the purpose and function of pleadings in the litigation procedure

Compulsory reading material

Rule 18

8.1 BASIC PRINCIPLES

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

- (1) Pleading stage: This stage extends from the issue of summons up to the close of pleadings, and is normally relevant in illiquid summons proceedings.
- (2) Pleading: This is a written document containing averments by the parties to an action in which the material facts on which they rely in support of their claim or defence are clearly and concisely set out to enable the opponent to plead thereto, and which is exchanged between such parties.

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

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

*Dorfman v Deputy Sheriff,
Witwatersrand* 1908 TS 703

8.2 FUNCTION OF PLEADINGS

The importance of pleadings cannot be overemphasised. From the description in 8.1 above, it is clear that the object of pleadings is to enable the parties to come to court fully prepared to meet the case of the opponent, and to enable the court to isolate the issues that have to be adjudicated upon. The parties are bound by the pleadings unless duly amended.

Pleadings serve several functions, and the most important are subsequently discussed.

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

8.3 RULES FOR THE DRAFTING OF PLEADINGS

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

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

Study Rule 18(4) and **read** Rule 18(3), 18(5) and 18(7) attentively. Rule 18(8) to 18(11) contains provisions in respect of specific matters, and you are not expected to study these provisions. Take note that these lay down certain formal requirements for pleadings.

- Pleadings must contain clear and concise statements of the material facts upon which the claim, defence or reply is based; but there must be adequate details so that the pleadings are not vague and embarrassing, and inform the opponent about matters in dispute.
- Details must be reflected clearly, logically and in a comprehensible form.
- Facts, and not the law, must be pleaded. Evidence must, however, not be pleaded.
- Pleadings should not contain repetitions. If repetition is necessary, this should be effected by reference, and not by restatement.

Apart from the general requirement relating to particularity of pleadings, it should be noted that the Rules also lay down specific requirements in respect of claims based on contract (Rule 18(6)), for divorce (Rule 18(8)(9)) and for damages (Rule 18(10)(11)). Failure to comply with any provision of Rule 18 will cause such pleadings to be deemed to be an irregular step which entitles the opposite party to act in accordance with Rule 30 – see later (Rule 18(12)).

ACTIVITY

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

(1) The simple summons

.....
.....

(2) The combined summons

.....
.....

(3) The declaration

.....
.....

FEEDBACK

(1) Process. A summons is a printed form which is merely a step in the litigation process and

whereby litigation is instituted. This step can only be taken with the help of a court official (the Registrar or Assistant Registrar must first issue the summons before the plaintiff can use it any further).

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

LITIGATION PROCEEDINGS UP TO AND INCLUDING CLOSE OF PLEADINGS

One morning, D, a champion cyclist, rides into F, an outstanding marathon athlete, on a public road. Both are injured and, for months after the accident, suffer pain. F is sponsored by XYZ Sports Drink Company and, owing to her injuries, can no longer meet her sponsorship commitments. D is sued by F for damages in the amount of R600 000. D is very upset at being sued and feels that F was responsible for the accident and therefore for his (D's) damages (to his bicycle).

Overview

- 9.1 Introduction
- 9.2 Notice of intention to defend
- 9.3 The plea on the merits and counterclaim
- 9.4 Replication, rejoinder and close of pleadings

Learning outcomes

Once you have studied this study unit, you should

- describe the sequence of the litigation proceedings up to and including the close of pleadings
- classify the different documents which are part of the litigation procedure as either processes or pleadings
- explain the purpose and function of the different pleadings which are exchanged between the parties to the litigation

Compulsory reading material

Rule 19; Rule 22; Rule 24; Rule 25; Rule 29

9.1 INTRODUCTION

Read

Read through study unit 3 above as well as the schematic representation of the summons procedure (figure 3.1) to prepare yourself for this study unit.

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

9.2 NOTICE OF INTENTION TO DEFEND

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

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

Study Rule 19(5)

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

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

Example

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

(Heading)

NOTICE OF INTENTION TO DEFEND

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

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

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

TO:
The Registrar of the High Court
Pretoria

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

Received a copy hereof on the
.... day of May 20..

.....
for the Plaintiff's attorneys

9.3 THE PLEA ON THE MERITS AND COUNTERCLAIM

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

Although the defendant must deal with each allegation in the particulars of claim or declaration,

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

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

Read Rule 22(1)

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

Study Rule 24(1)

Rule 24(1) provides that a defendant may, together with his or her plea, or at a later stage with the leave of the plaintiff, or if refused, the court, deliver a claim against the plaintiff. This is known as a counterclaim. Study this subrule so that you know what form the counterclaim takes. The counterclaim is called a "claim in reconvention". (The claim which is instituted by means of a summons is called a "claim in convention".) Since a counterclaim is similar to a claim which is instituted by a plaintiff in convention, the plaintiff has the opportunity to answer to the counterclaim with a plea on the counterclaim, which corresponds to the defendant's plea as regards form and content. The same pleadings as are exchanged between the parties in convention, are exchanged in reconvention; the only difference is that the parties act in the reverse order. In other words, the plaintiff in convention acts as the defendant in reconvention. The pleadings in reconvention are also exchanged until close of pleadings occurs.

When the counterclaim is served at the same time as the plea, in practice it is contained in the same document, but under a separate heading (but can be filed separately) and looks something like this:

Example

(Heading)
<hr/>
PLEA
<hr/>
Defendant pleads as follows on the particulars of Plaintiff's claim as attached to her summons:
1
<i>AD PARAGRAPH 1 THEREOF:</i>
The allegations contained in this paragraph are acknowledged.

AD PARAGRAPH 2 THEREOF:

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

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

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

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

DEFENDANT'S COUNTERCLAIM

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

WHEREFORE DEFENDANT PRAYS that

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

DEFENDANT'S COUNSEL

DEFENDANT'S ATTORNEY
(address, etc)

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

9.4 REPLICATION, REJOINDER AND CLOSE OF PLEADINGS

Study Rule 25(2)

A replication contains the plaintiff's reply to the defendant's plea. Rule 25(1) prescribes the *dies induciae* for the delivery of the replication. This plea is, however, not essential and is necessary only where the defendant raises new averments as to facts in his or her plea.

Study Rule 25(2) in this regard so that you are aware of when replication is unnecessary. A replication will typically be relevant in the case where a defendant's defence is one of confession and avoidance. For example, a defendant in a defamation action admits in her plea the publication of the alleged defamatory statements, but avers that such statements were made in privileged circumstances. The plaintiff will then deal with these in replication.

A plaintiff who fails to deliver a replication within the prescribed *dies induciae* is *ipso facto* (or automatically) barred from replicating (see Rule 26, read with Rule 25(1)). Where a replication is not necessary, joinder of issue will be assumed and the pleadings will be deemed to be closed when the last day for filing the replication has elapsed (see Rule 25(2) and Rule 29(b)). ("Joinder of issues" refers to the moment when the dispute is crystallised and is ready to be presented to court for adjudication. In practice, this usually coincides with close of pleadings.)

Rule 25(5) makes provision for the exchange of further pleadings by the parties, and also prescribes the *dies induciae* within which such pleadings must be delivered. The further pleadings which are intended have already been mentioned in this section. The most common of these is the rejoinder. If the plaintiff raises new averments of fact in the replication, the defendant is given an opportunity of reacting thereto by way of rejoinder. However, these pleadings are not often needed in practice.

Study Rule 29

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

Example

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

<p>(Heading)</p> <hr/>
<p>REPLICATION</p> <hr/>
<p>Plaintiff replicates as follows to Defendant's plea:</p>
<p>1</p>
<p>Plaintiff denies that he was negligent as alleged or that he was contributory negligent as alleged, and demands Defendant to prove it.</p>
<p>Signed at ... on this ... day of May 20...</p>
<p>(Signatures)</p>
<p>(Indicates who must be served. Provides for acknowledgement of receipt by the defendant's attorneys.)</p>

ACTIVITY

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

.....
.....
.....
.....

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

.....

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

.....
.....
.....
.....

FEEDBACK

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

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

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

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

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

FURTHER PLEADINGS AND PROCESSES UP TO AND INCLUDING CLOSE OF PLEADINGS

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

Overview

- 10.1 Introduction
- 10.2 Inspection
- 10.3 Application to strike out
- 10.4 Amendment of pleadings and documents
- 10.5 The exception
- 10.6 The special plea
 - 10.6.1 The difference between the special plea and the exception
 - 10.6.2 The two categories of special pleas
- 10.7 Application to set aside irregular proceedings
 - 10.7.1 The meaning of an "irregular proceeding"
 - 10.7.2 The meaning of a "further step"

Learning outcomes

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

- identify the other pleadings and procedures which may be exchanged during the pleading stage
- explain the circumstances in which such documents may be used, and indicate the specific purposes which can be achieved by using them
- apply these different documents practically to a given set of facts
- distinguish between the various processes and pleadings
- describe the law of civil procedure as an integrated whole, with reference to examples of interlocutory applications

Compulsory reading material

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

10.1 INTRODUCTION

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

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

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

10.2 INSPECTION

Study Rule 35(14)

Study Rule 35(14). Note at what stage of the proceedings inspection can be requested, for what purposes, and precisely in respect whereof. It is important to note that any party can obtain inspection, but not merely in respect of any type of document or tape recording: the document must be clearly specified, and this procedure can therefore not be used for purposes of a “fishing expedition” in search of possible documents. Also note that the test is whether the document is essential, and not merely useful, for purposes of pleading.

10.3 APPLICATION TO STRIKE OUT

Where any pleading contains averments which are “scandalous, vexatious or irrelevant”, the opposing party may, within the period allowed for any subsequent pleading, apply for the striking out of such matter (see Rule 23(2)). Although Rule 23(2) refers only to pleadings, it is commonly accepted that offending passages in affidavits relating to motion proceedings may

also be struck out. “Irrelevant” in this context means irrelevant in relation to the points in dispute which have been raised and which must be decided by the court.

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

Example

“5.

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

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

(b) ...”

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

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

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

If you are uncertain about this matter, refer to study unit 2.3.3 and 2.2.3, which deals with interlocutory applications.

10.4 AMENDMENT OF PLEADINGS AND DOCUMENTS

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

Study Rule 28

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

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

Example

This procedure may be illustrated by means of the following example. A pleading might contain the following statement: “... the contract of lease was signed on 6 July 1956 ...”.

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

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

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

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

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

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

Example

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

<p>(Heading)</p> <hr/> <p>DEFENDANT'S NOTICE IN TERMS OF RULE 23</p> <hr/>
<p>Kindly take notice of Defendant's contention that Plaintiff's particulars of claim are vague and embarrassing and that, alternatively, they do not disclose any cause of action in respect of what is set out hereunder.</p>
<p>Further, kindly take notice that Defendant hereby gives Plaintiff the opportunity to remove the causes of the objections within days.</p>
<p>The grounds of Defendant's objection are as follows:</p>
<p>1.</p>
<p>(a) In paragraph 3.1 of Plaintiff's particulars of claim it is alleged that defendant would be liable for the payment of taxes for the period to</p>

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

Signed at Pretoria this day of May 20

Attorneys for Defendant

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

(Heading)

DEFENDANT'S NOTICE OF EXCEPTION

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

The grounds of Defendant's objection are as follows:

1.

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

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

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

Signed at Pretoria this day of May 20

Counsel for Defendant

Attorneys for Defendant

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

10.6 THE SPECIAL PLEA

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

Please note that, if a defendant intends to serve and file a special plea, we are of the opinion that he or she must still deliver a plea on the merits. Therefore, a special plea does not replace the plea on the merits. A failure to deliver the last-mentioned document will expose a defendant to a request for default judgment. (We base our opinion on *David Beckett Construction (Pty) Ltd v Briston* 1987 3 SA 275 (W) 280C–F. Note that the views in the various divisions of the court are not uniform, and the Uniform Rules are silent in this regard.)

10.6.1 The difference between the special plea and the exception

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

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

10.6.2 The two categories of special pleas

Although the nomenclature may vary, special pleas are usually divided into two categories after *Brown v Vlok* (1925 AD 56 at 58): those special pleas which seek to destroy the action (pleas in abatement) and those special pleas which seek to postpone the action until the defect has been cured (dilatory pleas). (Elsewhere, you may encounter a different nomenclature, in which reference is made to a “declinatory plea”, “a plea in abatement” and a “dilatory plea”, depending on whether these arise from the nature or the effect of the special plea.)

10.6.2.1 Dilatory pleas

Examples:

- Where the defendant disputes the plaintiff's authority to sue because of the absence of a formal requirement which is a condition for suing (e.g. that a director is not competent to sue because of a lack of specific authorisation).
- *Lis pendens*. If an action is already pending between the parties, and the plaintiff brings another action against the defendant or relating to the same cause and in respect of the same

subject matter, whether in the same or in different courts, the defendant can take the objection of *lis pendens*.

- *Arbitration*. The defendant may raise this as a special plea where the parties have previously agreed to submit their dispute to arbitration.

10.6.2.2 Pleas in abatement

Examples:

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

10.7 APPLICATION TO SET ASIDE IRREGULAR PROCEEDINGS

Where a party has taken an irregular step or proceeding during the course of litigation, Rule 30 provides the other party with a mechanism by means of which the irregularity may be set aside or otherwise dealt with. The court has a discretion to allow the application or not. Normally, the court will condone the irregularity if no substantial harm was done.

Study Rule 30(2)

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

10.7.1 The meaning of an “irregular proceeding”

An irregular proceeding is not defined in the Rules.

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

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

The period within which the applicant must act commences as soon as a party takes notice that a step has been taken or that a proceeding has occurred, and not once the irregularity thereof has come to his or her notice. This interpretation was given in *Minister of Law and Order v Taylor* 1990 (1) SA 165 (EC), and corresponds with the current wording of Rule 30(2)(b). However, such an application may be launched only if the objector has not taken some further step in the litigation after becoming aware of the existence of an irregularity (Rule 30(2)(a)).

10.7.2 The meaning of a “further step”

Kopari v Moeti 1993 4 SA 184 (BGD)

In *Kopari v Moeti* 1993 4 SA 184 (BGD) 188H, the step is described as “some act which advances the proceedings one stage nearer completion”. Objectively judged, the step must show

the intention to continue with the action despite the irregularity (*Jowell v Bramwell-Jones* 1988 1 SA 836 (W) 904).

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

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

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

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

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

ACTIVITY

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

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

.....

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

.....

.....

.....

.....

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

.....

.....

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

.....

.....

.....

.....

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

.....

.....

.....

FEEDBACK

- (1) An application to set aside the summons as an irregular proceeding.
- (2) The filing of a notification of intention to defend does not initiate a "further step" which could obstruct the procedure in (1) above. It has already been decided that it is simply an action with the purpose of allowing the defendant to raise a defence.
- (3) Application to amend.
- (4) N's attorney must file a special defence, since N has raised an objection *of lis pendens*.
- (5) The answer to this question is contained in Rule 35(14). Make a short summary of the content of this Rule for yourself.

OFFER TO SETTLE, TENDER AND INTERIM PAYMENTS

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

Overview

- 11.1 Introduction
- 11.2 Offer to settle
 - 11.2.1 Claim for payment of a monetary sum
 - 11.2.2 Performance of an act
- 11.3 Common law tender
- 11.4 Interim payments

Learning outcomes

Once you have finished studying this study unit, you should

- identify the ways in which a matter can be settled in terms of the Rules and discuss any aspect of the offer to settle
- identify the most applicable method of settlement in a given situation
- compare settlement in terms of the Rules with settlement outside the Rules

Compulsory reading material

Rule 34 and Rule 34A

11.1 INTRODUCTION

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

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

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

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

11.2 OFFER TO SETTLE

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

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

or

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

11.2.1 Claim for payment of a monetary sum

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

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

Study Rule 34(5)

Now study Rule 34(5). Ensure that you know to whom notice of the offer must be given and what

the requirements are with which such an offer must comply. For the purposes of this Rule, the following expressions have the following meanings:

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

The plaintiff may, within 15 days of receiving the notice of the offer, accept the offer by delivering a notice of acceptance at the address of the defendant indicated for the purposes hereof (Rule 34(6) and Rule 34(8)). If the plaintiff fails to accept the offer within such period, it may thereafter be accepted only with the written consent of the defendant, or with the court’s consent.

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

It is important to note that the fact that an offer has been made may not be disclosed in court before judgment has been given, and no reference to such offer may appear on any file in the office of the Registrar containing the papers of the case (Rule 34(10)) – any party acting contrary to this Rule will be liable to have costs given against him or her, even if he or she is successful in the action (Rule 34(13)). The offer is, however, brought to the attention of the judge concerned before any order as to costs is made, since the fact that an offer was made is relevant to the apportionment of costs. A plaintiff who rejected an offer and thereafter obtains judgment in his or her favour, but in a smaller amount than offered by the defendant, may be penalised by an averse costs order.

11.2.2 Performance of an act

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

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

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

11.3 COMMON LAW TENDER

A party to litigation is not obliged to offer a settlement in terms of the Rules. A tender can be

made even before proceedings are instituted. If such a tender is satisfactory, it will provide a defendant with protection against costs which accrue from the summons stage.

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

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

11.4 INTERIM PAYMENTS

Read Rule 34A(1)

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

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

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

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

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

- (1) the defendant (respondent) has in writing admitted liability in respect of the plaintiff's damages (Rule 34A(4)(a))
or
- (2) that he or she (the plaintiff) has obtained judgment against the defendant for the damages, the amount (*quantum*) of which still has to be determined (Rule 34A(4)(b))
and
- (3) that the defendant is insured in relation to the plaintiff's claim, or that the defendant has the means to make such an interim payment (Rule 34A(5))

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

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

ACTIVITY

- (1) Briefly indicate the requirements which an offer must meet in terms of Rule 34(5).

.....
.....
.....
.....

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

.....
.....
.....
.....

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

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

.....

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

.....
.....
.....

FEEDBACK

- (1) These requirements are set out clearly in Rule 34(5). Summarise the four requirements briefly for yourself in the space provided above. Do it as if you were answering an examination question.
- (2) These provisions are also set out very clearly in the Rule, and you must summarise them yourself.
- (3) An application for interim payment in terms of Rule 34A.
- (4) They cannot use this procedure, since the procedure can only be used in actions for damages for personal injuries or the death of a person (usually the breadwinner). Actions for damages for damage to property are therefore excluded.

PRE-TRIAL JUDGMENTS

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

John, a handyman, buys a large number of items on credit at his local hardware shop. John has known the owner of the hardware shop for years. The things are delivered at John's house and a copy of the invoice is handed to him once he has signed the original. The total amount for the items is R420 000. Despite requests, John refuses and/or fails to pay his account. The owner of the shop suspects that John simply does not have the money to pay owing to the generally poor economic situation. John is sued and he enters an appearance to defend. What should the plaintiff do now?

Overview

- 12.1 Introduction
- 12.2 Consent to judgment
- 12.3 Default judgment and bar
 - 12.3.1 Bar
 - 12.3.2 Default judgment
- 12.4 Summary judgment
 - 12.4.1 Grounds
 - 12.4.2 Procedure and content of affidavit
 - 12.4.3 Courses of action which the defendant may take in response to the application
 - 12.4.4 Powers of the court when hearing the application
 - 12.4.5 Costs
 - 12.4.6 Summary dismissal

Learning outcomes

Once you have completed studying this study unit, you should

- explain the fact that a court can pass judgment even before hearing a matter, which can then bring the matter to a close
- identify the different actions which can be taken when an opposing party neglects to deliver pleadings and process documents timeously (i.e. within the prescribed *dies induciae*) and what the results of such failure are, as well as solve problems according to the principles involved
- identify the action which can be taken when an opposing party litigates in a vexatious way
- describe the law of civil procedure as an interconnected whole by grouping the different procedures which belong together from a procedural point of view (e.g. the simple summons and summary judgment)

Compulsory reading material

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

12.1 INTRODUCTION

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

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

In this study unit, we shall pay attention to the following:

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

We shall begin with this last-mentioned case.

12.2 CONSENT TO JUDGMENT

Study Rule 31(1)

Study Rule 31(1). The contents of the Rule are self-explanatory and do not warrant further comment. Note that, in certain cases, consent is excluded. Where the Rule provides that

application by the Registrar must be made before a judge, this simply means that a judge sitting elsewhere (usually in chambers) than in open court, may grant judgment.

12.3 DEFAULT JUDGMENT AND BAR

As indicated in 12.1 above, a party who fails to deliver a pleading or process document in time, is “in default”. Depending on the type of pleading or process, the other party can request a judgment (“default judgment”) immediately or another step may first have to be taken before judgment may be requested. (A default judgment is a judgment which is given without hearing the defaulting party and which ends the proceedings.) When a further step is required, this step is known as the giving of a notice of bar. Judgment by default can therefore only be studied properly in conjunction with bar, which is dealt with in Rule 26. We shall first explain what is meant by “bar”.

12.3.1 Bar

Bar applies only in respect of pleadings.

A distinction is drawn between the situation where (a) automatic bar occurs, and (b) where a notice calling for the delivery of a pleading is first required.

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

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

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

Study Rule 27(1)(3)

12.3.2 Default judgment

Default judgment is relevant in the following cases:

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

12.3.2.1 Failure to file a notice of intention to defend

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

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

- claims for a debt or liquidated demand
- unliquidated claims

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

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

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

12.3.2.2 Failure to file a plea

Study Rule 31(2)

Once again, study Rule 31(2). What has been said above as regards this Rule, applies here as well. It is, however, very important to note that, although this Rule refers to a defendant who “is in default of ... a plea”, and thus creates the impression that default judgment may be requested where the defendant is late in delivering a plea, the position is that a notice of bar must first be delivered. Only where the defendant still fails to deliver the plea, will he or she be in default.

In terms of Rule 31(5)(a), the plaintiff must, where the claim is for a debt or liquidated demand, file with the Registrar a written application for judgment after notice to the defendant of not less than five days of his or her intention to apply for default judgment. The Registrar may make a variety of orders (Rule 31(5)(b)). Where the claim is unliquidated, the plaintiff may set the matter down as prescribed, but, in this instance, the court, after hearing evidence, will grant judgment (Rule 21(2)(a)).

12.3.2.3 Failure to deliver a declaration

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

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

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

or,

(2) after presenting evidence, “judgment” (This simply means that the court will give a judgment as it thinks fit.)

12.3.2.4 Failure to appear at the trial

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

12.3.2.5 Setting aside of default judgment

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

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

The courts have held that “sound reasons” mean that

- (1) a reasonable explanation must be given for the failure
- (2) the application must be *bona fide* and not merely a delaying tactic
- (3) the defendant must have a *bona fide* defence (See *Grant v Plumbers (Pty) Ltd* 1949 2 SA 470 (O) 476–477; *Coetzee v Nedbank Ltd* 2011 2 SA 372 (KZD) 373.)

Once again, “application” does not refer to a notice of motion.

12.3.2.6 Influence of the Constitution, 1996

Please note that when a plaintiff applies for default judgment in terms of Rule 31(5) and the defendant is in default either in respect of the notice of intention to defend or the plea on the merits, and the claim is for a debt or liquidated demand, and the plaintiff requests that immovable property which is the defendant’s primary residence be declared specially executable, it is unconstitutional for a Registrar to declare the property specially executable, according to *Gundwana v Steko Developments* 2010 3 SA 608 (CC). This means that only the court may declare a person’s primary residence executable: See Rule 31(5).

12.3.2.7 The National Credit Act of 2005 (NCA)

Please note that section 129 of the NCA contains certain requirements that have to be met before any “legal proceedings” may commence to enforce a credit agreement. Read the discussion in this regard in part 1 of this study guide.

12.4 SUMMARY JUDGMENT

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

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

Bear in mind that section 129 of the National Credit Act of 2005 contains certain requirements that must be met before any “legal proceedings” may commence to enforce a credit agreement. (Refer to part 1 of this study guide.)

12.4.1 Grounds

Study Rule 32(1)

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

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

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

12.4.2 Procedure and content of affidavit

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

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

No further averments are permitted, and no evidence other than that which is referred to in Rule 32(2) may be presented.

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

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

Study Rule 32(3)

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

assumption that the plaintiff's claim is unimpeachable. Consequently, the defendant must convince the court that this is not in fact the case.

Defendants who wish to defend themselves in terms of the NCA against an application for summary judgment should note the following (the objective of these remarks is not to provide you with a comprehensive discussion of a defendant's position under the NCA: you are referred to standard works on the NCA for this):

The Supreme Court of Appeal in *Rossouw v FirstRand Bank Ltd* 2010 6 SA 439 (SCA) held that there is compliance with the provisions of section 129(1)(a) of the NCA if the credit provider **despatches** the required notice to the consumer in the manner chosen by the latter (e.g. by sending it to the consumer's last-known address by registered mail) – actual receipt thereof is the consumer's responsibility. In this regard, *Standard Bank of South Africa v Van Vuuren* 2009 5 SA 557 (T) is interesting. In this case, it was held that the attaching of the notice by the sheriff to the main gate of a property other than the mortgaged property provided no evidence that the notice in terms of section 129 reached the respondent, and that this accordingly was a *bona fide* defence.

Bald allegations by a consumer that there was "reckless credit" or of "overindebtedness" do not constitute a *bona fide* defence – a reasonable amount of verificatory detail is required. Consequently, a defendant should, *inter alia*, provide the following: a statement showing his or her assets and liabilities, and income and expenditure, in a way sufficient to enable the court to determine whether the allegation of overindebtedness is *bona fide*; particulars of the particular debt counsellor and the date on which such person was approached; the assessment by the debt counsellor, etc (see *SA Taxi Securitisation (Pty) Ltd v Mbatha and two similar cases* 2011 1 SA 310 (GSJ).

12.4.4 Powers of the court when hearing the application

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

12.4.5 Costs

Read Rule 32(9)

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

12.4.6 Summary dismissal

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

ACTIVITY

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

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

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

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

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

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

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FEEDBACK

- (1) The grounds are clearly set out in Rule 32(1) and require no further explanation. Write down the grounds yourself in the space provided above.
(2) The procedure is clearly described in Rule 31(3) and 31(4). Summarise this procedure

yourself in the space provided above. Write it down as you would answer an examination question.

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

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

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

PREPARATION FOR TRIAL

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

Overview

- 13.1 Introduction
- 13.2 Steps which may be taken both before and after the close of pleadings
 - 13.2.1 Medical examinations
 - 13.2.2 Examination of inanimate objects
 - 13.2.3 Medical reports, hospital records, X-ray photographs and similar documents
 - 13.2.4 Expert evidence
 - 13.2.5 Admission of plans, diagrams, models and photographs
 - 13.2.6 Other productions
- 13.3 Steps which may be taken only after the close of pleadings
 - 13.3.1 Request for further particulars for trial
 - 13.3.2 The pre-trial conference
 - 13.3.3 Discovery of documents and tape recordings
 - 13.3.4 Inspection of documents and tape recordings
 - 13.3.5 Specifying documents and tape recordings to be used at the trial
 - 13.3.6 Production of documents and tape recordings (Rule 35(10))
 - 13.3.7 Set-down of cases for trial
 - 13.3.8 Removal of cases
- 13.4 Securing the necessary evidence
 - 13.4.1 Advice on evidence
 - 13.4.2 Ways in which evidence may be placed before the trial court

Learning outcomes

Once you have studied this study unit, you should

- distinguish between the steps that **may** be taken as well as the steps which **must** be taken during the preparation phase of the trial
- describe the purpose of the steps taken during the preparation phase
- discuss the ways in which evidence can be submitted to the court
- discuss any of the preparation steps and apply these steps to a given set of facts

Compulsory reading material

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

13.1 INTRODUCTION

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

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

13.2.1 Medical examinations

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

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

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

13.2.2 Examination of inanimate objects

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

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

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

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

Rule 36(4) is of relevance here.

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

13.2.4 Expert evidence

Study Rule 36(9)

Rule 36(9) is of relevance here.

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

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

13.2.5 Admission of plans, diagrams, models and photographs

Study Rule 36(10)

Rule 36(10) is of relevance here.

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

13.2.6 Other productions

Rule 35(11) provides that the court may as it deems fit **during any proceedings** order the production of documents and tape recordings. This Rule supplements other steps contained in Rule 35. Rule 35(12) allows a party to require the production of documents and tape recordings **referred to in pleadings or affidavits**, and Rule 35(14) provides that a party must, for purposes of pleading, make available specified documents and tape recordings for inspection when requested to do so and after appearance has been entered.

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

13.3.1 Request for further particulars for trial

Study Rule 21(2)

Rule 21(2) is of relevance here.

Note that the request for further particulars for trial, and the reply thereto, does not form part of the pleadings which are exchanged. Also note that only particulars that are, strictly speaking, necessary to prepare for trial may be requested. This does not mean that the requesting party is entitled to know what evidence the other party is going to lead, but only which **facts** will be presented. The purpose of the request is to inform a party more fully about what the opponent intends to prove and to put him or her in a position to prepare for the trial and to prevent him or her from being taken by surprise by evidence given against him or her, which he or she could not reasonably anticipate would be produced (*Thompson v Barclays Bank DCO* 1965 1 SA 365 (W)).

Note the prescribed *dies induciae* for both the request and the reply. If a party fails to furnish the particulars timeously or sufficiently, the opposing party may approach the court for an order for their delivery, or for the dismissal of the action or the striking out of the defence. The court will then make an appropriate order (Rule 21(4)). The court will also *mero motu* at the end of the trial consider whether the further particulars were strictly necessary – if not, it will disallow all costs of, and flowing from, any unnecessary request or reply and may penalise the responsible party with an appropriate costs order (Rule 21(5)).

13.3.2 The pre-trial conference

Study Rule 37

Rule 37 is of relevance here.

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

Study Rule 37(4)(7)

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

Minutes of the pre-trial conference must be prepared and signed by those present and must be filed with the Registrar not later than five weeks prior to the trial date. Also note that a conference may be held before a judge in chambers (see Rule 38(8)), after which minutes are prepared which must be filed with the Registrar.

13.3.3 Discovery of documents and tape recordings

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

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

which may assist him or her to establish his or her own case, or to break down the case of his or her adversary, or what documents may assist an opponent, or weaken his or her own case. Discovery therefore assists the parties and the court to discover the truth and thus to reach a fair decision/judgment. It is therefore important to ensure that discovery is not abused by parties so that its important role is not diminished.

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

Discovery relates to all documents and tape recordings relevant to any matter in dispute in the action (whether or not such matter is one arising between the party requiring discovery and the party required to make discovery) which are, or have at any time been, in the possession or under the control of such other party. (Rule 35(15) defines the concept “tape recordings”.)

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

In this discovery affidavit, the party making discovery must set out

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

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

A party may validly object to the discovery of a document if he or she is able to claim privilege for its contents. Examples are communications made “without prejudice”, documents which fall under legal professional privilege, incriminating documents and documents which affect the security of the state. Privilege is usually seen as a matter falling within the law of evidence, so see your study guide for the Law of Evidence.

A document or tape recording not discovered in terms of the Rules may not be used at the trial by the party who failed to do so (unless the court allows him or her to do so), but any other party is entitled to use such document or tape recording (Rule 35(4)).

Please note that, although Rule 15(5)’s definition of “tape recording” is wide enough to cover all types of material on which visual images, sound and other information may be stored, the precise position with regard to all electronically stored information is unclear. Today, most documents are digitally stored and are often never printed. This, of course, poses challenges, especially with regard to the interpretation of a “document” for purposes of discovery.

13.3.4 Inspection of documents and tape recordings

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

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

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

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

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

13.3.7 Set-down of cases for trial

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

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

13.3.8 Removal of cases

Section 27 of the Superior Courts Act, 2012 provides that application may be made to have proceedings transferred from one division of the High Court to another.

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

13.4 SECURING THE NECESSARY EVIDENCE

13.4.1 Advice on evidence

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

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

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

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

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

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

A witness duly subpoenaed to appear in court and who fails to do so (or fails to remain present) may be arrested after the court authorises a writ for his or her arrest (section 35 of the Superior Courts Act, 2013).

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

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

Study Rule 38(3)(8)

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

- (b) by way of interrogatories

Interrogatories differ from commissions *de bene esse* in that, while in the latter case evidence is given generally, in the former case specific evidence only is taken, and for this purpose specific questions are formulated which must be put to the witness by the commissioner. This method is used if a person resides outside the court's jurisdiction or is outside this area at that stage (s 40 of the Superior Courts Act, 2013).

- (c) by way of affidavit

Study Rule 38(2)

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

discretion to allow this, and factors such as the costs involved in bringing a witness from overseas, illness and the nature of the evidence to be presented are relevant for the court's consideration.

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

ACTIVITY

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

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

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- (3) State the content of the list that a party must provide the opposing party with in terms of Rule 37(4).

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- (4) With reference to the given facts at the start of this study unit, set out which of the matters mentioned in Rule 37(6) must appear in a hypothetical set of minutes of a pre-trial conference.

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FEEDBACK

- (1) The plaintiff will have to give notice of his intention to call expert witnesses and will also have to make summaries of their evidence available to the opposing party; notice will also have to be given of any plans, photographs, etc, which will be used. (Remember, this was a collision and, in all likelihood, there will be a police plan and possibly even photographs of the scene of the accident.) The plaintiff will also request further details for trial purposes, will have to disclose documents, request inspection of the defendant's discovery and possibly also demand that the defendant specify documents that he is going to use in the trial. (Note that the steps will depend on the facts of the particular case and that not all the steps will necessarily be taken in every case.)
- (2) The court will permit it if there is adequate reason. If the court believes that the opposing party has reason to want to cross-examine a witness, and the witness can be brought before court, evidence by way of affidavit will not be permitted.
- (3) Rule 37(4) requires the list to indicate
 - the admissions required
 - the enquiries that will be directed, and which are not included in a request for particulars for trial, and
 - other matters regarding preparation for trial which will be raised at the conference.
- (4) The wording of Rule 37(6) makes it clear that the minutes must deal with **all** the matters set out in the Rule. Study this Rule, and be prepared to list at least five matters in a possible examination question.

THE TRIAL AND COSTS

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

Overview

- 14.1 Conduct of the trial
 - 14.1.1 General trial procedure
 - 14.1.2 Reopening a case already closed
- 14.2 Costs of the action
 - 14.2.1 Costs payable by the client to his or her attorney
 - 14.2.2 Party-and-party costs
 - 14.2.3 Costs *de bonis propriis*

Learning outcomes

Once you have finished studying this study unit, you should

- describe the trial procedure and certain related matters
- discuss the principles which determine the granting or refusal of costs and apply them in practice
- distinguish between the different types of cost orders and identify the appropriate order in a given set of facts

Compulsory reading material

Rule 39

14.1 CONDUCT OF THE TRIAL

14.1.1 General trial procedure

The procedure to be followed during a trial is set out in Rule 39. You are not expected to study the relevant provisions in detail, but you must read them for background purposes. The information which follows is sufficient for study purposes. A reading knowledge of such information will be adequate. (This information is, of course, subject to the provisions of the practice manuals and directives of the various divisions of the High Court.)

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

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

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

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

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

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

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

14.1.2 Reopening a case already closed

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

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

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

(See e.g. *Oosthuizen v Stanley* 1938 AD 322; *Mkwanazi v Van der Merwe* 1970 1 SA 609 (A).)

14.2 COSTS OF THE ACTION

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

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

The purpose of awarding costs to a successful litigant is to "indemnify" (compensate) him or her for the expenses actually incurred for having been unjustly compelled to initiate or defend litigation, as the case may be. An award of costs seldom, if ever, fully compensates a litigant for such expenses. The "successful party" is not necessarily the party in whose favour judgment is given, and therefore the court will attempt to determine which of the parties has been substantially successful (*Swanepoel v Van Heerden* 1928 AD 15). However, it is also possible that, in exercising its discretion, the successful party is deprived by the court of his or her costs wholly or partly, should grounds exist to justify such an order.

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

14.2.1 Costs payable by the client to his or her attorney

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

14.2.1.1 Meaning of the concept

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

Where costs are not statutorily fixed, it is important that, at the commencement of the attorney’s mandate, the attorney and client agree on the costs payable. The utmost care should be taken to ensure that costs are not excessive. A client who feels that costs are excessive may have such costs taxed. Practitioners found guilty of charging excessively may be struck off the roll. The various law societies provide guidelines for practitioners to assist them in determining reasonable costs.

14.2.1.2 The awarding of attorney-and-client costs

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

Read Rule 32(9)(a)

- (1) Rule 32(9)(a) – where the conduct of the plaintiff is penalised in summary judgment proceedings. As an illustration, read this Rule yourself
- (2) Section 50 of the Magistrates’ Courts Act 32 of 1944 – where the removal of a case to the High Court by a defendant was unnecessary

14.2.2 Party-and-party costs

14.2.2.1 Meaning of the concept

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

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

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

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

14.2.2.2 The awarding of party-and-party costs

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

- (1) As a general rule, the successful party is entitled to his or her costs.
- (2) In determining who the successful party is, the court must look to the substance of the judgment and not merely its form.
- (3) Although the general rule is that costs are awarded to the successful party, the court may, in its discretion, deprive the successful party of part, or all, of his or her costs. In exercising his or her discretion in this regard, the judge will take into account the following circumstances in connection with the successful party's conduct:
 - (a) whether the demands made are excessive
 - (b) how the litigation was conducted
 - (c) the taking of unnecessary steps or the adoption of an incorrect procedure
 - (d) misconduct

14.2.3 Costs *de bonis propriis*

This cost order is relevant only where a person acts in a representative capacity. This is an exceptional order, and, unless there are very good reasons, it will not be given. A good reason would be lack of *bona fides*, or negligent or unreasonable or improper conduct by a trustee or an executor, as well as by an attorney, company director, liquidator, etc. The order must be specifically requested, preferably at the trial.

ACTIVITY

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

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

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FEEDBACK

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

ENFORCEMENT OF JUDGMENT

K sues L for damages on the ground of breach of contract. K succeeds in his action and the court orders L to pay K damages in the amount of R600 000. Despite reminders, L refuses and/or fails to do so. K wants to know if there are any legal steps that he can take against L, since asking nicely has not worked.

Overview

- 15.1 Introduction
- 15.2 The enforcement of judgments *ad pecuniam solvendam*
 - 15.2.1 Enforcement by means of execution against the debtor's property
 - 15.2.2 Enforcement against the debtor's person
- 15.3 The enforcement of judgments *ad factum praestandum*

Learning outcomes

Once you have finished studying this study unit, you should explain

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

Compulsory reading material

None

15.1 INTRODUCTION

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

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

Example

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

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

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

15.2 THE ENFORCEMENT OF JUDGMENTS *AD PECUNIAM SOLVENDAM*

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

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

The attachment which takes place in this instance must be distinguished from attachment for jurisdictional purposes which was discussed in Module 1 (CIP2601). The former takes place after judgment and the provisions of section 42 apply, that is, attachment can take place anywhere in the Republic. The two types of attachment differ fundamentally as regards their purpose – in the present instance, attachment takes place so that the attached property can be sold to pay the judgment debt, while, for jurisdictional purposes, attachment takes place to vest a court with jurisdiction and the property is not sold, but is merely secured until judgment.

Movable property must be attached and sold in execution before immovable property. Immovable property can only be attached and sold in the following three cases in terms of Rule 46(1)(a):

- (1) where a writ has been issued against the movables and the sheriff has made a *nulla bona* return, that is, has indicated that insufficient movable property exists which can be attached
- (2) where a special order declaring certain property specially executable after an application on

- notice of motion to the debtor, setting out that there is no movable property which can be attached and sold in execution, has been made by the court
- (3) where the Registrar, in an instance where judgment was given in terms of Rule 31(5), declared immovable property specially executable

Hypothecation of immovable property as security entitles a creditor to have such property declared executable. In such instance, a creditor may immediately proceed to satisfy the judgment out of the proceeds of the property. Although Rule 46(1)(a) authorises the Registrar when granting default judgment in terms of Rule 31(5) to declare immovable property specially executable, the Constitutional Court in *Gundwana v Steko Developments* 2010 3 SA 608 (CC) held that it is unconstitutional for the Registrar to make such declaration **to the extent that this permits the sale in execution of the home of the debtor**. Only a court is competent to declare the primary residence of a person specially executable after having considered all relevant circumstances. Some of these circumstances include

- the debtor's payment history
- whether the property is occupied or not
- whether the property is in fact occupied by the debtor
- the position of the debtor's dependants and other occupants of the residence
- the arrears outstanding on the date default judgment is sought

(Because it is impossible to anticipate every potential circumstance, these factors are merely some of those already identified by the courts.)

A debtor's rights in respect of incorporeal property may also be attached in execution (Rule 45(8)).

15.2.2 Enforcement against the debtor's person

The process used in this type of enforcement was known as *civil imprisonment*, but such process was abolished by the Abolition of Civil Imprisonment Act 2 of 1977. If, therefore, a debtor has no assets or income against which execution can be levied, the judgment cannot be enforced.

15.3 THE ENFORCEMENT OF JUDGMENTS *AD FACTUM PRAESTANDUM*

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

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

Although it is possible to lay a criminal charge against the judgment debtor and for a state prosecution then to take place, what usually happens is that the judgment creditor institutes civil proceedings for contempt. He or she approaches the court by means of a notice of motion for an

order to commit the defendant to prison for contempt. The court will, as a rule, suspend imprisonment pending compliance with the original court order.

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

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

ACTIVITY

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

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FEEDBACK

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

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

INTERDICTS AND EXTRAORDINARY PROCEDURES

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

Overview

- 16.1 The interdict
 - 16.1.1 The different kinds of interdicts
 - 16.1.2 The requirements for an interdict
 - 16.1.3 Procedure
- 16.2 Extraordinary procedures
 - 16.2.1 Cases where no pleadings or processes are filed
 - 16.2.2 Perpetual silence and vexatious proceedings
- 16.3 Arrest *suspectus de fuga*

Learning outcomes

Once you have finished studying this study unit, you should

- describe the nature of interdicts and other unique procedures
- indicate the requirements for their use, and the procedure to be followed to obtain relief.

16.1 THE INTERDICT

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

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

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

An interdict may be defined as a summary remedy of an extraordinary nature, the object of which is to protect a person against the unlawful deprivation, or threatening deprivation, of his or her rights. An interdict is not a remedy in respect of an infringement that has already occurred, but in respect of present or future infringements. The general rule is that the applicant must have *locus standi* in respect of the matter – in other words, he or she must have a legal interest in the matter and not only a moral interest.

16.1.1 The different kinds of interdicts

16.1.1.1 Prohibitory interdicts

A prohibitory interdict is an interdict in the more literal and restricted sense of the word, and may be described as an order requiring a person to abstain from committing a threatened wrong, or from continuing an existing one (e.g. trespassing or actions that could lead to the collapse of foundations).

16.1.1.2 Mandatory interdicts

A mandatory interdict is an order compelling a person to perform some positive act in order to remedy a wrongful state of affairs which the respondent has brought about, or to do something which he or she is in law obliged to do if the complainant is not to be deprived of his or her rights (e.g. the demolition of a structure which encroaches over the boundaries of a property).

Where the act to be carried out must be performed by a public official, the order is called a *mandamus* (e.g. an order directing the Registrar of Deeds to register a property transfer).

16.1.1.3 Restitutory interdicts

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

16.1.2 The requirements for an interdict

16.1.2.1 Distinction between temporary and final interdicts

An interdict may be either temporary or final. A temporary interdict is an order granted provisionally, and does not finally determine the rights of the parties. It is granted on an interim basis and remains in force only until the respective rights of the parties have been finally determined by the court. Essentially, the effect thereof is that the position is “frozen” until the court has decided where precisely the right concerned lies.

A final interdict, as the name suggests, is of permanent effect (to finally end an unlawful situation). The requirements for these two types of interdicts differ, and will be dealt with separately.

16.1.2.2 Final interdicts

The requirements for the granting of a final interdict are

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

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

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

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

16.1.2.3 Temporary interdicts

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

- (1) There must be a right that is *prima facie* established.
- (2) If the right is established only *prima facie*, the applicant must show in addition, that, if the interdict were to be refused, he or she would suffer irreparable harm, whereas, if the interdict were to be granted, the respondent would not suffer such irreparable harm.
- (3) The balance of convenience must favour the granting of the interdict. The court must weigh up the prejudice which each of the parties will suffer if the interdict is granted or refused, and, if there is greater possible prejudice to the respondent, will refuse to grant the interdict.
- (4) There must be no other satisfactory remedy available to the applicant.

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

586 (C)

These requirements should not be considered in isolation, but should be considered in

conjunction with one another to determine whether a court should exercise its discretion in favour of granting the relief sought.

16.1.3 Procedure

- (1) Although final interdicts are usually sought by way of action, they may also be sought by way of notice of motion where the facts are not in dispute.
- (2) Where a temporary interdict is sought, the applicant always approaches the court by way of notice of motion. Temporary interdicts are always sought by way of the application procedure and will be granted despite the existence of a factual dispute, provided that the applicant fulfilled the requirements set out above (see 16.1.2.3).

A temporary interdict will, if granted, be valid only

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

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

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

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

16.2 EXTRAORDINARY PROCEDURES

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

16.2.1 Cases where no pleadings or processes are filed

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

16.2.1.1 *Special cases*

It may happen that the parties to a dispute agree about the facts of the case, but differ from each other as regards the legal conclusion which may be drawn from the facts. Rule 33 lays down that

the parties may agree, after the institution of proceedings, (which may be by summons or notice of motion) to a written statement of facts in the form of a special case for the adjudication of the court.

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

16.2.1.2 Questions of law on appeal

- (1) Rule 49(10) provides that, when the decision of an appeal from a single judge to the full bench of the court depends exclusively on a point of law, the parties may agree to submit the decision to the court in the form of a special case, in which event copies need be made only of such portions of the record as may be necessary for a proper decision in respect of the appeal.
- (2) Section 20 of the Superior Courts Act also makes provision for the position where different divisions of the High Court have given conflicting decisions on a point of law. In such instances, the minister of justice may submit the question to the Chief Justice who may have the matter argued before the Constitutional Court or the Supreme Court of Appeal. All other divisions of the High Court will then be bound by the decision of the Supreme Court of Appeal or the Constitutional Court, as the case may be.

16.2.1.3 Declaration of rights

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

However, legislation changed the position. In terms of section 21(1)(c) of the Superior Courts Act, 2013, the applicant must be an "interested party" to an "existing, future or contingent (conditional) right or obligation". A "future right" means an already existing right which will be enforceable only in the future. There does not have to be an existing dispute between parties. However, a court will not decide on matters which are completely academic. Depending on whether there is a factual dispute or not, a declaration of rights can be made by means of summons or motion proceedings.

16.2.1.4 De lunatico inquirendo

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

16.2.2 Perpetual silence and vexatious proceedings

16.2.2.1 Perpetual silence

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

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

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

16.2.2.2 Vexatious proceedings

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

16.3 ARREST *SUSPECTUS DE FUGA*

Earlier arrest *suspectus de fuga* served to keep a debtor in the Republic until judgment was given. Rule 9 was repealed in 2013, and this procedure therefore does not exist anymore.

ACTIVITY

Simply name the procedures applicable in the given situations:

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

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

.....

- (3) A and B have been neighbours for 15 years. In the third year in which they were neighbours, A was unsuccessful in an action against B, and, since then, has instituted six actions against B. Although all the actions appear different at first glance, the facts are only slightly different and the actions are essentially the same.

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

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FEEDBACK

- (1) *A de lunatico inquirendo* application (or rather an application to declare him unfit to manage his own affairs).
- (2) Prohibitory interdict.
- (3) An order which prohibits vexatious proceedings.
- (4) Restitutory interdict.

PART 3

Procedure in the Magistrates' Court

THE APPLICATION PROCEDURE

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

Overview

- 17.1 Introductory remarks
- 17.2 *Ex parte* applications
 - 17.2.1 Sphere of application
 - 17.2.2 Powers of the court
 - 17.2.3 Anticipation and discharge of the *ex parte* order
- 17.3 The application procedure where the respondent is cited
 - 17.3.1 The application
 - 17.3.2 Procedures in terms of section 30 orders
 - 17.3.3 Interlocutory and urgent applications
 - 17.3.4 Striking out

Learning outcomes

After you have finished studying this study unit, you should

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

Compulsory reading material

Rule 55; 56 of the Magistrates' Courts Rules

17.1 INTRODUCTORY REMARKS

You are advised to refer to the introductory remarks on civil procedure in the magistrates' courts ("A few introductory remarks ...") in "Orientation" at the beginning of this study guide before commencing with this study unit.

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

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

17.2 *EX PARTE* APPLICATIONS

17.2.1 Sphere of application

An *ex parte* application is one in which notice is not given to another party, and in which the applicant is the only person before court. The notice of motion must comply with Form 1, Annexure 1 (see rule 55(3)(b)).

In certain circumstances, relief may be sought against another party *ex parte*. In order to succeed, the applicant must show that (a) the giving of notice to such party would defeat the purpose of the application, or that (b) the degree of urgency is so great that it justifies dispensing with notice (rule 55(3)(a)). If the application is brought with undue haste and without good reason, the court will not grant the application and the applicant will have to bear the costs of the failed application. The founding affidavit contains the facts on which the applicant relies for relief, namely the facts upon which his or her cause of action is based and why no notice has been given to the respondent. An applicant is obliged to furnish the court with all possible facts, including adverse facts.

Example

The general rule is that *ex parte* applications may only be brought in those instances where the applicant cannot request an order against a person. An exception to this general rule is found in rule 56, in that applications for interdicts, attachments to secure claims, and *mandamenten van spolie* may be made by means of *ex parte* applications. The reason for this exception is that a speedy remedy, where relief is urgently required, would be frustrated if the other party is notified of the intended application in advance. Besides this, rule 55(4)(b) provides that applications to court for authority to institute proceedings, or for directions as to procedure or for service of documents, may be brought *ex parte* where notice of such applications is inappropriate or unnecessary.

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

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

17.2.2 Powers of the court

The *ex parte* application is an exception to the *audi alteram partem* principle, which literally means "hear the other side". Therefore, the court will not issue a final order without the person concerned (usually the person against whom the order is made) being given an opportunity to put his or her case. Consequently, after hearing the *ex parte* application, the court grants a temporary order and determines a return day on which the respondent must give reasons why the order should not be made final – termed the *rule nisi* (rule 55(3)(c)).

The court may also require any party opposing an order made *ex parte* to appear in order to be examined and cross-examined (rule 55(3)(f)).

Ex parte applications may be heard in chambers (rule 55(3)(h)).

17.2.3 Anticipation and discharge of the *ex parte* order

Any person affected by an *ex parte* order may anticipate the return day upon delivery of at least 24 hours' prior notice (rule 55(3)(d)).

The *ex parte* order may be confirmed, discharged or varied by the court on good cause shown (rule 55(3)(g)). However, an *ex parte* order for the attachment of property to found or confirm jurisdiction is *ipso facto* discharged upon security being provided by the respondent for the amount to which the order relates, plus costs (rule 56(6)). In the case of a *mandamenten van spolie*, the respondent cannot, by merely providing security, effect the discharge of the order if he or she is still in possession of the property to which the order relates.

17.3 THE APPLICATION PROCEDURE WHERE THE RESPONDENT IS CITED

17.3.1 The application

All applications must be supported by affidavits which set out the facts on which the applicant relies for relief. The notice of motion is addressed to the party (or parties) against whom relief is sought, as well as to the registrar or the clerk of the court and to any other any other person if it is necessary or appropriate to inform that person of the application (rule 55(1)). These requirements ensure that the *audi alteram partem* principle is adhered to.

The notice of motion shall be similar to Form 1A of Annexure 1 (rule 55(1)(d)) and the applicant shall appoint a physical address within 15 kilometres of the office of the registrar or clerk of the court at which notice and service of all documents in the proceedings will be accepted. It shall also state the applicant's postal, facsimile or electronic mail addresses, the day on or before

which the respondent must notify the applicant of his or her intention to oppose the application, as well as the day on which the matter will be set down for hearing if no such notice is given (rule 55(e)(i)–(iii)).

Should the respondent oppose the application, he or she shall give the applicant written notice of the intention to oppose and state the address at which notice and service of all documents will be accepted, as well as his or her postal, facsimile or electronic mail addresses. The same documents that are exchanged between the parties in the High Court in opposed application proceedings are exchanged in the magistrates' court (see study unit 2.3.2). However, rule 55(1)(g)(iii) further provides that, where a respondent intends to raise **questions of law only**, he or she must deliver notice of intention to do so and set forth such questions within the same *dies induciae* provided for delivery of the answering affidavit. The court may permit the filing of any further affidavits (rule 55(i)).

Where no answering affidavit or notice regarding questions of law is delivered within the stated *dies induciae*, or after the applicant has delivered his or her replying affidavit (or after the expiry of the period allowed to do so), the applicant may apply to the registrar or clerk of the court for the allocation of a trial date. If the applicant fails to do so within the prescribed period, the respondent may do so. Written notice of the date allocated by the registrar or clerk of the court shall be delivered to the opposite party (rule 55(1)(j)).

The court's powers to deal with an application that cannot properly be decided on affidavit, are set out in rule 55(1)(k) and are similar to those of the High Court.

Where an application cannot properly be decided on affidavit, the court may

- dismiss the application, or
- make such order as it deems fit to ensure a just and expeditious decision (rule 55(1)(k)(i))

In particular, the court may direct that oral evidence be heard on specified issues in an effort to resolve any dispute of fact. To this end, the court may

- order any deponent to appear personally, or
- it may grant leave for any person to be subpoenaed to appear and to be examined and cross-examined as a witness, or
- it may refer the matter to trial with directions as to pleadings or definition of issues (rule 55(1)(k)(ii))

A court may also, after hearing an application (whether *ex parte* or otherwise), make no order thereon, but grant leave to the applicant to renew the application on the same papers and supplemented by further affidavits if the case so requires (rule 55(7)).

17.3.2 Procedures in terms of section 30 orders

Rule 56 provides that applications for an order of an interdict, attachment or a *mandamenten van spolie* shall be made in terms of rule 55 and shall be accompanied by an affidavit stating the facts upon which the application is made and the nature of the order sought. Before granting an order, the court may require the applicant to give security for any damages which may be caused by such order, and may also require additional evidence that it thinks fit (rule 56(3)).

17.3.3 Interlocutory and urgent applications

Applications incidental to pending proceedings must be brought on notice. If facts need to be placed before court, such facts must be contained in a supporting affidavit(s) (rule 55(4)(a)) and must thereafter be set down.

If a court is satisfied that a matter is urgent, it may make an order dispensing with the forms and service provided for in the rules, and may dispose of the matter at such time and place and in accordance with such procedure (but as far as practicable in accordance with the rules) as the court deems appropriate (rule 55(5)(a)). An application brought on an urgent basis must be supported by an affidavit which sets out explicitly the circumstances which the applicant avers render the matter urgent **and** the reasons why the applicant claims that he or she cannot be accorded substantial redress at a hearing in due course (rule 55(5)(b)).

17.3.4 Striking out

Rule 55(9) provides for the striking out on application from any affidavit any matter that is scandalous, vexatious or irrelevant, together with an appropriate order as to costs, including costs as between attorney and client. However, unless the court is satisfied that the applicant will be prejudiced in his or her case, the court will not grant such application.

ACTIVITY

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

- (1) Write concise notes on *ex parte* applications in magistrates' courts procedure.

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.....
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.....
.....
.....

- (2) Name the form of proceeding that Peter should use to approach the court for relief.

.....
.....

- (3) Briefly describe the documents which may be exchanged between Peter and Solly in the opposed application proceedings in the magistrates' court.

.....
.....
.....
.....
.....

FEEDBACK

- (1) *Ex parte* applications may be brought only in those instances where the applicant cannot request an order against a person. Rule 56 provides an exception in that applications for interdicts, attachments to secure claims, and *mandamenten van spolie* may be made by means of *ex parte* applications. The reason is that a speedy remedy, where relief is urgently required, will be frustrated if the other party is notified of the intended application in advance.

The court grants a temporary order and determines a return day on which the person against whom the order is made must give reasons why the order should not be made final (*rule nisi*). The court may also require the applicant to provide security for any losses suffered and may require any additional evidence where relevant. Any party affected by the *ex parte* order may, after 24 hours' prior notice, anticipate the return date. The order is *ipso facto* discharged upon security being provided by the respondent for the amount to which the order relates.

- (2) Motion or application procedure.
- (3) The applicant, Peter, will initiate the proceedings by drawing up a notice of motion which conforms with Form 1A of the Magistrates' Courts Rules. Attached to this notice of motion is a supporting affidavit. Such affidavit sets out Peter's and other interested persons' evidence in support of the order applied for. The respondent, Solly, replies to Peter's allegations as contained in the supporting affidavit, in the responding affidavit. Peter has an opportunity to reply to Solly's responding affidavit by way of a replying affidavit. The purpose of such reply is to adduce new facts which serve as a reply to the respondent's defence. The court has a discretion to allow the filing of further affidavits.

INSTITUTING THE ACTION: THE SUMMONS PROCEDURE

John and Peter are involved in a motor collision in Johannesburg. Peter contends that the collision was due solely to the negligence of John. Peter suffers damages in the amount of R80 000. Peter wishes to institute proceedings in a magistrates' court in the amount of R80 000. John intends to defend the action.

Overview

- 18.1 Introductory remarks
- 18.2 Schematic outline
- 18.3 The summons
- 18.4 Form and content of the summons
 - 18.4.1 *Dies induciae*
 - 18.4.2 Address for service of pleadings
 - 18.4.3 Declaration/particulars of claim
 - 18.4.4 The plaintiff as cessionary
 - 18.4.5 Averments of jurisdiction
- 18.5 Issue of summons
- 18.6 Amendment of summons

Learning outcomes

After you have finished studying this study unit, you should

- describe the form and content of the various types of summons
- explain how a summons is issued
- explain how a summons is served

- explain how a summons may be amended before service and after service respectively
- describe what happens if there is a delay in serving the summons
- apply the contents of this study unit to solve problems

Compulsory reading material

Rules 5; 7; 52(2) of the Magistrates' Courts Rules

18.1 INTRODUCTORY REMARKS

The action procedure in a magistrates' court is instituted by means of a summons. The action procedure is discussed in study units 18 to 28. Since there is a large measure of similarity between litigation by means of the illiquid summons procedure in the High Court and the action procedure in a magistrates' court, the study units concerned also largely overlap. Therefore, we discuss the action procedure in a magistrates' court only briefly and try to emphasise the more important aspects, as well as try to indicate some important differences between the procedures in the High Court and those in the magistrates' court.

18.2 SCHEMATIC OUTLINE

The following diagram provides a schematic outline of magistrates' court proceedings. You are advised to study magistrates' court proceedings with reference to this outline, since it will aid your understanding.

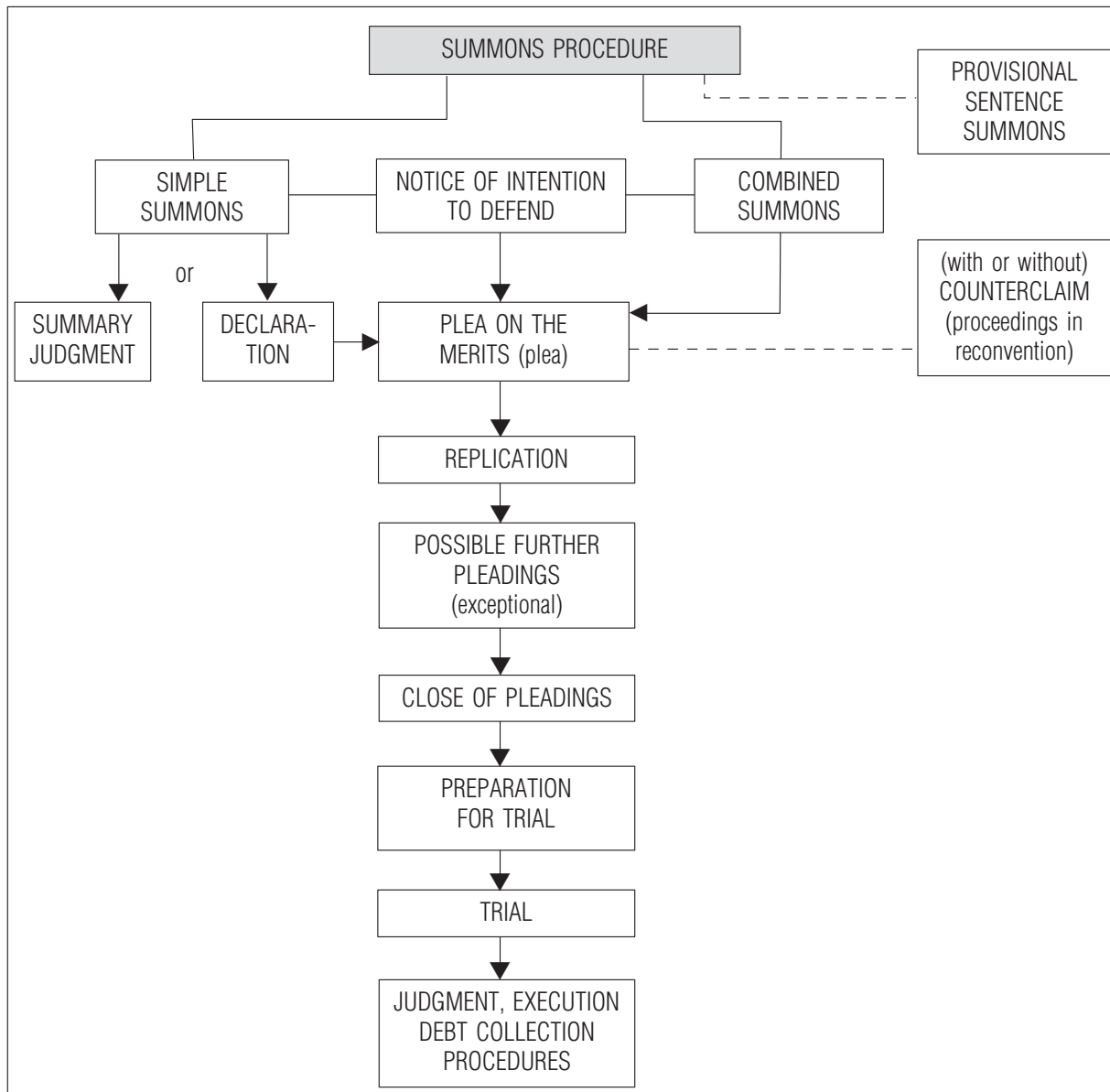


Figure 18.1: Schematic outline of magistrates' court proceedings

18.3 THE SUMMONS

As in the High Court, summons proceedings are instituted either by way of a simple summons or a combined summons, depending on the nature of the claim. In both instances, the summons is addressed to the sheriff and it directs the sheriff to inform the defendant, amongst other things, that if the defendant wishes to defend the matter, he or she must give notice of intention to defend within the prescribed time period, and to thereafter, in the case of a combined summons, deliver a plea, an exception or an application to strike out within the prescribed time period (rule 5(1)).

The combined summons must be in a form similar to Form 2B of Annexure 1, while the simple summons must be in a form similar to Form 2 of Annexure 1 (see rule 5(2)(a) and rule 5(2)(b))

respectively). As in the High Court, it is required that a “statement of the material facts” relied upon by the plaintiff in support of the claim (the “particulars of claim”) be annexed to the combined summons (see rule 5(2)(a)). Because this “statement” is a pleading, it must comply with rule 6 (which contains the rules relating to pleadings). It is important that this rule is duly complied with, because rule 6(13) provides that failure to comply with any of its provisions will cause the pleading to be deemed to be an irregular step, and that the opposite party will be entitled to act in accordance with rule 60A (see study unit 23.4).

Note that a summons must be signed by the attorney acting for the plaintiff, and must contain such attorney’s physical address, postal address and facsimile and electronic mail addresses for purposes of accepting service of all documents and notices in the proceedings. Where a plaintiff acts in person (i.e. without legal representation), these requirements apply likewise.

Rule 5(8) requires that a summons for rent under section 31A of the Magistrates’ Courts Act of 1944 shall be in accordance with the form prescribed in Form 3, Annexure 1.

A power of attorney does not have to be filed, since rule 52(2) provides that it is not necessary for anyone to file a power of attorney to act in a magistrates’ court. However, the authority of a person acting for a party may be challenged by the other party within ten days after he or she has received such notice that such person is so acting, or with the court’s leave, for good cause shown at any time before judgment. When a person’s authority is challenged in this manner, he or she may not, without the court’s leave, act any further without satisfying the court that he or she had authority to act. The court may adjourn proceedings in order to enable him or her to do so.

18.4 FORM AND CONTENT OF THE SUMMONS

Rules 5 and 6 contain the most important provisions regarding the content of a summons. The following particulars must be included in the summons:

- (1) the surname and first names or initials of the defendant by which the defendant is known to the plaintiff, the defendant’s residence or place of business and, where known, the defendant’s occupation and employment address and, if the defendant is sued in any representative capacity, such capacity
- (2) the full names, gender (if the plaintiff is a natural person) and occupation and the residence or place of business of the plaintiff, and if the plaintiff sues in a representative capacity, such capacity
- (3) a form of consent to judgment
- (4) a form of appearance to defend
- (5) a notice drawing the defendant’s attention to the provisions of section 109 of the Act
- (6) a notice in which the defendant’s attention is directed to the provisions of sections 57, 58, 65A and 65D of the Act in cases where the action is based on a debt referred to in section 55 of the Act
- (7) where the defendant is cited under the jurisdiction conferred upon the court by section 28(1)(d) of the Act, an averment that the whole cause of action arose within the district or region, and the particulars in support of such averment
- (8) where the defendant is cited under the jurisdiction conferred upon the court by section 28(1)(g) of the Act, an averment that the property concerned is situated within the district or region

- (9) any abandonment of part of the claim under section 38 of the Act and any set-off under section 39 of the Act
- (10) where the plaintiff issues a simple summons in respect of a claim regulated by legislation, the summons may contain a bare allegation of compliance with the legislation, but the declaration, if any, must allege full particulars of such compliance (provided that, where the original cause of action is a credit agreement under the National Credit Act (NCA), the plaintiff seeking to obtain judgment in terms of section 58 of the Act shall in the summons deal with each of the relevant provisions of sections 129 and 130 of the NCA, and allege that each one has been complied with)
- (11) where the plaintiff sues as cessionary, the plaintiff shall indicate the name, address and description of the cedent at the date of cession as well as the date of the cession
- (12) a summons in which an order is sought to declare executable, immovable property which is the home of the defendant shall contain a notice in the following form:

The defendant's attention is drawn to section 26(1) of the Constitution of the Republic of South Africa which accords to everyone the right to have access to adequate housing. Should the defendant claim that the order for eviction will infringe that right it is incumbent on the defendant to place information supporting that claim before the Court.

Please note that rule 5(11) provides that, if a party fails to comply with any of the provisions of this rule, such summons will be deemed to be an irregular step and the opposite party will be entitled to act in accordance with rule 60A. These matters are not discussed in detail. However, please note the following:

18.4.1 *Dies induciae*

This refers to the stipulated period mentioned in the summons within which the defendant is called upon to enter an appearance to defend after service of the summons. Rule 13(1) provides that appearance to defend the action must be entered within ten days after service of the summons.

18.4.2 Address for service of pleadings

Rule 5(3)(a) provides for the attorney's and plaintiff's facsimile or electronic mail address to be included in the summons, apart from the physical address which should be within 15 kilometres of the courthouse. Rule 5(3)(b) to (d) provides for service by facsimile or electronic mail under certain conditions.

18.4.3 Declaration/particulars of claim

Rule 5(7) provides that a party relying on an agreement governed by legislation shall state the nature and extent of his or her compliance with the provisions of the legislation. In any action based on the NCA, the summons must allege compliance with sections 129 and 130 of the NCA. Rule 5(7) further provides that a simple summons in respect of a claim regulated by legislation may contain a bare allegation of compliance with the legislation, but a declaration (and a combined summons's particulars of claim) must allege full particulars of such compliance.

Rule 5(10) contains a reference to section 26 of the Constitution, which accords a right to access

adequate housing to everyone. Rule 5(10) provides that, in actions where an order is sought to declare immovable property which is the home of a defendant, executable (and also probably in actions where an eviction of a lessee is sought), the defendant's attention must be drawn to section 26 of the Constitution, which accords everyone the right to access adequate housing.

It should be noted that, in practice, it is trite law that a plaintiff has a choice whether to use a simple or a combined summons. This position is correctly set out in rule 5(2)(b) by the insertion of the word "may", as opposed to "shall". Rule 5(2)(b) sets out that, in every case where the claim is based on a debt or liquidated demand, a simple summons may be used. However, where a claim is not based on a debt or liquidated demand, rule 5(2)(a) provides that a combined summons must be used.

It should be noted that a summons for rent under section 31 of the Act shall be in the form prescribed in Annexure 1, Form 3 (rule 5(8)). Rule 5(11) provides that failure to comply with any of the provisions of rule 5 may be addressed in terms of rule 60A (irregular proceedings).

Therefore, rule 60A must be used where there is no compliance with rule 5. If a party fails to comply with any of the provisions of this rule, such summons shall be deemed to be an irregular step and the opposite party shall be entitled to act in accordance with rule 60A (rule 5(11)).

18.4.4 The plaintiff as cessionary

Where the plaintiff sues as cessionary, the name, address and description of the cedent, and the date of the cession, must be mentioned in the summons (rule 5(9)).

18.4.5 Averments of jurisdiction

Rule 5(6)(a) states that it is compulsory for a plaintiff who relies on the jurisdiction conferred upon the court in terms of section 28(1)(d) of the Magistrates' Courts Act 32 of 1944 to aver that the whole cause of action arose within the district or region, and to set out the particulars in support of such averment. A mere averment that the whole cause of action arose within the magistrates' court or district is thus insufficient.

Where a plaintiff relies on section 28(1)(g) of the Act for jurisdiction, the summons must contain an averment that the property concerned is situated within the court's area of jurisdiction (rule 5(6)(b)). Likewise, a summons must show any abandonment of part of the claim under section 38 and any set-off under section 39 of the Act.

18.5 ISSUE OF SUMMONS

The registrar or clerk of the civil court issues summons by furnishing the summons with a case number, and by signing and dating it.

The issue of summons has certain consequences. The preferred view is that an action is instituted at the time that the summons is issued and not by the service of the summons. This view affords greater certainty to the plaintiff. The issue of a summons also establishes jurisdiction. To illustrate this, the issue of a summons out of a particular court implies that the court has jurisdiction to try the case. Unless the court decides that it does not have jurisdiction, all further steps in the proceeding, including the trial itself, will take place in that court.

It should also be noted that the issue of a summons does not interrupt the running of prescription. Prescription is only interrupted by the service of the summons.

18.6 AMENDMENT OF SUMMONS

Amendments may be made at any time before service. However, such amendments may be initialled by the registrar or clerk of the court (rule 7(2)). Rule 7(3)(a) sets out the procedure to follow when an error occurs with the initials or first names of the defendant, and states that the registrar or clerk of the court may insert the correct name or initial in the summons if disclosed in the return of the sheriff. Such amendment will then, for all purposes, be considered as if it had been made before service of the summons. However, rule 55A still applies to amendments after service of summons.

ACTIVITY

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

(1) In what circumstances will it be necessary for Peter's attorney to file a power of attorney?

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.....
.....

(2) Who is responsible for issuing the summons?

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.....

(3) The plaintiff does not have to specifically allege that the court has jurisdiction. Discuss this statement critically.

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.....

(4) What procedure must Peter follow if he decides to amend the summons after service?

.....
.....
.....

(5) What particulars will Peter's summons contain?

.....
.....
.....

FEEDBACK

- (1) A power of attorney does not have to be filed, since rule 52(2) provides that it is not necessary for anyone to file a power of attorney to act in a magistrates' court unless the attorney's authority to act is challenged.
- (2) The registrar or clerk of the civil court.
- (3) This statement is not correct. Normally, the plaintiff need not allege that a specific court has jurisdiction, but rule 5(6) provides that it is compulsory for a plaintiff who relies on the jurisdiction of a court in terms of section 28(1)(d) and 28(1)(g) respectively, to state that the cause of action arose wholly within the particular district or region as well as the particulars in support thereof, or that the property is situated within the court's jurisdictional area.
- (4) Peter may amend the summons after service by following the procedure set out in rule 55(A).
- (5) Peter's summons will contain the particulars as set out under 18.4 above. You should be able to list approximately six to eight of these in a possible examination question.

PROVISIONAL SENTENCE

Jonas, the owner of a spaza shop, purchases goods to the value of R60 000 from Quicksell CC, a retailer. The goods are delivered at Jonas's shop, and Jonas issues a cheque in payment. When Quicksell CC presented the cheque at its bank for payment, the cheque was returned unpaid and marked "Refer to drawer". Quicksell CC does not tolerate bad debts, and instructs its attorneys to issue summons against Jonas.

OVERVIEW

- 19.1 Introduction
- 19.2 The summons
- 19.3 The procedure

Learning outcomes

Once you have finished studying this study unit, you should

- describe the field of application of the procedure
- define a liquid document
- explain the procedure
- apply the content of the study unit to a set of facts to solve problems

Compulsory reading material

Rule 14A of the Magistrates' Courts Rules

19.1 INTRODUCTION

The provisions of rule 14A correspond to those contained in Uniform Rule 8, which was discussed fully in study unit 7. To avoid unnecessary repetition of the basic principles, you are referred to that study unit. The discussion of the procedure will consequently be limited to a few aspects only.

The procedure is used only when the claim is based on a valid liquid document from which appears an unconditional admission of liability for the payment of a certain and fixed amount of money.

Bear in mind that this is a unique procedure with a limited application field, and holds the following benefits for the plaintiff:

- It is a speedy procedure and is aimed at the speedy recovery of a monetary debt without the necessity of an expensive, lengthy and formal litigation process.
- Initially, the plaintiff need not prove anything, while the onus rests on the defendant from the start to prove on a balance of probability that he or she is not indebted in the amount claimed, and that the probability of success in the principal case is not in the favour of the plaintiff. If the defendant fails to discharge this onus, provisional sentence is granted and the plaintiff is entitled to receive immediate payment of the judgment amount plus costs.

The debtor will only be able to enter into the merits of the matter once satisfactory security has been provided or the judgment debt and costs have been paid.

19.2 THE SUMMONS

The provisional sentence summons must be drawn up in accordance with Form 2A of Annexure 1 (rule 14A(1)) and calls upon the defendant to pay the amount claimed in the summons or to appear before court in person or through a legal representative on the day mentioned in the summons to deny or admit his or her liability.

The summons must comply with the requirements stated in rule 5 and is issued in the normal way by the registrar or clerk of the court and is served by the sheriff. Copies of all documents on which the claim is based must be attached to, and served with, the summons (rule 14A (3)).

19.3 THE PROCEDURE

Once the summons is served, the plaintiff has to set the matter down for hearing not later than three days before the day upon which it will be heard (rule 14A(4)). The *dies induciae* is 15 days.

The defendant may oppose the provisional sentence summons by appearing personally, or by way of a practitioner as representative, on the day named in the summons, or she or he may not later than three days prior to that date deliver an affidavit stating the grounds upon which she or he disputes liability (rule 14A(5)(a)).

The plaintiff is given a reasonable opportunity to reply to the opposing affidavit (rule 14A(5)(b)). The defendant may admit liability either before or at the hearing. The defendant must sign a

written admission of liability which must be witnessed by an independent attorney. The court will award a final judgment for the plaintiff (rule 14A(6)).

A defence against a provisional sentence summons is aimed at the following:

- (1) the authenticity of the signature on the document or the authority of the person signing
- (2) the merits of the claim

If the provisional sentence is refused, the defendant may be ordered to file a plea within a stated time, and the court may award any order of costs which it deems fit (rule 14A(8)(a)). This is a discretionary step, and the court must be satisfied that the defendant has a case before ordering this. If the court does not order the defendant to file a plea, the matter is at an end.

If the defendant does not succeed in warding off a provisional sentence, the court will grant the plaintiff a provisional sentence. The sentence is provisional in the sense that the defendant may defend the matter at a full trial, but on certain conditions.

The defendant may demand from the plaintiff security *de restituendo* to the satisfaction of the registrar or clerk of the court (rule 14A(a)). Such security covers the defendant should he or she succeed in the principal action. The defendant may only enter into the principal case if he or she has satisfied the amount of the judgment of provisional sentence and costs, or if the plaintiff on demand fails to furnish due security as required by this rule (rule 14A(10)).

The defendant initiates the process within two months of the granting of the provisional sentence by delivering a notice of intention to enter the principal case, and by delivery of a plea ten days after the notice.

If the defendant does not take these steps timeously, the provisional sentence becomes a final judgment (rule 14A(11)).

Once the plea has been filed the matter is conducted as a normal trial action.

ACTIVITY

Again read the scenario at the beginning of this study unit, and then answer the following questions:

- (1) Jonas pays the amount of R60 000 to Quicksell CC by cheque and the cheque is dishonoured by the bank. What type of summons may Quicksell CC now use?

.....

- (2) What is a defence against provisional sentence based on?

.....
.....

- (3) What do you understand by the term “security *de restituendo*”?

.....
.....

FEEDBACK

- (1) Quicksell CC may now use a provisional sentence summons.
- (2) A defence against a provisional sentence summons is based on the authenticity of the signature on the document or the authority of the person signing, and the merits of the claim itself.
- (3) The term refers to the security which the plaintiff must give for the restitution of money he or she has received from the defendant in terms of a judgment in the event of the defendant defending and succeeding in the main case.

SERVICE

Mr Plaintiff wishes to issue summons against Defendant (Pty) Ltd for damages sustained. You act on behalf of Mr Plaintiff and issue a combined summons at the offices of the clerk of the court.

Overview

- 20.1 Introduction
- 20.2 Meaning
- 20.3 Methods of service
- 20.4 Substituted service
- 20.5 Edictal citation

Learning outcomes

Once you have finished studying this study unit, you should

- explain what “service” entails
- on a given set of facts identify and apply the appropriate method of service

Compulsory reading material

Rule 8(1)–(3); 9; 10 of the Magistrates’ Courts Rules

20.1 INTRODUCTION

The methods of service in the magistrates' courts (district and regional courts) are contained in rule 9 and largely correspond to those contained in the Uniform Rules.

20.2 MEANING

As you are aware, most legal proceedings commence when court documents (or processes) are **delivered** to the defendant (or respondent). Such delivery is known as **service**, and, because the opposing party is thus informed about the court proceedings against him or her to enable him or her to be heard, the requirements of the *audi alteram partem* maxim are complied with. Service is effected by the sheriff (rule 8), an independent officer of the court who acts in terms of the Sheriff's Act 90 of 1986. In terms of section 3(1) of this Act, the services and functions of a sheriff may be exercised only within the specific jurisdictional area of the court for which the sheriff has been appointed service outside such jurisdiction is invalid.

The original court document and as many copies as there are opponents, are handed to the sheriff for service (rule 9(1)). At the time of service, the sheriff must show the original to the person being served; explain the nature and content thereof, and must indicate in the return of service (rule 8(3)) that this has in fact been done (rule 9(3)) and (4)). The return of service serves as proof of service (rule 9(17)).

You should note that not all documents need to be served by the sheriff – examples include a notice of intention to defend, a plea on the merits and interlocutory applications. In such instances, it is sufficient to deliver the documents by way of a firm's clerk or messenger to the address appointed for this purpose.

20.3 METHODS OF SERVICE

Normally, service may not take place on a Sunday or a public holiday, unless it is by mail or in terms of a court order, or unless it concerns service of an interdict or of a writ for the attachment of property in terms of section 30*bis* of the Magistrates' Courts Act of 1944 (rule 9(2)(a) and (b)). Although this rule also refers to a writ of arrest, you must bear in mind the decision in *Bid Industrial Holdings (Pty) Ltd v Strang and another (Min of Justice and Constitutional Development, Third Party)* 2008 3 SA 355 (SCA).

Rule 9(3) provides for service of processes by way of mainly the following methods:

- (1) personal service on the defendant or on his or her duly authorised representative (If the defendant is a minor or under disability, service is effected on his or her guardian, tutor or curator.)
- (2) at the residence or place of business of the defendant and on a person who is apparently not younger than 16 years and apparently lives or works there
- (3) at the defendant's place of employment and on a person who is apparently not younger than 16 years and apparently in authority over the defendant, **or**, in the absence of such a person apparently in authority, on a person apparently not younger than 16 years and apparently in charge of the defendant's place of employment
- (4) at the defendant's chosen *domicilium citandi*
- (5) at the registered office or the principal place of business of a company or other juristic

- person situated within the area of jurisdiction of the court concerned, and on a responsible employee or, if none, by affixing a copy to the main door
- (6) by registered post when the plaintiff so instructs the sheriff in writing
 - (7) at the national or local offices of the State Attorney where the defendant is a state organ or civil servant
 - (8) at the offices or place of business of a partnership or otherwise upon any member of the partnership
 - (9) upon curators, executors, liquidators and guardians in their representative capacity
 - (10) upon clubs, societies, churches, public bodies and similar bodies at the local office or place of business of such body, or otherwise on the chairperson, secretary or similar officer

Rule 9(5) provides that if a person keeps his or her residence or place of business closed in order to prevent service, it is sufficient service if a copy of the document is affixed to the outer or principal door or security gate, or is placed in the post box.

Service of a notice, request, statement or any other document that is **not** a process, may be effected by hand or by registered post, or may be sent by fax or electronic mail (rule 9(9)(a)). Chapter III, Part 2 of the Electronic Communications and Transactions Act of 2002 applies to service by fax and electronic mail.

If a summons has been improperly served, a defendant may raise an exception to the summons (see the discussion of the exception below).

20.4 SUBSTITUTED SERVICE

If service by one of the usual methods of service is not possible and the matter falls within the jurisdiction of the court concerned, the court may make an order allowing service by a person and in the manner specified in such order (rule 9(10)). As is the case in the High Court, the court must be approached on application for leave to serve documents by means other than the usual methods on a defendant (or respondent) who is known or believed to be within the borders of the Republic.

Study rule 10(2)(a)

Rule 10(2)(a) prescribes the contents of the application in respect of proceedings that initiates proceedings. **Study** this section.

20.5 EDICTAL CITATION

In contrast to substituted service, edictal citation is used if service has to be effected **outside** the borders of the Republic, whether or not the defendant's or respondent's address in the foreign country is known. Rule 10 substantially replicates Uniform Rule 5, and provides that no document or process that initiates proceedings may be served outside the Republic without leave of the court. The same allegations (set out in rule 10(2)(a)) contained in an application for substituted service are contained in an application to serve by means of edictal citation.

If leave is given, service is effected by a person in the administration or professional section of the South African diplomatic service or who is a foreign diplomatic or consular officer (rule 9(14)). The certificate by the person effecting service in the foreign country constitutes proof of service. Not only must such person identify himself or herself, but he or she must also mention

that he or she is authorised in terms of the law of the country concerned to effect service, and that service is taking place as required by that country's legal system, and he or she must indicate the method of service as well as the date of service (rule 9(18)(a)).

ACTIVITY

- (1) Explain briefly how service ensures compliance with the *audi alteram partem* principle.
- (2) Briefly explain what factors must be considered before you have the summons served by a particular method on behalf of Mr Plaintiff in the scenario above.
- (3) Defendant (Pty) Ltd is a slippery customer and manages to avoid service of the summons. Advise the messenger which method of service will constitute sufficient service in these circumstances.
- (4) State the allegations that the applicant must set out in the application for substituted service, as required by rule 10(2)(a).

FEEDBACK

- (1) In terms of this principle, any person is entitled to be heard before an order or judgment is given against him or her. Service causes legal processes (which include court documents and notices) to be brought to the attention of the opposite party to enable him or her to take notice of any legal steps taken against him or her which affect his or her rights and/or interests, as well as of the steps that he or she may take in response. Such a party is then in a position to defend himself or herself against such legal steps, and is able to put his or her side before court.
- (2) This question simply aims to stimulate your thoughts on a basic and practical level: it is not a typical examination-type question, and tests common sense. In the first place, you should confirm (by way of a company-office search) that the defendant is not a foreign company, and you should establish its registered address and main place of business. If satisfied that neither substituted service nor edictal citation is applicable, you will then peruse the contents of rule 9 to ensure proper service.
- (3) Rule 9(5) provides that, in these circumstances, it will be sufficient for the sheriff to affix a copy of the summons to the outside door, the door of the main entrance or to the security door of the defendant's place of business. The sheriff may also place the copy in the post box of the business.
- (4) The application must set out, in precise terms, the nature and extent of the claim; the grounds upon which the claim is based and upon which the court has jurisdiction to hear the matter; as well as the method of service for which leave is sought. If the method is not personal service, the plaintiff must also set out the last-known address of the defendant and the enquiries made to establish his or her current address.

LITIGATION PROCEEDINGS UP TO AND INCLUDING CLOSE OF PLEADINGS

John and Peter are involved in a motor-vehicle collision in Johannesburg. Peter contends that the collision was due solely to the negligence of John. Peter suffers damages in the amount of R80 000. Peter wishes to institute proceedings against John in the magistrates' court. Peter issues summons in the amount of R80 000 against John. John may take various steps after being served with the summons.

Overview

- 21.1 Introduction
- 21.2 Notice of intention to defend ("appearance")
- 21.3 The plea on the merits, the counterclaim ("claim in reconvention") and the special plea
 - 21.3.1 The plea on the merits
 - 21.3.2 Special plea
 - 21.3.3 Counterclaim
- 21.4 The replication and further pleadings
- 21.5 Close of pleadings

Learning outcomes

After you have finished studying this study unit, you should

- explain what steps the defendant may take after service of summons
- identify the contents of a notice of intention to defend
- explain what happens if a notice is defective
- discuss the plea on the merits, the special plea and the counterclaim

- explain the differences between the plea on the merits and the special plea
- apply the contents of this study unit to solve problems

Compulsory reading material

Rules 13; 17; 20; 21; 21A of the Magistrates' Courts Rules

21.1 INTRODUCTION

Please again consult the schematic outline in study unit 18.2 (figure 18.1). The litigation proceedings in the magistrates' courts are essentially the same as in the High Court. This study unit sets out how the defendant is given the opportunity of stating the case on which his or her defence against the plaintiff's claim is based (by means of the plea) and of counterclaiming, but also sets out how the plaintiff may react to these steps.

21.2 NOTICE OF INTENTION TO DEFEND ("APPEARANCE")

If the defendant wishes to defend the action, he or she must file a notice of intention to defend.

A defendant has ten days after service of a summons on him or her to enter an appearance to defend, either personally or by his or her attorney (rule 13(1)). In this notice, the defendant must not only indicate his or her full residential or business address and postal address, but also a facsimile and electronic postal address, if available. The preferred address for acceptance of service of all documents in the action must also be indicated, and, if the defendant is willing to accept such service at any other address than the physical or postal address, this fact must be clearly mentioned (rule 13(3)(a) and (b)).

The mere fact that a defendant entered an appearance does not mean that he or she waived any right to raise an objection to the court's jurisdiction or to any irregularity or impropriety in the proceedings (rule 13(4)).

Please note that an appearance to defend may be entered after the prescribed *dies induciae* has expired, but before default judgment has been granted. However, if appearance to defend is entered after a plaintiff has already lodged a request for default judgment, the plaintiff is entitled to costs (rule 13(5)).

If the notice is defective in that certain requirements in terms of the rules have not been complied with, for example if

- (1) it has not been properly served,
- (2) it has not been properly signed, or
- (3) it does not comply with the requirements in respect of address for service,
- (4) exhibits any two or more of such defects or any other defect of form,

the registrar or clerk of the court shall not enter judgment against the defendant unless the plaintiff has delivered a notice in writing to the defendant calling upon him or her to deliver a

notice of intention to defend in due form within five days of the receipt of such notice (rule 12(2)(a)).

The notice provided for in rule 12(2)(a) shall set out in what respect the defendant's notice of intention to defend is defective. If the defendant fails to deliver a notice of intention to defend as provided for in subsection (a), the plaintiff may lodge with the registrar or clerk of the court a written request for judgment as a result of the defendant's failure to deliver a due notice of intention to defend (provided that, in divorce actions, rule 22(5) shall apply).

The contents of such a notice are as follows:

Example

<p>NOTICE IN TERMS OF RULE 12(2)</p> <hr/> <p>Kindly take notice that the Defendant's notice of intention to defend, served on the plaintiff on, is defective in that it has not been properly signed by the Defendant or his legal representative.</p> <p>Further, kindly take notice that the Defendant is required to deliver a proper notice of intention to defend within five (5) days of receiving this notice.</p> <p>(Signatures and addresses)</p>

21.3 THE PLEA ON THE MERITS, THE COUNTERCLAIM ("CLAIM IN RECONVENTION") AND THE SPECIAL PLEA

The defendant is given the opportunity of stating the case on which his or her defence against the plaintiff's claim is based. This occurs by means of the plea. The defendant may also institute a counterclaim against the plaintiff at this stage.

21.3.1 The plea on the merits

The most common way of defending a matter is to raise a defence on the merits. The plea contains the defence. In essence, the plea on the merits represents the defendant's answer or defence to the plaintiff's claim as contained in the particulars of claim or declaration, as the case may be. Where a defendant has delivered a notice of intention to defend, a defendant must deliver a plea (with or without a claim in reconvention or an exception) within 20 days after service upon him or her of a declaration, or within 20 days after delivery of such notice in respect of a combined summons. Failure to comply with certain provisions of this rule (subrules (2), (3) and (5)) shall be deemed to be an irregular step, and the other party may then act in accordance with rule 60A (application for the setting aside of an irregular step).

The plea must be formulated sufficiently clearly to inform the plaintiff precisely of the basis of the defendant's defence. A bare denial of liability or a defence of general issue is not permissible, although specific allegations in the summons may be denied in so far as such denials are not inconsistent with the rest of the defence. Every allegation in the summons, and details with regard thereto, must thus be dealt with separately in the defence. Consequently:

- (1) with regard to all the material facts in the summons, these must be
 - (a) admitted to, or
 - (b) denied, or
 - (c) confessed to and avoided, and

- (2) with regard to the defence
 - (a) the nature thereof must be clearly and concisely stated, and
 - (b) all the material facts on which the defence rests must be provided

This is now explained in further detail.

Admission

Example

Admissions relate not only to facts explicitly admitted, but also to the necessary implications or results of facts explicitly admitted. All facts admitted expressly, or by necessary implication or result, need not be proved at the trial. Great circumspection must be used in drafting a defence. To illustrate this, where a defendant denies the existence of a contract but not the amount of the claim, he or she will be deemed to have admitted the amount. The plaintiff must only prove the existence of the contract to succeed in the claim. The defendant may withdraw an admission only in exceptional circumstances, and then only with the court's permission. Where permission is granted for such a withdrawal, the court will generally also issue an order for postponement and costs as may be reasonable in the circumstances.

Denial

Example

The defendant must clearly and explicitly deny all the facts which he or she wishes to deny. A vague denial may lead the court to find that certain facts have not been placed in issue, and need consequently not be proved. The defendant must thus ensure that he or she does not make a general or bare denial which is inadmissible. To illustrate this, assume that the plaintiff avers that his motor vehicle was damaged on 2 January in a collision involving the defendant's vehicle. The defendant, however, merely denies the contents of this paragraph in his plea. Thus it is not clear what the defendant is denying. Is he denying that the plaintiff's vehicle was damaged; that the collision occurred on 2 January; that a collision occurred at all, or that he was the driver of the other vehicle? Such a general denial is vague and embarrassing and does not inform the plaintiff of the basis of the defendant's defence.

Please also refer to rule 17(3)(a) in this respect.

Instances will arise where the defendant will be unaware of certain of the plaintiff's allegations, and will consequently not be in a position to admit or deny them. It is customary to plead in such circumstances that the specific allegation falls outside of the defendant's knowledge, but that he or she does not admit it and requires proof thereof.

Confess and avoid

Example

This type of plea arises where the defendant admits all, or certain, of the facts in the plaintiff's summons, but proceeds to raise other facts which put a different complexion on the facts admitted, thereby neutralising them. An example of this is the case where a plaintiff sues a defendant for monies loaned and advanced. The defendant admits that the transaction took place, but pleads that the plaintiff absolved him or her from repayment at a later date.

The nature of the defence must be clear and concise

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

Material facts on which the defence rests

The defendant must not only indicate the nature of his or her defence; he or she must also indicate the actual facts on which his or her defence rests. Therefore, it is insufficient for a defendant to aver that he or she acted lawfully in the circumstances; he or she must indicate the facts on which he or she relies for justification, for example self-defence.

21.3.2 Special plea

Please refer to study unit 10.6, dealing with the High Court, regarding the nature of a special plea, and the difference between a special plea and a plea on the merits.

A special plea is a defence which is not an answer to the factual allegations made by the plaintiff but which goes beyond the merits. Examples of special pleas are

- the court has no jurisdiction
- the plaintiff's claim has become prescribed
- the defendant or the plaintiff has no *locus standi*, that is, legal capacity to institute action
- *lis pendens* – a special defence that an action is already pending between the same parties (or their successors in title) which arises from the same cause of action or in relation to the same subject matter in dispute
- *res iudicata* special defence that the entire matter is *res iudicata* (This defence amounts to a plea that a judgment has already been given by a competent court in a matter between the same parties in which the point in dispute was the same.)
- arbitration
- splitting of claims
- non-joinder and mis-joinder (Non-joinder – an example of where the plea will be successful will be where only one owner of property owned by several co-owners is sued or where there is a joint financial or proprietary interest not based upon co-ownership.)

Usually, the onus rests on the defendant to prove his or her special plea.

21.3.3 Counterclaim (also known as a “claim in reconvention”)

Study 9.3 dealing with the counterclaim in the High Court. The counterclaim is also used in a magistrates' court. Rule 20(1)(a) provides that the counterclaim (claim in reconvention) is made by filing, within the time period laid down for the delivery of a plea, a statement in writing giving such particulars of the claim in reconvention as are required for claims in convention. Therefore, rule 20(2) is intended to prescribe the same time limits for bringing a counterclaim as for delivering a plea.

The defendant who institutes a counterclaim is known as the plaintiff in reconvention, while the

plaintiff (in the main claim) is known as the defendant in reconvention. Rule 20(1) provides that the provisions of the rules of the magistrates' courts apply *mutatis mutandis* to claims in reconvention, except that it is not necessary for the defendant in reconvention (i.e. the plaintiff in the main action) to enter appearance. The effect of rule 20(1) is that, from the time a claim in reconvention is delivered, it is treated as any claim in convention as at the moment the defendant enters appearance to such claim.

21.4 THE REPLICATION AND FURTHER PLEADINGS

Rule 21 is essentially the same as Uniform Rule 25, and the procedures in the two courts are consequently the same.

The plaintiff may react to the defendant's plea on the merits within 15 days after receipt thereof by way of a replication. As in the High Court, a replication is necessary only if the defendant raises **new** factual allegations in the plea on the merits to which the plaintiff has to respond. In the normal course of events, a replication will be unnecessary, because a defendant will either admit the various allegations, or deny them and no new allegations are made.

In exceptional cases, the exchange of further pleadings is possible in terms of rule 21(5). These will also only be necessary if new allegations are made in the preceding pleading. In each instance, the *dies induciae* is ten days.

21.5 CLOSE OF PLEADINGS

As soon as the issues in dispute have been crystallised, pleadings close. The moment of close of pleadings is the moment of *litis contestatio*. At this point, the issues have been "joined". Rule 21A is substantially identical to Uniform Rule 29. Pleadings are regarded as closed when

- (a) either party has joined issue without alleging any new matter, and without adding any further pleading,
- (b) the last day allowed for filing a replication or subsequent pleading has elapsed and it has not been filed,
- (c) the parties agree in writing that the pleadings are closed and such agreement is filed with the registrar or clerk of the court, or
- (d) the parties are unable to agree as to the close of pleadings, and the court upon the application of a party declares them closed

ACTIVITY

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

- (1) What pleading must John file in order to disclose his defence?

.....
.....
.....

(2) When must the pleading referred to in (1) above be filed?

.....
.....
.....

(3) John alleges that Peter was also negligent. He wishes to institute proceedings against Peter. What pleading must John file?

.....
.....

(4) When must the pleading referred to in (4) above be filed?

.....
.....

FEEDBACK

- (1) John must file his plea on the merits.
- (2) Rule 17(1) sets out the instances when the defendant may deliver his or her plea, namely within 20 days after service upon him or her of a declaration (in respect of a simple summons), or within 20 days after delivery of the notice of intention to defend (in respect of a combined summons).
- (3) John must file his counterclaim.
- (4) The particular pleading may be filed within the time period laid down for the delivery of a plea. See rule 20(1)(a) in this respect.

PRE-TRIAL JUDGMENT

John, a spaza shop owner, purchases goods to the value of R80 000 from Peter, the owner of a retail merchandise store. The goods are delivered at John's shop. John receives a copy of the invoice after having signed the original. Despite repeated requests, John refuses and/or fails to pay for the goods delivered. Peter issues summons against John in the amount of R80 000 for goods sold and delivered. John enters an appearance to defend.

Overview

- 22.1 Summary judgment
 - 22.1.1 Claims in respect of which summary judgment may be granted
 - 22.1.2 Initiating the application
 - 22.1.3 Steps which the defendant may take to ward off a summary judgment application
 - 22.1.4 Procedure
 - 22.1.5 Orders
- 22.2 Default judgment
- 22.3 Bar
- 22.4 Consent to judgment

Learning outcomes

After you have finished studying this study unit, you should

- list the types of claim in respect of which summary judgment can be granted
- define a liquid document
- explain how the application is initiated
- identify the steps which the defendant may take after initiating the application
- describe the procedure applicable at the hearing of a summary judgment application

- discuss the orders which a court may make at the hearing of an application for summary judgment
- explain bar
- discuss consent to judgment
- apply the abovementioned principles to a given set of facts

Compulsory reading material

Rules 11; 12; 14 of the Magistrates' Courts Rules

22.1 SUMMARY JUDGMENT

As in the case of the High Court, the plaintiff may, in a matter before a magistrates' court, apply for summary judgment after the defendant has given notice of intention to defend (in terms of rule 14). If the plaintiff's application is successful, the action is finalised. If the plaintiff does not succeed, the action proceeds as described in study unit 21 onwards. Summary judgment is described as an extraordinary procedure that is designed to protect the plaintiff in certain instances against a defendant who is merely defending the matter in order to delay its finalisation.

Summary judgment in the magistrates' court is discussed briefly in this study unit.

22.1.1 Claims in respect of which summary judgment may be granted

An application for summary judgment may be made on the following four types of claims:

- (1) claims based on a liquid document such as a cheque
- (2) claims for a liquidated amount of money
- (3) claims for the delivery of specified movable property
- (4) claims for ejectment (rule 14(1))

As explained in study unit 7.2.2.1 above, a liquid document (in terms of rule 14(1)(a)) is a document from which an acknowledgement of debt or an undertaking to pay is clearly apparent, and in respect of which no extrinsic evidence (evidence outside of the document itself) is required to prove the debt.

Van Eeden v Sasol Pensioenfonds 1975 2 SA 167 (0)

A liquid document need not, however, be a single document. It may comprise a number of documents, for example a hire-purchase agreement and a cession thereof – *Van Eeden v Sasol Pensioenfonds* 1975 2 SA 167 (0).

The test generally applied by a magistrates' court in determining whether or not a document qualifies as a liquid document, is whether the High Court would grant provisional sentence on such document. A wide interpretation is given to the concept of a liquidated amount of money; for example, a claim for work done and material supplied has, on occasion, been regarded as a claim for a liquidated amount in money.

The concept of a liquidated amount in money is used to indicate an amount that is fixed and certain. It is an amount that has been precisely quantified, or that is readily capable of accurate determination and that is not in dispute.

S Dreyer and Sons Transport v General Services 1976 4 SA 922 (C)

In *S Dreyer and Sons Transport v General Services* 1976 4 SA 922 (C), Diemont J, in adopting a literal interpretation of the concept, stated as follows:

... The claim sounds in money and since the exact amount down to the last cent is stated, it is *prima facie* liquidated and not merely an unliquidated estimate such as a claim for damages which remains unliquidated until it is determined by a judge and an award made (at 923 C–D).

As the judge correctly remarks, there will be a wide variety of examples of what may be regarded as a liquidated sum of money, such as an account rendered to a shopkeeper, insurance premiums, and taxed bills of costs. It is submitted that the determination of this question rests in the discretion of the judicial officer concerned.

22.1.2 Initiating the application

Study rule 14(2)

It should be stressed that the application for summary judgment may be made only after the defendant has entered appearance to defend. The plaintiff is required to bring the application for summary judgment on at least ten days' notice to the defendant and the application must be brought not more than ten days after the defendant's appearance to defend has been delivered.

The plaintiff proceeds by way of application. If the claim is based on a liquidated amount of money or for the delivery of specified movable property or for ejectment, the plaintiff must attach a copy of an affidavit made by him or her, or by someone else who is able to confirm the facts under oath. The cause of action and the amount (if any) claimed must be confirmed and the plaintiff must aver that in his or her belief there is no *bona fide* defence to the claim and that the notice of intention to defend has been given solely for the purpose of delaying the action.

If the claim is based on a liquid document, the plaintiff is required to attach a copy of the liquid document to the application. However, the original liquid document must be handed in at the hearing of the application.

22.1.3 Steps which the defendant may take to ward off a summary judgment application

Study rule 14(3)

Rule 14(3) sets out the steps which may be taken by the defendant if he or she wishes to ward off summary judgment.

22.1.4 Procedure

Study rule 14(5), 14(6), 14(7), 14(8)

These rules describe the procedure applicable at the hearing of an application for summary judgment.

22.1.5 Orders

Study rule 14(9)

Rule 14(9) prescribes the orders which a magistrates' court may make at the hearing of a summary judgment application.

22.2 DEFAULT JUDGMENT

If the defendant fails to enter an appearance to defend or to file a plea after a notice of bar, the plaintiff is entitled to apply for default judgment. Default judgment can also be granted if a party fails to appear at the trial. A default judgment is regarded as a judgment entered or given in the absence of the party against whom it is given. Default judgment may be granted in the following instances:

- (1) If the defendant fails to enter appearance to defend within the time stipulated in the summons (*dies induciae*).
- (2) Where the defendant enters appearance to defend, but thereafter fails to deliver a plea within the time stipulated in the notice of bar (five days) (rule 12(1)(b)). In *Speelman v Duncan* 1997 1 SA 868 (C), it was held that five days' written notice in terms of rule 12(1)(b) means five days from the date of receipt of the notice within which the defendant may comply with it, and not five days from the date on which the notice was delivered to the clerk of the court.
- (3) If the plaintiff or applicant does not appear at the time of set-down for the hearing in the trial of the action or in the application.
- (4) If a party fails to comply with a court order obliging him or her to comply with the provisions of the rules of court in terms of rule 60(2) and (3). To illustrate this, the court may have ordered a plaintiff to supply further particulars and he or she fails to furnish further particulars within the time stipulated in the court order. The judgment is granted on application in terms of rule 60(3).

The following aspects of rule 12, which deals with default judgment, are important:

Barclays Western Bank Ltd v Creser 1982 2 SA 104 (T)

- (1) The application for default judgment is not ordinarily heard in open court. The plaintiff merely lodges a written request with the registrar or clerk of the court.
- (2) The registrar or clerk of the court may grant the judgment in all liquidated claims.
- (3) In any unliquidated claim, such as a claim for damages, the request for judgment must be referred to a magistrate in chambers. The plaintiff must give evidence either orally or on affidavit regarding his or her quantum of damages (rule 12(4)). In *Barclays Western Bank Ltd v Creser* 1982 2 SA 104 (T), it was decided that the plaintiff does not have to prove his or her cause of action in this respect. The plaintiff merely has to identify his or her claim by showing, for instance, that it is a claim for specific performance or damages. Thereafter, the magistrate can determine the amount which the plaintiff is entitled to recover according to rule 12(4), and can grant an apposite judgment.
- (4) In any request for judgment made in respect of a claim arising out of a credit agreement governed by the National Credit Act (NCA) or the old Credit Agreements Act, the request must also be referred to the court.
- (5) If the application is based on a liquid document, this document must be filed before judgment is entered. If the original document cannot be located, the plaintiff must file an affidavit setting out reasons why the original liquid document cannot be attached to the request.

- (6) Please note that the proceedings only take place in open court when evidence is led. Furthermore, an official of the court may grant judgment in certain cases.
- (7) Rule 12(6A) provides that requests for default judgments in claims arising out of or regulated by legislation must include evidence confirming compliance with the provisions of such legislation.

22.3 BAR

Study rule 15(5)

As is the case in the High Court, bar is not associated only with default judgment: bar is a procedure which prevents the delivery of any further pleadings in an action. Unlike the position in the High Court (Uniform Rule 26), no provision is made for automatic bar in the magistrates' court. In fact, Uniform Rule 26 has no equivalent. This matter is consequently dealt with in two separate rules, namely in rule 12(1)(b) in respect of a plea which was not delivered within the prescribed *dies induciae*, as well as in rule 15(4) and (5) in respect of a declaration. In both instances, the bar procedure followed is the same as in the High Court. It should be noted that, in the case of a declaration, an order for absolution or, after presenting evidence, "judgment" may be requested. Study rule 15(5) in this regard.

22.4 CONSENT TO JUDGMENT

Rule 11 provides for judgment by consent in actions, excluding actions in terms of the Divorce Act or the nullity of a marriage. Rule 11(1) provides that a defendant may consent to judgment before delivering notice of intention to defend by signing the consent form on the original summons which must be lodged with the registrar or the clerk of the court. Rule 11(4) provides that consent to judgment may also be given after notice of intention to defend has been delivered by delivering a consent form similar to that endorsed on the summons. Such consent must also be signed by the defendant or his or her attorney. If a defendant's consent is for a lesser amount than claimed, the defendant may deliver a notice of intention to defend in respect of the balance of the claim (rule 11(5)(a)), and the action may proceed in respect of such balance (rule 11(5)(b)).

ACTIVITY

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

- (1) What procedure may Peter use when applying for summary judgment?
.....
- (2) What are the three requirements for the supporting affidavit which must be filed by the plaintiff together with the notice for summary judgment?
.....
.....
.....
- (3) What steps may the defendant John take to ward off the summary judgment application?

.....
.....
.....
(4) What allegations must be contained in John's opposing affidavit?

.....
.....
.....

(5) What orders may the court make at the hearing of the summary judgment application?

.....
.....
.....

FEEDBACK

(1) The plaintiff, Peter, proceeds by way of application procedure. This procedure involves an application for which a special form is prescribed, namely summary judgment, and must be distinguished from an application by means of notice of motion with or without supporting affidavits.

(2) The three requirements are as follows:

(a) It must be signed by the plaintiff personally and he or she must state that he or she has personal knowledge of the facts; or, in the case of a legal person, it must be signed by someone who alleges that he or she is duly authorised to make the affidavit; in addition, he or she must state his or her capacity in respect of the plaintiff and that he or she has personal knowledge of the facts.

(b) The plaintiff must verify or confirm the amount or cause of action.

(c) The deponent must state that, in his or her belief, there is no *bona fide* defence to the claim and that appearance has been entered solely for the purpose of delaying the action (rule 14(2)).

(3) The defendant, John, may take the following steps:

(a) The defendant may give security that he will satisfy whatever judgment may be given against him in the action.

(b) The defendant may give evidence that he or she has a *bona fide* defence or counterclaim against the plaintiff (rule 14(3)).

(4) John's opposing affidavit must contain the following:

(a) the allegation that he has a *bona fide* defence (thus also a denial that the appearance to defend has been entered solely for the purpose of delaying the plaintiff's action)

(b) a disclosure of the nature and grounds of the defence or counterclaim

- (5) The court may grant the following orders:
- (a) The court may give leave to defend to a defendant so entitled and give judgment against a defendant not so entitled.
 - (b) It may give leave to defend to a defendant as to such part of the claim and give judgment against the defendant as to the balance of the claim unless the defendant has paid such balance into court.
 - (c) It may make both such orders (rule 14(6)).

REMEDIAL STEPS

Ms Momentum and Mr Dozie are involved in a motor collision in a busy intersection. Ms Momentum estimates the damage to her new German SUV to be R120 000 and issues a summons in this amount against Mr Dozie. Mr Dozie denies causing the collision and also denies the estimated damages, because the chrome bull bar of his double-cab bakkie does not have as much as a scratch, and, according to him, the alleged damage amounted to no more than a scratch and a dent that could be fixed manually. He therefore intends defending the action. The streets forming the intersection have recently undergone name changes, and the parties and their attorneys all spell these names in documents differently from the official version.

Overview

- 23.1 Introduction
- 23.2 Exception
- 23.3 Striking out
- 23.4 Irregular proceedings
- 23.5 Enforcing compliance
- 23.6 Amendment

Learning outcomes

After you have finished studying this study unit, you should

- discuss the various steps that can be taken to address a defect in a pleading
- identify the step that can be taken to address noncompliance with the rules
- discuss the grounds for an exception and for striking out
- identify and apply the various steps to solve problem statements
- discuss the amendment of pleadings

Compulsory reading material

Rule 6(4), 6(13); 19(1)–(3); 55A; 60; 60A of the Magistrates' Courts Rules

23.1 INTRODUCTION

In part 2, which dealt with procedure in the High Court, we discussed the rules for drafting pleadings. As you will recall, Uniform Rule 18(4) provides that every pleading shall contain a clear and concise statement of the material facts upon which a party relies for his or her claim or defence with “sufficient particularity” to enable the opponent to reply thereto. Magistrates' Courts rule 6(4) contains a similar provision, while rule 6(13) provides that noncompliance with rule 6 amounts to an irregular proceeding. As seen in part 2 above, pleadings can also be defective in other respects. Consequently, the same remedial steps available in the High Court are also available in the magistrates' court, and will thus be discussed in broad terms only. The appropriate study unit in part 2 should be consulted for more detail.

23.2 EXCEPTION

Rule 19(1) is a mirror image of Uniform Rule 23. As you will recall, an exception can be raised owing to a defect which appears *ex facie* a document, while the grounds are that the pleading

- does not disclose a claim or a defence
- is vague and embarrassing

The material facts (*facta probanda*) constituting an enforceable claim or defence of course depend upon the nature of the specific claim, which is determined by substantive law. For example: if a claim for damages arises from breach of contract relating to a deed of sale, the *essentialia* of the deed of sale must be proved; if damages arise from a motor collision, the elements of a delict must be proved. Failure to allege any of these elements will cause a plaintiff's particulars of claim to be excipiable.

The following example illustrates the abovementioned grounds for exception:

Example

Jan issues summons against Peter on the basis of damages sustained by him in a motor collision caused by Peter's alleged negligence. Jan must allege the following facts to disclose a cause of action, namely that he has suffered harm as a result of a collision with a vehicle driven by Peter, and that the cause of the collision was due to Peter's negligence. Should Jan fail to disclose any of the above facts in his summons, Peter can except to the summons on the basis that it does not disclose a cause of action.

Example

The following is an example of a notice of exception:

(Heading)

NOTICE OF EXCEPTION

Kindly be pleased to take notice that the Defendant notes exception to the Plaintiff's particulars of claim on the basis that the particulars fail to disclose a cause of action.

The grounds upon which the Defendant excepts are:

- (a) no averment has been made that the cause of the collision was due to the Defendant's fault
- (b) *ex facie* the Plaintiff's averments it does not appear that the Defendant is liable to him.

WHEREFORE the Defendant prays that the Plaintiff's claim be dismissed with costs.

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

.....
Defendant's attorneys

TO: The Clerk of the Court

AND TO:
Plaintiff's attorneys

Copy hereof received on
at

.....
Plaintiff's attorneys

A party may, in terms of rule 19(1), raise an exception within the time allowed for the filing of any subsequent pleading. This means that a defendant must raise an exception to a plaintiff's particulars of claim within the period allowed for the serving of his or her plea on the merits. If an exception is raised because a pleading is vague and embarrassing, the party raising the exception must afford the opposite party the opportunity to remove the cause of complaint within 15 days. The notice of exception must set out the grounds for the objection in clear and concise terms (rule 19(3)), and, if the party fails to remove the objection, the party raising the exception must raise the exception within 10 days from the date on which the reply to the notice is received or from the date on which the reply must be delivered. An exception is set down for trial in terms of rule 55(1)(j).

23.3 STRIKING OUT

The grounds for striking out are the following:

Where any pleading contains averments which are scandalous, vexatious, or irrelevant, the

opposite party may, within the period allowed for filing any subsequent pleading, apply for the striking out of such averments. Such application may be set down for hearing in terms of rule 55(1)(j). The court shall not grant the order unless it is satisfied that the applicant will be prejudiced in the conduct of his or her claim or defence if it is not granted (rule 19(2)).

23.4 IRREGULAR PROCEEDINGS

Rule 60A is based on Uniform Rule 30, and expressions carry the same meaning. Also note that this particular step's purpose is to address technical defects (in contrast to substantive defects). Rule 60A(2)(4) sets out the procedure for the setting aside of irregular proceedings. According to this, a party may lodge such an application only if he or she

- has not taken a further step in the matter after he or she became aware of the irregular proceeding,
- within ten days after he or she became aware of the irregular step/proceeding has given the opponent the opportunity to remove the cause for complaint within ten days, and
- the application has been delivered within 15 days after the expiry of the second period mentioned above.

At the hearing of the application, the court may set aside the proceedings in whole or in part and grant leave to amend, or make any other order as it deems fit (rule 60A(3)). Until a party has complied with the court's order, he or she may take no further step in the matter (rule 60A(4)).

23.5 ENFORCING COMPLIANCE

Rule 60 deals with noncompliance with the rules, including time limits and certain errors. Rule 60(2) provides that a court may be approached on application to order the opponent to comply with a particular provision in the rules, or to comply with a request in terms of the rules. Should the opponent hereafter continue to fail to comply with the rules within the prescribed *dies induciae* as contained in the court order, the applicant may again approach the court in terms of rule 60(3) for judgment against the opponent.

Rule 60(5) makes provision for the extension of prescribed time periods. Most time periods may be extended with the written consent of the other party/parties to the suit. Should such parties fail to do so, the court may be approached on application.

Finally, rule 60(7) provides that no process or notice will be invalid by virtue of any obvious error in spelling, or in figures or in respect of a date.

23.6 AMENDMENT

A party may conclude, during the exchange of pleadings or during preparation for trial, that there is an error in his or her pleadings which he or she wishes to rectify. In *Rosner v Lydia Swanepoel Trust* 1998 2 SA 123 (WLD), the court held that the general rule was that an amendment of a notice of motion, a summons or a pleading in an action would always be allowed unless the application to amend was *mala fide* or the amendment would cause an

injustice or prejudice to the other side which could not be compensated for by an order for costs.

The main aim in allowing an amendment is to obtain a proper solution to the dispute between the parties and to identify the real issues in the matter. However, a party seeking to amend its pleadings should not consider itself to have the right to that effect. Instead, it is seeking an indulgence, and has to offer an explanation as to the reasons for the amendment (*Embling v Two Oceans Aquarium CC* [2000] 2 All SA 346 (A)).

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

Section 111(1) provides that the court may, at any time before judgment, amend a pleading. The considerations for the amendment of pleadings which are applicable in the High Court, also apply in the magistrates' courts. Consult study unit 10.4, which deals with the High Court in this regard.

Rule 55A provides an easy way of effecting amendments to pleadings. A party wishing to amend a pleading, must deliver the following notice:

Example

<p>(Heading)</p> <hr/> <p>NOTICE IN TERMS OF RULE 55A</p> <hr/>
<p>Take notice that Plaintiff intends to amend his particulars of claim as follows:</p> <p style="padding-left: 40px;">Ad paragraph 2: By deleting the words "right turn" and inserting the words "left turn" instead.</p> <p style="padding-left: 40px;">Further take notice that, unless objection in writing is delivered within ten (10) days of the delivery of this notice, the amendment will be effected.</p> <p>If the other party objects to the proposed amendment, the party who wishes to amend must, within ten days, lodge an application for leave to amend.</p>

ACTIVITY

Read the scenario at the beginning of this study unit again, and then answer the following questions:

- (1) Ms Momentum describes Mr Dozie in the particulars of claim as a "churl in a lumber-box who drives as if he owns the road". Mr Dozie is offended by this statement, because not only is he of slender build, but he is also well known in local arts and culture circles and considers himself to be a cultured person. Moreover, he considers his vehicle to be stylish. As his attorney, explain what step can be taken to address his objection.
- (2) Mr Dozie serves his plea on the merits and denies that Ms Momentum's vehicle sustained damages, alternatively, if it did, it did not amount to R120 000. He does not specifically deny being responsible for the damages, nor does he aver that the collision occurred due to Ms Momentum's negligence. What remedy is available to Ms Momentum?

- (3) If Ms Momentum spells one of the street names incorrectly in the particulars of claim, may Mr Dozie take any steps to address this defect?
- (4) If Ms Momentum wishes to correct this spelling error, which procedure may she follow?
- (5) On what grounds may the procedure referred to in (4) be refused?
- (6) Who is responsible for the costs of amending a pleading?

FEEDBACK

- (1) Mr Dozie may bring an application for striking out, because the particulars of claim contain scandalous, vexatious or irrelevant averments. (Only the offending part is removed and the rest of the pleading stands.)
- (2) She can raise an exception on the ground that the plea does not disclose a defence.
- (3) No, there is no formal remedy available to him – a party may amend only his or her own pleading.
- (4) She may bring an application for an amendment.
- (5) No amendments will be made by which any party other than the party applying for such amendment may be prejudiced in the conduct of his or her action or defence – section 111(1).
- (6) The party giving notice of such amendment (unless the court directs otherwise) (rule 55A(9)).

OFFER TO SETTLE, INTERIM PAYMENTS AND SECURITY

Overview

- 24.1 Introduction
- 24.2 Offer to settle
- 24.3 Interim payments
- 24.4 Security

Learning outcomes

After you have finished studying this study unit, you should

- explain how a settlement can be achieved
- discuss the requirements for an offer to settle
- discuss the requirements for interim payments, and apply these to solve problems
- explain security

Compulsory reading material

Rule 18; 18A; 62 of the Magistrates' Courts Rules

24.1 INTRODUCTION

A defendant is entitled to attempt a settlement of a claim instituted against him or her. If the

attempt to settle the matter on an informal basis fails, the defendant may make use of the settlement procedure contained in the rules of court in a further attempt to achieve this goal.

Similar to the position in the High Court, a party in the magistrates' court who is involved in a protracted matter and requires financial assistance may turn to the court for an interim payment.

24.2 OFFER TO SETTLE

Rule 18 is in essence a copy of the Uniform Rules.

In terms of rule 18(1), a defendant may at any time unconditionally or without prejudice make an offer to settle the plaintiff's claim where

- (a) a sum of money is claimed, either alone or with any other relief (rule 18(1)(a)) or
- (b) the performance of an act is claimed (rule 18(2)(a))

An offer to settle the plaintiff's claim shall be signed either by the defendant himself or herself or by his or her attorney if the latter has been authorised thereto in writing.

Where the plaintiff claims the performance of some act by the defendant, the defendant may at any time tender, either unconditionally or without prejudice, to perform such act.

In the event of a tender contemplated in 2(a) above, the defendant shall, unless the act must be performed by him or her personally, execute an irrevocable power of attorney authorising the performance of such act, which he or she shall deliver to the registrar together with the tender (rule 18(2)(b)).

It should be noted that the notice of any offer or tender in terms of this rule shall be given to all parties to the action and shall state

- (a) whether the same is unconditional or without prejudice as an offer of settlement,
- (b) whether it is accompanied by an offer to pay all or only part of the costs of the party to whom the offer or tender is made, and further that it shall be subject to such conditions as may be stated therein,
- (c) whether the offer or tender is made by way of settlement of both claim and costs or of the claim only, and
- (d) whether the defendant disclaims liability for the payment of costs or for part thereof, in which case the reasons for such disclaimer shall be given, and the action may then be set down on the question of costs alone (rule 18(5))

A plaintiff or party may within 15 days after the receipt of the notice, or thereafter with the consent in writing of the defendant or third party or order of court, on such conditions as may be considered to be fair, accept any offer or tender, whereupon the registrar or clerk of the court, having satisfied himself or herself that the requirements have been complied with, shall hand over the power of attorney to the plaintiff or his or her attorney (rule 18(6)).

In the event of failure to pay or to perform within ten days after delivery of the notice of acceptance of the offer or tender, the party entitled to payment or performance may, on five days' notice in writing to the party who has failed to pay or perform, apply through the registrar or clerk of the court to a magistrate for judgment in accordance with the offer or tender as well as for the costs of the application (rule 18(7)).

If an offer or tender accepted in terms of this rule does not satisfy a plaintiff's claim and costs,

the party to whom the offer or tender is made may apply to the court, after notice of not less than five days, for an order for costs (rule 18(9)).

It is important to note that no offer or tender in terms of this rule made without prejudice shall be disclosed to the court at any time before judgment has been given, and no reference will be made to such offer or tender in the court file (rule 18(10)).

The fact that an offer or tender referred to in this rule has been made may be brought to the notice of the court after judgment has been given as being relevant to the question of costs (rule 18(11)). If the court has given judgment on the question of costs in ignorance of an offer or tender in terms of this rule, and it is brought to the notice of the registrar or clerk of the court, in writing, within five days after the date of judgment, the question of costs shall be considered afresh in the light of the offer or tender, provided that nothing in this subrule contained shall affect the court's discretion as to an award of costs (rule 18(12)). Any party who, contrary to this rule, personally or through a representative, discloses an offer or tender in terms of this rule to the magistrate or the court, shall be liable to have costs given against him or her, even if he or she is successful in the action (rule 18(13)).

24.3 INTERIM PAYMENTS

Rule 18A is in essence a copy of its equivalent in the Uniform Rules.

Please note the following:

- Interim payments may be ordered in an action for damages for personal injuries or the death of a person.
- An application for an order for interim payments may be made at any time after the expiry of the period for the delivery of the notice of intention to defend.
- The damages which are relevant are confined to
 - (1) plaintiff's medical costs
 - (2) plaintiff's loss of income arising from his or her physical disability, or
 - (3) plaintiff's loss of income as a result of the death of a person
- Note that the order is made by way of application. See, further, rule 18A(2)(3).
- Rule 18A(2) describes the contents of the affidavit: the affidavit in support of the application shall contain the amount of damages claimed and the grounds for the application, and all documentary proof or certified copies thereof on which the applicant relies.
- The court will grant the order for interim payment in circumstances such as the following:

If at the hearing of an application for interim payment, the court is satisfied that

 - (a) the defendant against whom the order is sought has in writing admitted liability for the plaintiff's damages, or
 - (b) the plaintiff has obtained judgment against the defendant for damages to be determined,
 - (c) the defendant is insured in respect of the plaintiff's claim or that he or she has the means at his or her disposal to enable him or her to make such a payment (rule 18A(4)(5)).
- In an action where an interim payment or an order for an interim payment has been made, the action shall not be discontinued or the claim withdrawn without the consent of the court (rule 18A(9)).

- See, further, rule 18A(8) regarding prohibitions on disclosure and rule 18A(10) regarding the orders made by the court.

24.4 SECURITY

This rule reads exactly the same as Uniform Rule 47. The rule states that a party that chooses to request security for costs from another shall, as soon as practicable after the commencement of proceedings, deliver a notice setting forth the grounds upon which such security is claimed, and the amount demanded (rule 62(1)).

If the amount of security requested in terms of rule 62(1) is contested, the registrar or clerk of the court shall determine the amount to be given, and his or her decision shall be final (rule 62(2)). If a party from whom security is requested in terms of rule 62(1) contests his or her liability to give security, or fails or refuses to furnish security in the amount requested or the amount fixed by the Registrar or clerk within ten days of the demand or the registrar's or clerk's decision, the other party may apply to court on notice for an order that such security be given and that the proceedings be stayed until the order is complied with (rule 62(3)).

If the requested security is not given within a reasonable time, the court has the power to dismiss any proceedings instituted or strike out any pleadings filed by the defaulting party, or make such other order as it deems fit. Any security for costs shall, unless the court otherwise directs, or the parties otherwise agree, be given in the form, amount and manner directed by the registrar or clerk of the court (rule 62(5)). The registrar or clerk of the court may, upon written request of the party in whose favour security is to be provided and on notice to interested parties, increase the amount thereof if he or she is satisfied that the amount originally furnished is no longer sufficient; this decision shall be final (rule 62(6)).

ACTIVITY

- (1) State the requirements for the content of an offer to settle.
- (2) Explain the consequences of disclosing to the court that an offer or tender was delivered before judgment is given.
- (3) Explain under what circumstances a court will order an interim payment.
- (4) Explain what the consequences are for a party who fails to give security within a reasonable period of time if so requested.

FEEDBACK

- (1) It must indicate
 - whether the offer is unconditional or without prejudice
 - whether it is accompanied by an offer to pay all or only part of the costs
 - whether the offer is made by way of settlement of both claim and costs, or of the claim only, and
 - whether the defendant disclaims liability for the payment of costs, or part thereof, in which case the reasons for such disclaimer shall be given

- (2) Such a party will be liable for a costs order against him or her, despite being successful in the action (rule 18(13)).
- (3) If the court is satisfied that
 - the defendant admitted liability for the plaintiff's damages in writing
 - the plaintiff obtained judgment against the defendant for damages to be determined
 - the defendant is insured in respect of plaintiff's claim, or has the means at his or her disposal to make payment
- (4) The court may dismiss any proceedings instituted or strike out any pleadings filed by the defaulting party, or make such other order as it deems fit (rule 62(4)).

PREPARATION FOR TRIAL

Peter issues summons against John in the amount of R80 000 for damages sustained in a motor-vehicle collision. Peter alleges that the collision was due solely to the negligence of John. John defends the action. Pleadings have been closed between the parties. The parties now begin to prepare for trial. The parties need to disclose to each other certain aspects of the evidence which they hope to adduce at the trial.

Overview

- 25.1 Introduction
- 25.2 Set-down of trial
- 25.3 Discovery of documents
- 25.4 The provisions of rule 24
- 25.5 Pre-trial conference
- 25.6 Subpoenas
- 25.7 Non-appearance of a party
- 25.8 Further particulars for purposes of trial

Learning outcomes

After you have finished studying this study unit, you should

- discuss what steps a party may take in order to prepare for trial
- explain what you understand by the concept of discovery of documents
- discuss the pre-trial conference
- describe subpoenas

Compulsory reading material

Section 54(1)(3) of the Magistrates' Courts Act of 1944
Rules 22; 23; 24(1); 25; 27(5) of the Magistrates' Courts Rules

25.1 INTRODUCTION

Adjudication of the dispute between the parties occurs at the trial. The pleadings delimit the issues between the parties. The parties are obliged to disclose to each other certain aspects of the evidence they wish to place before the court before the matter can go to trial. The aim of the pretrial procedures is to facilitate an orderly and speedy trial and to prevent the parties from being taken by surprise at the trial by unexpected evidence.

25.2 SET-DOWN OF TRIAL

As *dominus litus*, it is the plaintiff's duty to set down a matter for trial. However, if the plaintiff fails to set down the matter timeously (within 15 days after the pleadings have closed), the defendant may set down the trial. Rule 22 describes the procedure for setting down a matter for trial.

The following points are noteworthy:

- Rule 22(1) does not prescribe a particular form to be used for a notice of trial, nor does it disclose how the plaintiff should go about obtaining a day or days approved by the registrar or clerk of the court.
- The plaintiff must set down the matter within 15 days, which equates to three weeks, since "days" refers to court days (see rules 22(1) and 2(2)) after the pleadings have closed. If the plaintiff fails to do this, the defendant may do so. Rule 22(4) provides that the registrar or clerk of the court shall allocate a trial date within ten days of receipt of an application for a trial date.
- Rule 22(5) deals with default judgments in divorce actions. In the magistrates' court, no notice of set-down needs be served on the defendant, irrespective of the nature of his or her default. It should be noted that rule 22(5) only provides for judgments by default in divorce actions. All other default judgments are dealt with in terms of rule 12.
- Rule 22(6) provides that, should an undefended divorce matter be postponed, the same action may proceed before another court, notwithstanding the fact that evidence had been led before such postponement.

25.3 DISCOVERY OF DOCUMENTS

Discovery is the process whereby each party can compel the other to reveal the documentary evidence which it hopes to adduce at the trial, and also to reveal other documents (including tape, electronic or digital recordings) in its possession which tend to prove or disprove its case. In order that the parties may prepare for trial and not be taken by surprise (which would entail unnecessary postponements, delays and costs), it is deemed expedient that each party should

Read Rule 23

know what documents the other has in his or her possession, or under his or her control. He or she is entitled to be informed only of those documents in the custody or under the control of his or her adversary which the latter intends using in the action, or which tend to prove or disprove either case.

Rule 23 sets out the application for such information and the way in which such information is to be furnished. Read rule 23 carefully. Please note that pleadings have to be closed.

Documents in respect of which privilege is claimed must be listed separately in the schedule, and the grounds for each particular claim of privilege must be specified. Note that confidential communications between attorney and client are “privileged” from disclosure. Legal professional privilege applies to communications between attorney and client in the following circumstances:

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

Rule 23(8) refers to the consequences of a failure to disclose. However, one party can compel the other to disclose by means of rule 60(2). If the party called upon to make discovery fails to comply with the request to do so, the party calling for discovery may make an application in terms of rule 60(2) before the trial to compel compliance with the request. If an order is made compelling discovery within a certain period and the other party persists in his or her default, the court may dismiss the action or strike out the defence.

Rule 23(11) provides that the parties may be compelled to produce the documents disclosed in their schedules, and/or any other documents specified in a notice to that effect, at the trial.

Rule 23(6) provides that each party is allowed to inspect and make copies of the documents so disclosed, and of the documents specified in rule 23(7).

25.4 THE PROVISIONS OF RULE 24

Rule 24 contains similar provisions in respect of medical examinations, the examination of objects, and the adducing of expert evidence in the form of a plan, diagram, model, or photograph as we find in respect of the High Court. Refer to study unit 13.2, which deals with the High Court in this regard.

25.5 PRE-TRIAL CONFERENCE

Section 54(1), read together with rule 25, provides that a party to a suit may request the court to convene a pre-trial conference.

At such a pre-trial conference, the parties attempt to limit the points in issue by, *inter alia*, making admissions not already contained in the pleadings. Therefore, the parties try before the trial to restrict and delimit the points in dispute so as to curtail the time taken up by the conduct of the trial. The parties try to reach agreement on matters that may be mutually admitted and the precise points in issue between them. This helps to curb the leading of unnecessary evidence.

Rule 22(4) provides that the registrar or the clerk of the court shall draw the file and take it to a magistrate on receipt of an application for a trial date, to enable the magistrate to consider whether a pre-trial in the particular case is necessary. Pre-trials held in magistrates' courts are convened similarly to the procedure envisaged in Uniform Rule 37(8) in so far as the court may *suo motu* or at the request of a party order that a pre-trial be held before a magistrate. Rule 1(3) grants the authority to a magistrates' court to dispense with any provision of the rules during a pre-trial conference. (In the High Court, noncompliance with the rules may be condoned at any time.)

25.6 SUBPOENAS

Witnesses can also be summoned to appear in court as in the case of the High Court (s 51, rule 26, Form 24). The subpoena compels the witness to present himself or herself at a civil trial. A subpoena *duces tecum* directs a witness to make books or documents in his or her possession or under his or her control available at the trial and to produce them for the court. A witness failing, without lawful excuse, to comply with a subpoena may be fined an amount not exceeding R300 and, in default of payment, face imprisonment for a period not exceeding three months (s 51(2)(a)).

Marais v Smith en 'n Ander
2000 2 SA 924 (WPD)

The court made pertinent remarks regarding a witness appearing by virtue of a subpoena *duces tecum* in *Marais v Smith en 'n Ander* 2000 2 SA 924 (WPD). The court found that if such a witness intends claiming privilege in respect of the documents he was called upon to produce, he has to do so in person, and not through his legal representative. If the witness should feel aggrieved by an overruling of the privilege claimed by him, he is entitled to approach the High Court for a suitable order. The court also held that if a witness is not paid his witness or travelling fees, it does not mean that the magistrate is entitled without hearing evidence to excuse the witness on the ground that the subpoena did not conform to the provisions of section 51(2) of the Magistrates' Courts Act. Such a finding would lead to an irregularity. However, such a witness was free to approach the court for an order compelling payment of his fees.

25.7 NON-APPEARANCE OF A PARTY

Rule 32(2) provides that, "after consideration of such evidence, either oral or by affidavit, as the court deems necessary the court may grant judgment where a defendant or respondent does not appear at the time appointed for the trial of an action or the hearing of an application".

25.8 FURTHER PARTICULARS FOR PURPOSES OF TRIAL

As is the position in the High Court, any party may after close of pleadings not less than 20 days before trial, deliver a notice requesting only such further particulars as are **strictly necessary** to enable him or her to prepare for trial (rule 16(2)(a)). Such a request must be signed by an attorney or the party if such party is unrepresented. The request must be complied with within ten days of receipt thereof. Failure to do so enables the requesting party to apply to court for an order compelling delivery, or for the dismissal of the action or the striking out of the defence (rule 16(4)).

ACTIVITY

(1) What is the reason for discovery?

.....
.....
.....

(2) When does discovery take place?

.....
.....

(3) What is the procedure involved?

.....
.....

(4) What are the consequences of failure to disclose?

.....
.....

(5) When is it necessary to submit to a medical examination in terms of rule 24?

.....
.....

(6) What matters may be discussed at a pre-trial conference?

.....

(7) Explain what the consequences are for a party who fails to comply with a request for further particulars for purposes of preparing for trial.

.....
.....

FEEDBACK

- (1) Discovery of documents is important so that parties may prepare for trial and not be taken by surprise. This will prevent unnecessary postponements, delays and costs.
- (2) Discovery takes place when pleadings have been closed.
- (3) Rule 23 describes the procedure involved. See rule 23. After the close of pleadings, but not later than 15 days before the date of trial, either party may deliver a notice to the other party calling on him or her to deliver a schedule specifying the documents in his or her possession or under his or her control relating to the action and which he or she intends to use in the action or which tends to prove or disprove either party's case. Such schedule, verified by affidavit, shall be delivered by the party required to do so within ten days after the delivery of the notice. If privilege is claimed for any of the documents scheduled, such documents shall be separately listed in the schedule and the ground on which privilege is claimed in respect of each shall be set out.

- (4) In terms of rule 23(2), a document not disclosed may not be used for any purpose in the trial of the action by the party in whose possession or under whose control it is without the court's leave on such terms as to adjournment and costs as may be just. However, the other party may call for and use such document in the cross-examination of a witness.
- (5) A medical examination is relevant in the following instance: Any party to proceedings in which damages or compensation in respect of alleged bodily injury is claimed may require any party claiming such damages or compensation whose state of health is relevant to the determination of such damages or compensation to submit to an examination by one or more duly registered medical practitioners (rule 24(1)).
- (6) The court may at any stage in any legal proceedings in its discretion or upon the request in writing of either party direct the parties or their representatives to appear before it in chambers for a pre-trial conference. The following issues/matters are addressed at a pre-trial conference:
 - (a) the simplification of the issues
 - (b) the necessity or desirability of amendments to the pleadings
 - (c) the possibility of obtaining admissions of fact and of documents with a view to avoiding unnecessary proof
 - (d) the limitation of the number of expert witnesses
 - (e) such others matters as may aid in the disposal of the action in the most expeditious and least costly manner (s 54(1)).
- (7) A party which fails to deliver such particulars timeously or sufficiently, runs the risk of the opposing party applying to court for an order for their delivery or for the dismissal of the action or the striking out of the defence, as the case may be. The court may make such order as it deems fit (rule 16(4)).

THE TRIAL

Peter issues summons against John in the amount of R80 000 for damages sustained in a motor-vehicle collision. Peter contends that the collision was due solely to the negligence of John. John defends the action. The pleadings are closed. The parties have discovered relevant documentary evidence which they hope to adduce at the trial. The parties go to trial.

Overview

- 26.1 Place of trial
- 26.2 Procedure and conduct

Learning outcomes

After you have finished studying this study unit, you should

- explain where the trial takes place
- describe the procedure involved in the trial
- explain the conduct of the parties

Compulsory reading material

Rule 29 and 30(1) of the Magistrates' Courts Rules

26.1 PLACE OF TRIAL

Save in exceptional circumstances, the trial must take place in open court (s 5) at the courthouse from which the summons was issued, unless the court has ordered otherwise (rule 29(1)).

26.2 PROCEDURE AND CONDUCT

The complete procedure and conduct of the trial are not described here. However, certain important aspects will be emphasised.

A witness who is not a party to the action may be ordered by the court either to leave the court until his or her evidence is required, or after his or her evidence has been given, or to remain in court after the evidence has been given until the trial is terminated or adjourned.

Before proceeding to hear evidence, the court may require the parties to state briefly the issues of fact or questions of law which are in dispute, and may record the issues so stated (rule 29(3)). If it appears to the court that there is a question of law or fact which may conveniently be decided separately, it may order the proceedings to be stayed until the question has been disposed of. If the question in issue is a question of law, and the parties are agreed upon the facts, the facts may be admitted in court, either *viva voce* or by way of a written statement by the parties. The judgment may then be given without further evidence. Where questions of law and issues of fact arise in the same case, and the court is of the opinion that the case may be disposed of upon the questions of law alone, it may require the parties to argue upon these questions only. In such an instance, the court will give its decision thereon and will deliver final judgment without dealing with the issues of fact.

The party on whom the onus of proof rests according to the pleadings, has the duty to lead his or her evidence first. Usually, it is the plaintiff who is obliged to lead evidence first (rule 29(7)(a)), because the necessity for proof of a cause of action requires the plaintiff to establish the facts giving rise to his or her cause of action, while the defendant is required to prove a special defence raised by him or her. Unless absolution from the instance is then decreed, the defendant must then adduce his or her evidence. If the onus of proof is on the defendant, he or she must first adduce his or her evidence, and, if necessary (i.e. if the defendant has discharged the onus), the plaintiff must adduce his or her evidence.

However, there are cases where the burden of proving one or more issues is on the plaintiff, and that of proving the other issues is on the defendant. The plaintiff must then first adduce his or her evidence in respect of any issues he or she has to prove, and he or she may then close his or her case. The defendant will then be obliged to adduce his or her evidence on all the issues (i.e. unless absolution from the instance is granted in his or her favour). If the plaintiff has not adduced any evidence (other than that necessitated by the burden resting upon him or her), he or she will be entitled to do so after the defendant has closed his or her case. If he or she has adduced evidence on any issue in respect of which the burden of proof is not upon him or her, he or she will have no such right.

Rule 29(10) provides that the court must, in the case of a disagreement as to the party on whom the onus rests, direct which party must first adduce evidence. Either party may, with the court's leave, adduce further evidence at any time before judgment. However, such leave will not be granted if it appears to the court that the evidence concerned was intentionally withheld.

Rowe v Assistant Magistrate,
Pretoria 1925 TPD 361

The court may of its own motion, or on application by either party and at any time before judgment, recall any witness for further examination. However, the court is not competent of its own motion to call any new witness in any civil proceedings (*Rowe v Assistant Magistrate, Pretoria 1925 TPD 361*). Every witness may be examined by the court as well as by both parties. After the evidence on behalf of both parties has been led, the party who first adduced evidence may first address the court, and, thereafter, the other party may reply.

ACTIVITY

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

(1) Which party bears the onus of proof?

.....
.....

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

.....
.....
.....
.....

(3) What happens if the parties disagree regarding the question of who bears the onus of proof?

.....
.....

FEEDBACK

- (1) Peter.
- (2) Usually, it is the plaintiff (Peter, in this instance) who has to lead evidence first. Peter has to establish the facts giving rise to the cause of action. Peter must prove on a balance of probabilities that John was negligent, and is therefore responsible for the damages.
- (3) The court will direct which party must first adduce evidence (rule 29(10)).

JUDGMENT

Peter issues summons against John in the amount of R80 000 for damages sustained in a motor-vehicle collision. Peter contends that the collision was due solely to the negligence of John. John defends the action. The pleadings are closed. The parties have discovered relevant discovery evidence which they hope to adduce at the trial. The parties go to trial. Peter's attorney adduces his evidence first. He closes his case after presenting all the evidence which he wishes to lead before the court.

Overview

- 27.1 Introduction
- 27.2 Absolution from the instance at the close of the plaintiff's case
- 27.3 Absolution from the instance at the close of the case
 - 27.3.1 Onus on plaintiff
 - 27.3.2 Onus on defendant

Learning outcomes

After you have finished studying this study unit, you should

- list the judgments which a court may make in terms of section 48
- explain what you understand by the concept "absolution from the instance"

Compulsory reading material

Section 48 of the Magistrates' Courts Act of 1944

27.1 INTRODUCTION

Study section 48

Section 48 sets out the judgments which a magistrates' court may make in an action.

An order for absolution from the instance referred to in section 48(c), merits further discussion. The effect of such an order is to leave the parties in the same position as if the case had never been brought. The plaintiff may take out a summons and sue on the identical cause of action.

Absolution from the instance may be given at the close of the plaintiff's case or at the close of the defendant's case.

27.2 ABSOLUTION FROM THE INSTANCE AT THE CLOSE OF THE PLAINTIFF'S CASE

Absolution from the instance at the close of the plaintiff's case will be discussed first. In this case, absolution will be granted if there is insufficient evidence upon which the court may reasonably find for the plaintiff. It should be refused where there is evidence on which a reasonable person may find for the plaintiff.

Gordon Lloyd Page and Associates v Riviera 2001 1 SA 88 (SCA)

The principles regarding absolution from the instance were laid down in *Gordon Lloyd Page and Associates v Riviera* 2001 1 SA 88 (SCA). It was held that a plaintiff has to make out a *prima facie* case regarding all the elements of the claim in order to survive absolution. The inference from the evidence which is relied upon by the plaintiff must be a reasonable one, and not the only reasonable one. The court should be concerned with its own judgment, and not with that of another "reasonable" person or court. Absolution at the end of the plaintiff's case should be granted sparingly, but when the occasion arises a court should order it in the interests of justice.

27.3 ABSOLUTION FROM THE INSTANCE AT THE CLOSE OF THE CASE

The issue of granting absolution from the instance at the close of the case arises in two situations, namely when the burden of proof rests on the plaintiff, and when the burden of proof rests on the defendant. Both situations will be considered hereunder.

27.3.1 Onus on plaintiff

Forbes v Golach and Cohen 1917 AD 559; *Hairman v Wessels* 1949 1 SA 433 (O)

Where the court is unable to find that the plaintiff has proved his or her case on a balance of probabilities at the close of the case, and the court also cannot find that the defendant has established his or her defence on a balance of probabilities, it must grant absolution from the instance. Therefore, if the court cannot decide on which side the truth lies, after hearing the evidence of both parties, the proper judgment is absolution. However, if the court has, on the evidence, found against the plaintiff, judgment for the defendant, rather than absolution, must be granted. If the final decision of a case depends entirely upon the credibility of witnesses, and the court cannot find that either set of witnesses is untruthful, it should also grant absolution (*Forbes v Golach and Cohen* 1917 AD 559; *Hairman v Wessels* 1949 1 SA at 433 (O)).

Hirschfeld v Espach 1937 TPD 19; *Ah Mun v Ah Pak* 1974 4 SA 317 (E) 320

27.3.2 Onus on defendant

Where the onus is on the defendant, the court can never grant absolution from the instance at the end of the entire case. Where the defendant fails to discharge this onus on a balance of probabilities, the court must give judgment for the plaintiff. Where the defendant does discharge this onus on a balance of probabilities, the court must give judgment in his or her favour. Thus there is no room for a judgment of absolution in this situation (*Hirschfeld v Espach* 1937 TPD 19; *Ah Mun v Ah Pak* 1974 4 SA 317 (E) 320).

ACTIVITY

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

- (1) Suppose Peter has failed to discharge his onus on a balance of probabilities. What step may John take at the end of Peter's case?

.....
.....

- (2) What is the effect of such an order?

.....
.....

- (3) Discuss whether the above order can be applied for if the onus rested on John and he failed to discharge his onus on a balance of probabilities.

.....
.....

- (4) What judgments may the court grant after the plaintiff and the defendant have closed their cases and presented argument?

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FEEDBACK

- (1) John's attorney may apply for absolution from the instance. This order may be applied for when there is insufficient evidence on which the court may reasonably find for the plaintiff (Peter, in this instance).
- (2) The parties are left in the same position as if the case had never been brought.
- (3) No. The court can never grant absolution from the instance when the onus rests on the defendant. The court will grant judgment in favour of the plaintiff (Peter) when John (defendant) fails to discharge his onus on a balance of probabilities.

- (4) The court may grant the following judgments:
- (a) judgment for the plaintiff in respect of his claim in so far as he or she has proved the same
 - (b) judgment for the defendant in respect of his or her defence in so far as he or she has proved the same
 - (c) absolution from the instance, if it appears to the court that the evidence does not justify the court in giving judgment for either party
 - (d) such judgment as to costs (including costs as between attorney and client) as may be just
 - (e) an order, subject to such conditions as the court thinks fit, against the party in whose favour judgment has been given suspending, wholly or in part, the taking of further proceedings upon the judgment for a specified period pending arrangements by the other party for satisfaction of the judgment
 - (f) an order against a party for the payment of an amount of money for which judgment has been granted in specified instalments or otherwise, including an order contemplated by sections 65J or 73 (s 48)

COSTS

Overview

28.1 Costs

Learning outcomes

After you have finished studying this study unit, you should

- identify and discuss the different types of cost orders which a court may make
- explain the differences between attorney-and-client costs and party-and-party costs

Compulsory reading material

Rule 33(1), 33(2) of the Magistrates' Courts Rules

28.1 COSTS

Section 48(d) of the Magistrates' Courts Act of 1944 provides that the court may grant "such judgment as to costs ... as may be just".

Hoosan v Joubert 1964 4 SA 291 (T)

In *Hoosan v Joubert* 1964 4 SA 291 (T), the court held that a magistrates' court had no jurisdiction to grant costs on an attorney-and-client scale. However, in terms of section 3 of Act 48 of 1965, the power to make an order for attorney-and-client costs was specifically conferred on magistrates' courts.

The question of costs is a matter within the discretion of the magistrate, but this discretion must be exercised judicially and in accordance with the well-established general rules as to costs.

Table A, Part III of Schedule 2 of the Act contains scales in terms of which costs in the magistrates' courts are taxed in respect of opposed actions. The scale which is applicable depends on the amount of the dispute. On application by a party, the court may, in certain circumstances, award costs on a higher scale than would usually be applicable (rule 33(8)).

Refer to study unit 14.2, which deals with the different cost orders that may be made by the High Court and the general principles involved.

A client's liability for his or her attorney's costs can easily give rise to a complaint against the attorney. Therefore, it is imperative to clarify this aspect with the client at the commencement of the mandate. The attorney must be careful to avoid excessive fees, because to charge seriously in excess of what is reasonable is to overreach the payer. An attorney found guilty of overreaching can expect to be struck off the roll. An attorney must also be careful regarding trust monies deposited in his or her trust account.

ACTIVITY

(1) What do you understand by the following terms?

- (a) attorney-and-client costs
- (b) party-and-party costs
- (c) costs *de bonis propriis*

.....

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.....

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(2) The attorney-and-client costs between attorney John Smith and his client Abel Dixon amount to R5 000. According to the cost order granted by the court, the defendant Joshua Simelane is obliged to reimburse Abel for his costs on the party-and-party scale. The party-and-party costs are taxed at R3 800. Will Joshua be liable for R5 000 or R3 800? Give reasons for your answer.

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.....

(3) Why is an order for costs granted?

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.....

FEEDBACK

- (1)
 - (a) The amount due for services rendered and expenses incurred for which the client is liable to his or her attorney is known as attorney-and-client costs.
 - (b) The court usually makes an order at the end of a case to the effect that one of the parties (e.g. the defendant) is to pay the legal costs incurred by the other party (the plaintiff). This is known as party-and-party costs and must be paid by one party (the defendant) to the other party (the plaintiff) and not to the plaintiff's attorney. The defendant therefore reimburses the plaintiff for costs that he or she (the plaintiff) must pay to his or her attorney. Also note that party-and-party costs are determined by a tariff rather than a contract between attorney and client as is the case with attorney-and-client costs.
 - (c) Costs *de bonis propriis* are costs of suit which the court directs are to be paid by the unsuccessful party out of his or her own pocket where he or she instituted proceedings or defended the matter in a representative capacity. This usually applies where the litigation in question has been *mala fide*, negligent or unreasonable.
- (2) Party-and-party costs are calculated according to a fixed tariff. These party-and-party costs are less than the attorney-and-client costs because only certain cost items may be recovered on the party-and-party scale, and even those costs which are recoverable can be recovered only at the given tariff. Joshua therefore pays only part of Abel's costs, namely R3 800 (not the entire R5 000), to John Smith. Abel then remains liable for payment of the balance of the amount, namely R1 200.
- (3) The reason for granting an order for costs is that the successful party (e.g. the plaintiff) must be compensated for the costs that he or she is obliged to pay his or her attorney for conducting the case on his or her behalf.

THE ENFORCEMENT OF JUDGMENT AND DEBT COLLECTION

Peter sues John for damages sustained in a motor-vehicle collision. Peter succeeds in his action, and the court orders John to pay Peter damages in the amount of R80 000. Despite reminders, John refuses and/or fails to comply with the court judgment. Peter wishes to know if there are any legal steps that he can take against John to enforce the judgment.

Overview

- 29.1 Introduction
- 29.2 The judgment debtor's person
- 29.3 The judgment debtor's property
- 29.4 Procedure adopted when levying execution
- 29.5 Debt collection and administration

Learning outcomes

After you have finished studying this study unit, you should

- explain how the process of execution takes place
- explain when the execution process is used
- discuss how execution takes place against the judgment debtor's property
- discuss when execution takes place
- set out the order in which execution takes place
- discuss how execution of immovable property takes place
- describe the debt collection process

Compulsory reading material

None

29.1 INTRODUCTION

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

Execution may be defined as a court process whereby a successful litigant can enforce the court judgment or order granted in his or her favour. Jones and Buckle *The Civil Practice of the Magistrates' Courts in South Africa* (1996) (Vol I 238) summarise this process as follows:

Having obtained his judgment, the creditor sues out a warrant; the messenger then attaches so much movable property of the debtor as will satisfy the judgment or, if there will be insufficient movable property or the court on good cause so directs, immovable property. Thereafter a sale in execution takes place, and the proceeds are distributed.

Bear in mind that the National Credit Act (NCA) of 2005 places certain restrictions on a credit provider with regard to the enforcement of a credit agreement. The prescribed prior procedures must be strictly adhered to.

The process of execution may be used against the person or property of the debtor.

29.2 THE JUDGMENT DEBTOR'S PERSON

Execution against the judgment debtor's person has been abolished.

Coetzee v Government of the Republic of South Africa, Matiso v Commanding Officer, Port Elizabeth Prison 1995 (10) BCLR 1382 (CC)

Sections 65F and 65G of the Magistrates' Courts Act 32 of 1944, which ordered the committal of debtors to prison for failure to satisfy the judgment debt, were declared invalid by the Constitutional Court in *Coetzee v Government of the Republic of South Africa, Matiso v Commanding Officer, Port Elizabeth Prison* 1995 (10) BCLR 1382 (CC) and were consequently repealed.

29.3 THE JUDGMENT DEBTOR'S PROPERTY

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

- (1) movable property
- (2) immovable property
- (3) certain incorporeal property

The sheriff of the magistrates' court is expressly authorised in terms of section 68(1)(3) to attach certain incorporeal property.

Section 67 refers to certain property which is exempt from execution.

29.4 PROCEDURE ADOPTED WHEN LEVYING EXECUTION

Execution may occur when the court gives judgment for the payment of a sum of money or makes an order for the payment of money, in instalments, and the debtor fails to pay the money forthwith, or fails to pay any instalment at the time and in the manner ordered by the court. However, section 65E(4) provides that, where a warrant of execution is issued before an enquiry into the financial position of the judgment debtor and a *nulla bona* return is made, the judgment creditor will not be entitled to costs in connection with the issue and execution of such warrant.

Section 66(1)(a) (as amended by Act 63 of 1976) prescribes the order in which execution must be levied, namely: first against the movable property of the judgment debtor and then against his or her immovable property, provided that there is not sufficient movable property to satisfy the judgment or order, or if the court, on good cause shown, orders that execution be levied against the debtor's immovable property.

Therefore, where a party desires that property which is specially hypothecated be declared executable, it is not necessary to proceed in the High Court, because section 66(1)(a) (and its predecessor) empowers the magistrates' court to grant such an order.

However, section 66(2) still imposes an important proviso on execution against immovable property which is subject to a preferent claim. Such execution will not be allowed

- (1) unless the judgment creditor gives personal notice in writing of the intended sale to the preferent creditor, or
- (2) the magistrate of the district in which the property is situated has given directions as to how the intended sale is to be brought to the preferent creditor's notice, and
- (3) unless the proceeds of the sale are sufficient to satisfy the preferent creditor's claim in full, or
- (4) the preferent creditor confirms the sale in writing

Middelburg Town Council v McKenzie 1952 1 SA 63 (T);
Johannesburg City Council v Swale 1955 4 SA 150 (A)

However, in the case of proviso (2), it will often still be necessary to approach the High Court for an order declaring such property executable (see *Middelburg Town Council v McKenzie* 1952 1 SA 63 (T), which is equally applicable to the amended section, and which was followed regarding the amended section in *Johannesburg City Council v Swale* 1955 4 SA 150 (A)).

Please note that a *nulla bona* return does not automatically lead to the attachment of immovable property such as the home of a debtor – a creditor must in such instance first approach the court for an order authorising such attachment: see the Constitutional Court decision in *Jafftha v Schoeman and others; Van Rooyen v Stolls and others* 2003(10) BCLR 1149 (CC).

29.5 DEBT COLLECTION AND ADMINISTRATION

We do not deal with these matters in depth, and the following overview will suffice.

The Magistrates' Courts Act of 1944 provides for the section 65 debt collection procedure, an emoluments attachment order, an administration order and debt collection where a debtor offers to pay off debt in instalments in terms of section 57 or 58.

The section 65 procedure is applicable where a court orders payment of an amount and the order or judgment has remained unpaid for ten days from date of such order or judgment. The debtor is called upon to appear in court for a financial enquiry to enable the court to establish the debtor's financial position in order to make a fair and appropriate order.

Emoluments attachment orders are applicable when the court, in certain cases, orders the debtor's employer to pay a certain portion of the judgment debtor's salary to the judgment creditor. Section 65J(2)(a) and (b) contains the requirements for the issue of such attachment order. Section 65J(8) regulates the position where the judgment debtor leaves the employ of his or her employer, and when the new employer will be bound by the order or judgment.

Administration orders are dealt with in terms of section 74 of the Act. This process affords some measure of debt relief to debtors whose debt does not exceed a specified amount as determined by the minister from time to time, and in effect amounts to a rescheduling of a debtor's debt repayments. The court appoints an administrator and the debtor is obliged to make regular payments to the administrator who, in turn, divides the money and makes regular pro rata payments to the creditors. The order lapses as soon as the administration costs and the listed creditors have been paid in full; the administrator files a certificate to this effect with the clerk of the court, and sends copies thereof to the creditors (see section 74J).

ACTIVITY

(1) What kind of movables may be attached?

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.....
.....

(2) List the items that are exempt from execution.

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.....
.....

(3) When may a warrant be issued against immovable property?

.....
.....
.....

(4) When do you issue a warrant of execution?

.....
.....

(5) May a creditor at will elect to issue a warrant of execution against movable property or immovable property?

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.....
.....

FEEDBACK

- (1) Corporeal things, incorporeal things, bills of exchange, cheques, promissory notes, bonds, and securities for money belonging to the execution debtor (s 68).
- (2) The following items are exempt from execution in terms of section 67:
 - (a) the necessary beds, bedding and wearing apparel of the execution debtor and of his or her family
 - (b) the necessary furniture (other than beds) and household utensils in so far as they do not exceed in value the sum of R2 000
 - (c) stocks, tools and agricultural implements of a farmer in so far as they do not exceed in value the sum of R2 000
 - (d) the supply of food and drink in the house sufficient for the needs of such debtor and of his or her family during one month
 - (e) tools and implements of trade, in so far as they do not exceed in value the sum of R2 000
 - (f) professional books, documents or instruments necessarily used by such debtor in his profession, in so far as they do not exceed in value the sum of R2 000
 - (g) such arms and ammunition as such debtor is required by law, regulation or disciplinary order to have in his or her possession as part of his or her equipment:

Provided that the court shall have a discretion in exceptional circumstances and on such conditions as it may determine to increase the sums referred to in paragraphs (b), (c), (e) and (f)
- (3) If the debtor does not possess sufficient movable goods to satisfy the judgment, the court may, on good cause shown, order such attachment (s 66).
- (4) When compliance with a judgment is sought.
- (5) No, this may not be done. Sections 66(1) and 66(2) are relevant here. Section 66(1) provides that execution may first be levelled against the movable property of the judgment debtor and then against his or her immovable property, provided that there is not sufficient movable property to satisfy the judgment or order, or if the court, on good cause shown, orders that execution be levied against the debtor's immovable property. Section 66(2) refers to execution against immovable property which is subject to a preferent claim. Refer to section 66(2) above regarding the instances when such execution will be allowed.

PART 4

Variation of judgments, review and appeals

THE RESCISSION OR VARIATION OF JUDGMENTS

Thomas purchases goods to the value of R90 000 from Sibeko. Thomas takes delivery of the goods, but, despite demand, refuses to pay the purchase price. Thomas alleges that the goods are defective. Sibeko institutes proceedings against Thomas in the magistrates' court to obtain payment of the purchase price. Thomas fails to respond timeously to the summons, and default judgment is granted against him. Thomas is now displeased because the judgment was granted in his absence and he has a valid defence to the action.

Overview

- 30.1 Introduction
- 30.2 Grounds for the rescission or variation of judgments
 - 30.2.1 Magistrates' courts
 - 30.2.2 Superior courts
- 30.3 Procedure for the rescission or variation of judgments
 - 30.3.1 Magistrates' courts
 - 30.3.2 Superior courts

Learning outcomes

After you have finished studying this study unit, you should

- explain why there are rescission or variation procedures
- discuss the grounds for the rescission or variation of judgments
- explain the procedure for rescission or variation of judgments in the magistrates' courts and the superior courts respectively
- apply the contents of this study unit to solve problems

Compulsory reading material

Section 36 of the Magistrates' Courts Act of 1944; Uniform Rule 42(1); Rule 49(1)–(2) of the Magistrates' Courts Rules; Uniform Rule 42(2)–(3)

30.1 INTRODUCTION

A court's judgment becomes final and unalterable by it under common law when the judgment is pronounced by the judicial officer. The judicial officer thereafter becomes *functus officio* ("having performed his or her office": the court has exercised its jurisdiction fully and finally, and therefore its authority over the matter has come to an end).

However, a judgment might on occasion not reflect the intentions of either of the parties to an action, or the judicial officer. To illustrate this, a judgment might be given in the absence of a party who is affected thereby; the judgment could be ambiguous; the judgment could contain a patent error; or the judgment could have been granted as a result of a common mistake. A party to the action may in such circumstances request that the judgment be varied or set aside in terms of certain statutory provisions, or be set aside in terms of the common law.

The following is a schematic representation of this study unit:

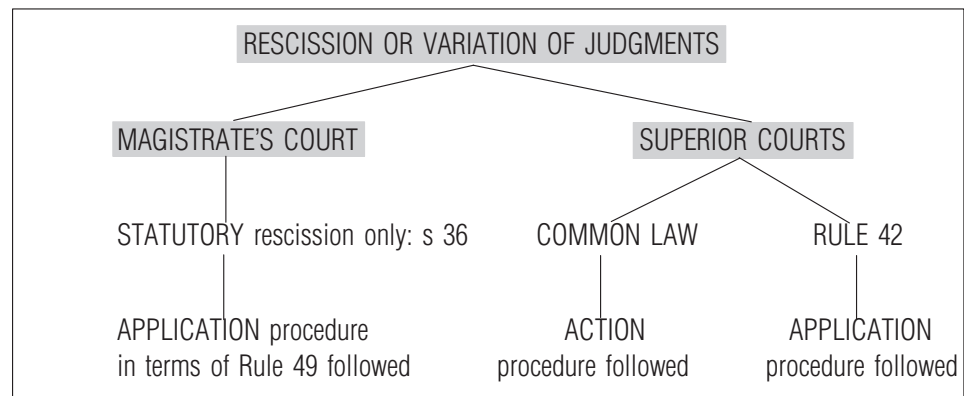


Figure 30.1: Schematic representation of procedure in respect of the rescission or variation of judgments

30.2 GROUNDS FOR THE RESCISSION OR VARIATION OF JUDGMENTS

We now consider the grounds for the variation of judgments. We will first consider the grounds for variation or rescission in the magistrates' courts.

30.2.1 Magistrates' courts

Judgments given by a magistrates' court may only be statutorily rescinded in terms of section 36. This differs from the High Court in that no rescission in terms of the common law is

required. Section 36 of the Magistrates' Courts Act was amended on 17 January 2003 in *Government Gazette* no 24277. Note that the grounds remain the same. However, an addition has been made to that particular section. The new section reads as follows:

What judgments may be rescinded

Section 36:

- (1) The court may, upon application by any person affected thereby, or in cases falling under paragraph (c), *suo motu* –
 - (a) rescind or vary any judgment granted by it in the absence of the person against whom that judgment was granted;
 - (b) rescind or vary any judgment granted by it which was void *ab origine* or was obtained by fraud or mistake common to the parties;
 - (c) correct patent errors in any judgment in respect of which no appeal is pending;
 - (d) rescind or vary any judgment in respect of which no appeal lies.
- (2) If a plaintiff in whose favour a default judgment has been granted has agreed in writing that the judgment be rescinded or varied, a court must rescind or vary such judgment on application by any person affected by it.

Study section 36

The following judgments may be varied or rescinded in terms of section 36, which must be studied carefully.

- (1) You should note that decrees, orders and rules are also regarded as judgments in terms of the definition of a judgment. There are many instances in which a court may grant judgment in the absence of the defendant in terms of the provisions of subsection 36(1)(a). Judgment may be granted in the following instances:
 - the case of a failure to file appearance to defend (rule 12)
 - the filing of consent to judgment (rule 11)
 - failure to plead (rule 12(1)(b))
 - noncompliance with a court order regarding compliance with the rules of court (rule 60)
 - non-appearance at the trial and withdrawal (rule 32)

De Allende v Baraldi t/a Embassy Drive Medical Centre 2000 1 SA 390 (T)

The case of *De Allende v Baraldi t/a Embassy Drive Medical Centre* 2000 1 SA 390 (T) is instructive regarding section 36(1)(a). The court found that, if a practitioner represents a natural or artificial person who is a party to litigation, that person, even if he or she is not physically present in court, is not regarded as "absent". That is what is usually understood by legal representation. Therefore, when a judgment is granted against a litigant who is not physically present but who is represented at the proceedings by a practitioner, the court is not authorised in terms of section 36(1)(a) to thereafter vary or rescind the order for this reason.

Pretoria Garrison Institute v Danish Variety Products (Pty) Ltd 1948 1 SA 839 (A)

- (2) The provisions of subsections (b) and (c) are clear and require no further comment.
- (3) In order to determine which judgments may, in terms of subsection (d), be rescinded or varied, one must first determine whether an appeal lies from such a judgment. The judgments affected by the subsection are those which do not have the effect of a final judgment. In this regard, refer to the discussion of section 83(b) in study unit 32.2.1, and to the test applied in *Pretoria Garrison Institute v Danish Variety Products (Pty) Ltd* 1948 1 SA 839 (A).

30.2.2 Superior courts

A judgment may be set aside in terms of the common law, or varied in terms of Rule 42 in the High Court.

30.2.2.1 The common law

The grounds upon which a judgment will be set aside in terms of the common law are the following:

(1) *Fraud*

Swart v Wessels 1924 OPD 187

A judgment procured by fraud committed by one of the parties cannot be allowed to stand. It must, however, be shown that the successful litigant was a party to the fraud or perjury. In *Swart v Wessels* 1924 OPD 187, it was held that a party seeking to have a judgment set aside on the ground of fraudulent evidence must prove the following:

- (a) that the evidence was in fact incorrect
- (b) that it was given fraudulently and with intent to mislead
- (c) that it diverged to such an extent from the true facts that the court would, had the facts been placed before it, have given a different judgment from that which it had given based on the incorrect evidence

(2) *New documents*

If new documents come to light which, had they been available at the trial, would have entitled the party claiming relief to judgment in his or her favour, the judgment can be set aside in certain circumstances. The following are examples of such circumstances:

- (a) where judgment has been given regarding a will, and a later will is discovered
- (b) where a document was not produced at the trial owing to fraud by the other party
- (c) where the document was not produced, although this was not the fault of the party claiming relief

(3) *Error*

Groenewald v Gracia 1985 3 SA 968 (D)

Although Rule 42 lays down provisions as to when a judgment may be rescinded or varied because of error, it does not exclude the common law ground for setting aside a judgment. However, under common law, nonfraudulent misrepresentation inducing *iustus* error on the part of the court is not a ground for setting aside a judgment induced by such error (see *Groenewald v Gracia* 1985 3 SA 968 (D)).

(4) *Irregularities in procedure*

A party may apply for a judgment to be set aside if it was obtained in his or her absence and he or she was not in court owing to improper service, or the lack of service.

30.2.2.2 Statutory rescission

Study Rule 42(1)

The statutory provisions which govern the rescission or variation of judgments in the High Court are contained in rule 42(1), which must be studied carefully.

Note that, in order to establish *locus standi*, the applicant must show that he or she has a

sufficient direct interest in the subject matter of the judgment which is sufficiently direct to entitle him or her to have intervened in the original litigation in respect of which the judgment was given.

The provisions of the various subsections are clear and require no further comment.

30.3 PROCEDURE FOR THE RESCISSION OR VARIATION OF JUDGMENTS

30.3.1 Magistrates' courts

Study rule 49

A party wishing to have a judgment rescinded or varied must in terms of rule 49 bring a substantive application on notice to the other parties. In addition to these provisions, rule 49 contains the following special provisions governing applications to set aside judgments. Study rule 49.

Phillips t/a Southern Cross Optical v SA Vision Care (Pty) Ltd 2000 2 SA 1007 (CPD)

- (1) The application must be made within 20 days of the judgment having come to the notice of the applicant (rule 49(1)). Please refer in this regard to the presumption created by rule 49(2). The case of *Phillips t/a Southern Cross Optical v SA Vision Care (Pty) Ltd* 2000 2 SA 1007 (CPD), which dealt with rule 49(1), is also instructive. Rule 49(1) provides that a court may rescind or vary a default judgment on such terms as it may deem fit upon good cause shown; or if it is satisfied that there is good reason to do so. The court stated that the term "good cause" in the context of rescission of judgments is generally accepted to mean that the applicant must provide a reasonable explanation for his or her default; he or she must show that he or she has a *bona fide* defence; and that the application is made *bona fide*. The introduction of the concept "good reason" in rule 49(1), as amended in 1997, was intended to expand the discretion of the magistrates' courts regarding the rescission of default judgments by introducing a less stringent criterion.
- (2) The supporting affidavit must furnish reasons for the failure to file an appearance to defend, or to plead. The grounds of defence to the main action or proceedings must also be set out (rule 49(3)). Please refer to *F and J Car Sales v Damane* 2003 3 SA 262 (WLD) regarding what needs to be disclosed in a supporting affidavit.
- (3) Before the application may be set down, the applicant must furnish security to the respondent for the amount of the costs awarded against him or her in terms of the judgment, together with a further amount of R200 to cover the cost of the application.
- (4) An application on the grounds set out in section 36(1)(b) may be made within one year of the applicant having become aware of such voidness, fraud or mistake (rule 49(8)).
- (5) Contrary to the practice in other cases, the court may, in the cases mentioned in section 36(1)(c), act *mero motu*. The court must then inform the parties of the correction in writing.

30.3.2 Superior courts

The procedure to be followed differs, depending on whether setting aside in terms of the common law or variation in terms of Rule 42 is sought.

Seme v Incorporated Law Society 1933 TPD 213

The correct procedure to be followed when setting aside a judgment in terms of the common law, is by means of the action procedure (see *Seme v Incorporated Law Society* 1933 TPD 213).

Study Rule 42(2)(3)

This appears to be accepted as general practice, and the various rules governing the action procedure must be complied with.

Rule 42 specifically provides that, where variation of a judgment is sought in terms of this rule, the application procedure must be followed. The provisions of Rule 6, which govern the application procedure in general, must be complied with. In addition, Rule 42(2) and (3) contains specific provisions governing applications for the variation or rescission of judgments, and these must be studied carefully.

ACTIVITY

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

(1) What procedure must Thomas follow to set aside the judgment?

.....
.....

(2) What information must be contained in the supporting affidavit?

.....
.....

(3) What judgments may be rescinded by a court in terms of section 36(1) of the Magistrates' Courts Act 32 of 1944?

.....
.....
.....
.....

(4) What judgments may be varied or rescinded by the High Court in terms of Rule 42(1)?

.....
.....
.....
.....

(5) Name the procedure to be followed when variation of judgment in terms of Uniform Rule 42 is sought.

.....

(6) Name the procedure to be followed when variation of judgment in terms of the common law is sought.

.....
.....
.....

FEEDBACK

- (1) Thomas must apply to court for rescission of the judgment in terms of rule 49.
- (2) The supporting affidavit must contain reasons for the defendant's absence or default and the grounds of the defendant's defence to the claim (rule 49(3)).
- (3) In terms of section 36(1), the magistrates' court may
 - (a) rescind or vary any judgment granted by it in the absence of the person against whom that judgment was granted
 - (b) rescind or vary any judgment granted by it which was void *ab origine* or was obtained by fraud or by mistake common to the parties
 - (c) correct patent errors in any judgment in respect of which no appeal is pending
 - (d) rescind or vary any judgment in respect of which no appeal lies
- (4) The High Court may, in addition to any powers it may have *mero motu* or upon the application of any party affected, rescind or vary
 - (a) an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby
 - (b) an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission
 - (c) an order or judgment granted as the result of a mistake common to the parties (Rule 42(1))
- (5) The application procedure must be followed.
- (6) The action procedure must be followed.

REVIEW

Peter Rendell, a disc jockey, is sued in the magistrates' court by Tony Mokaba, a supplier of stereo sound equipment, for the nonpayment of his account. Peter contends that the equipment that he purchased was defective. The magistrate, in passing judgment in favour of Tony Mokaba, states, *inter alia*, that: "only a lying, thieving, degenerate and drunken DJ would neglect to pay his debts like all other law-abiding citizens".

Overview

- 31.1 Introduction
 - 31.1.1 Meaning of the term "review"
 - 31.1.2 Distinction between appeal and review
- 31.2 Grounds for review
 - 31.2.1 Grounds for reviewing the proceedings of lower courts
 - 31.2.2 Grounds for reviewing the proceedings of quasi-judicial bodies
- 31.3 Procedure on review
- 31.4 Powers of the court on review

Learning outcomes

After you have finished studying this study unit, you should

- explain the concept "review"
- distinguish between appeal and review
- discuss the grounds for review in the lower courts
- set out the grounds for reviewing the proceedings of quasi-judicial bodies
- discuss the procedure pertaining to review
- apply the contents of this study unit to solve problems
- discuss the powers of the courts on review

Compulsory reading material

Section 22(1) of the Superior Courts Act, 2013; Uniform Rule 53(1)(6)

31.1 INTRODUCTION

31.1.1 Meaning of the term “review”

The meaning of the term “review” was laid down as follows by Innes CJ in the leading case of *Johannesburg Consolidated Investment Company Ltd v Johannesburg Town Council* 1903 TS 111:

In its ... most usual signification it denotes the process by which, apart from appeal, the proceedings of inferior Courts of Justice, both Civil and Criminal, are brought before this Court in respect of grave irregularities or illegalities occurring during the course of such proceedings ... But there is a second species ... Whenever a public body has a duty imposed upon it by statute disregards important provisions of the statute, or is guilty of gross irregularity or clear illegality in the performance of the duty, this Court may ... review the proceedings complained of ... Then ... the third signification ... The Legislature has ... conferred ... a power of review (of certain statutory bodies).

The Promotion of Administrative Justice Act 3 of 2000 (PAJA) creates, as it were, a fourth situation where review may occur. This Act was passed to give effect to section 33 of the Constitution, 1996, that requires administrative actions to be lawful, reasonable and procedurally fair. Because “administrative action” refers to a decision taken or a failure to take a decision by (a) an **organ of state**, or (b) a natural or juristic person when exercising a **public power** or performing a **public function** in terms of an empowering provision which adversely affects a person’s rights, review in terms of this Act falls outside the scope of this module. In this regard, you are referred to the course on Administrative Law ADL 2601, which you will encounter during the course of your studies. Suffice it to point out that the grounds for review in terms of this Act are contained in section 6 and the procedure for review in section 7. Rules of procedure to facilitate review proceedings were promulgated in GN R966 of 9 October 2009.

For purposes of this module, only the first two meanings will be discussed. As far as the third meaning is concerned, suffice it to state that, in addition to review under the common law, various statutes also make provision for the review of decisions taken by tribunals or officials. The provisions of these statutes vary and will not be dealt with here.

In general terms, it can be said that review is essentially concerned with the decision-making process (as opposed to the decision *per se*). Therefore, the question is whether or not the procedure followed is regular and valid.

31.1.2 Distinction between appeal and review

Traditionally, appeal and review may be distinguished as follows:

- (1) An appeal is aimed at the result of the trial, whereas a review is aimed at the method by which the result is obtained. This does not appear to be a very satisfactory distinction,

because the ultimate aim of both forms of proceedings is to reverse the judgment of the court *a quo*. However, the distinction lies rather in the methods employed to achieve this end.

In an appeal, the appellant accepts that the record correctly reflects the proceedings in the lower court (if he or she does not, and still wishes to appeal, he or she must have the record amended), and that the proceedings were conducted properly. He or she alleges, however, that the presiding officer made false deductions and findings of fact on the evidence (although acting perfectly properly), or that his or her legal conclusions were incorrect. The very object of a review is to show that the proceedings were improperly conducted, and it seeks to have the judgment set aside on these grounds without being concerned with the merits of the case.

- (2) The second distinction (which is simply another facet of the first) is that, in the case of an appeal, the parties are restricted to the record of the proceedings and may not go beyond it, whereas in the case of a review, the parties may, by virtue of the nature of review, go beyond the record.

The converse (i.e. that in review one can never argue the matter without going beyond the record) is not true, as we shall see. A sound starting point is the proposition that, in the case of an appeal, one cannot go beyond the record. If one wishes to go beyond the record, one must resort to review proceedings; appeal proceedings may never be used for this purpose.

As Innes CJ expressed it in *R v Bates and Reidy* 1902 TS 199:

The difference between appeal and review is that an appeal is based upon the matters contained in the record, while in review the appellant may travel beyond the record in order to rely on certain grounds, such as gross irregularity and the admission of incompetent evidence. If the appellant desires to appeal, but is not satisfied with the record as it stands, he may proceed to apply for leave to amend it.

- (3) The third distinction is that the rules governing civil appeals usually provide that an appeal must be noted within a stipulated number of days, and that the steps to prosecute it must be taken within a further limited period. In regard to reviews, however, there is generally no fixed period within which the proceedings must be brought, but this must be done within a “reasonable time”. What is “reasonable” will depend upon the facts of each case. The reason for there being no fixed period is that an irregularity might come to light months or even years after the case has been tried.
- (4) The final (and most obvious) distinction is that the procedure differs. An appeal must be noted and prosecuted according to statutory provisions, supplemented by the rules of court. Reviews, on the other hand, are brought on notice of motion.

31.2 GROUNDS FOR REVIEW

31.2.1 Grounds for reviewing the proceedings of lower courts

Study section 24

Section 21(1)(b) of the Superior Courts Act, 2013, authorises the divisions of the High Court to review the proceedings of lower courts.

Section 22 of the Superior Courts Act, 2013 lays down uniform grounds for reviewing the proceedings of any lower court, and these must be studied carefully.

The following grounds for review are mentioned in section 22(1):

- (a) absence of jurisdiction on the part of the court
- (b) interest in the cause, bias, malice or corruption on the part of the presiding judicial officer
- (c) gross irregularity in the proceedings
- (d) the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence

The provisions of subsection (c) require some clarity. All the other grounds are clear and require no further comment.

The meaning of “gross irregularity”

The term “gross irregularity” refers not only to incidents in the courtroom, but also to any irregularity which prejudices any of the parties. To illustrate this, if a court makes a ruling against a party without giving him or her the opportunity to present his or her case, then this will lead to a 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 a gross irregularity. A gross irregularity must be prejudicial before review proceedings will proceed.

However, as mentioned above, there are instances where either review proceedings or an appeal may be instituted, but naturally only when it is not necessary to go beyond the record.

Example

King’s Transport v Viljoen
1954 1 SA 133 (C)

Retief Bros v Du Plessis
1928 CPD 387

The following two examples will illustrate this:

- (1) Where the court *a quo* had no jurisdiction, the proceedings may be reviewed in terms of section 22(1)(a) of the Superior Courts Act. However, the judgment can also be appealed against (see e.g. *King’s Transport v Viljoen* 1954 1 SA 133 (C), which was discussed in relation to section 28(1)(d) of the Magistrates’ Courts Act).
- (2) Where a magistrate has admitted inadmissible or incompetent evidence, the proceedings may be reviewed in terms of section 22(1)(d) of the Superior Courts Act. It is also permissible to appeal in a proper case (see e.g. *Retief Bros v Du Plessis* 1928 CPD 387), but then the appellant is restricted to the record.

31.2.2 Grounds for reviewing the proceedings of quasi-judicial bodies (“review in terms of the common law”)

As was stated earlier, superior courts have inherent jurisdiction to entertain all causes arising within their areas of jurisdiction. If a statutory body (e.g. a liquor licensing board, which is not a court in the usual sense of the word) does not conduct its proceedings in a fair and reasonable manner, a superior court will have the inherent jurisdiction necessary to correct such shortcomings. This type of review is therefore often termed a “review under the common law”, as opposed to a review of inferior court proceedings authorised by statute.

A superior court has jurisdiction to review the proceedings of any body or tribunal empowered to perform statutory duties, as well as to review the proceedings of quasi-judicial bodies.

The principles which should guide a superior court were set out as follows by Bristowe J in *Africa Realty Trust v Johannesburg Municipality* 1906 TS 179:

If a public body or an individual exceeds its powers the court will exercise a restraining influence; and if, while ostensibly confining itself within the scope of its powers, it nevertheless acts *mala fide* or dishonestly, or for ulterior reasons which ought not to influence its judgment, or with an unreasonableness so gross as to be inexplicable, except on the assumption of *mala fides* or ulterior motive, then again the court will interfere. But once a decision has been honestly and fairly arrived at upon a point which lies within the discretion of the body or person who has decided it, then the court has no functions whatever. It has no more power than a private individual would have to interfere with the decision merely because it is not one at which it would itself have arrived.

Jockey Club of South Africa v Feldman 1942 AD 340
Virginia Land and Estate Co Ltd v Virginia Valuation Court and Another 1961 (4) SA 479 (0)

It should be noted that a court will not interfere on review with a decision taken by a quasi-judicial tribunal, unless the party requesting review has suffered prejudice (*Jockey Club of South Africa v Feldman* 1942 AD 340). Where it has been proved that a party has suffered prejudice as a result of an irregularity, the onus of disproving prejudice must be discharged by the tribunal that committed the irregularity (*Virginia Land and Estate Co Ltd v Virginia Valuation Court and Another* 1961 (4) SA 479 (0)).

31.3 PROCEDURE ON REVIEW

The procedure pertaining to review is set out in Rule 53. This Rule provides that motion proceedings must be used when the review of a decision of any inferior court or quasi-judicial body is sought.

What does the notice of motion contain?

The notice of motion calls upon the presiding officer to dispatch the record of the original proceedings to the Registrar of the relevant division of the High Court where review proceedings have been instituted. This record must be dispatched within 15 days after receipt of the notice of motion. The notice must contain reasons for judgment which the presiding officer must, or wishes, to furnish. The notice also calls upon the other interested parties (i.e. parties who would be affected by review proceedings) to show cause why the decision should not be reviewed. The notice of motion must also be accompanied by a supporting affidavit setting out the grounds, facts and circumstances on which the applicant relies for requesting the review.

Example

The following is an illustration of a notice of review:

(Heading)

NOTICE OF REVIEW

Kindly take notice that the Applicant Ned Petersen hereby calls upon Honourable Magistrate Tom Jones to show cause why the proceedings in the matter between Solly Steyn (Plaintiff) and Ned Petersen (Defendant) heard under case number XXXX of 20
..... in the magistrates' court for the district of Johannesburg held at Greenside should not be reviewed and corrected.

Further, kindly take notice that Honourable Magistrate Tom Jones is called upon to dispatch, within 15 days after receipt of this notice, to the Registrar of the abovementioned Honourable Court the record of the proceedings in the abovementioned case together with such reasons as he is by law required or desires to give or make, and to notify the Applicant that he has done so.

Further, kindly take notice that the Applicant applies for review on the basis that, during the trial of the abovementioned matter and before the Applicant had called all of his witnesses and closed his case, the Honourable Magistrate indicated to Solly Steyn that he would grant judgment against the Applicant and that the said conduct of the Honourable Magistrate constitutes a gross irregularity.

Further, kindly take notice that the affidavit of Ned Petersen attached hereto will be used in support of the application.

The presiding officer then sends the record to the Registrar, who must permit the applicant to make copies thereof. The applicant gives two copies to the Registrar (for use by the judges hearing the application), and a copy to every other party to the proceedings.

After receipt of the record, the applicant has a ten-day period within which he or she may amend or add to his or her notice of motion or affidavit by means of a notice together with a supplementary affidavit. He or she may only do this if the record contains further information which he or she wishes to bring to the court's attention.

If the presiding officer, or any interested party, wishes to oppose the application for review, he or she must file a notice of intention to oppose within 15 days of receipt of the notice of motion. He or she must also file an answering affidavit within 30 days of the filing of the applicant's supplementary affidavit. (It should be noted that, because the applicant is afforded an opportunity of amending or adding to his or her notice of motion and supporting affidavit, the respondent is only required to file his or her answering affidavit after the period for amendment has expired otherwise he or she would not have the opportunity of dealing with any new matter raised by the applicant in his or her supplementary affidavit.)

After the answering affidavit has been filed by the respondent, the applicant may file a replying affidavit.

The application will then be set down for hearing in accordance with the procedure set out in Rule 6 of the Uniform Rules of Court.

From the above, it is clear that the normal, opposed application procedure is followed in review proceedings, with two important additions, namely

- (1) the provision for making the record available to all parties, and
- (2) the provision that the applicant may amend or add to the documents on the basis of which he or she institutes review proceedings, after receipt of the record.

31.4 POWERS OF THE COURT ON REVIEW

Roopsingh v Rural Licensing Board for Lower Tugela and Others 1950 4 SA 248 (N)

If review proceedings are successful, the High Court will set aside the decision or the proceedings that it has reviewed, and remit the matter to the particular body to decide in accordance with the correct procedure. However, the court will not substitute its own discretion for that of the body or official whose decision it has reviewed, unless there are exceptional circumstances (see *Roopsingh v Rural Licensing Board for Lower Tugela and Others* 1950 4 SA 248 (N)). It should also be noted that the court will not remit the matter to the particular body whose proceedings are reviewed, in the following circumstances:

- when the end result is clear and referring it back will merely waste time
- when a remittance will be futile
- when there are valid reasons why the court should exercise its discretion in favour of the applicant and substitute its own decision for that of the respondent

ACTIVITY

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

- (1) Should Peter appeal against the judgment or take it on review in terms of the requirements of section 22 of the Superior Courts Act, 2013? Explain.

.....
.....
.....

- (2) Depending on your answer to (1) above, state the procedure that must be used.

.....
.....

- (3) Name two distinctions between appeal and review.

.....
.....
.....

- (4) Name two instances when a court will interfere with a decision taken by a quasi-judicial body.

.....
.....

FEEDBACK

- (1) In determining which procedure is appropriate, one should begin by enquiring what one's grounds of complaint are. Generally, if one complains about the reasoning employed by the court in coming to a decision, one will proceed by way of appeal. But if one complains about the process which led to the decision of the magistrate, one will proceed by way of review. From the facts, it seems that Peter should take the judgment on review in terms of section 22(1)(b) of the Superior Courts Act, 2012. Section 22(1)(b) provides that a court will interfere with the judgment where there is interest in the cause, bias, malice or corruption on the part of the presiding judicial officer. Peter should use the above review procedure, because the magistrate's comments display bias and/or malice. It should be noted that a court may also interfere in other instances such as the following (not applicable to this answer, though):
- (a) in the absence of jurisdiction on the part of the court (s 22(1)(a))
 - (b) in the case of a gross irregularity in the proceedings (s 22(1)(c))
 - (c) where a magistrate has admitted inadmissible or incompetent evidence, or rejected admissible or competent evidence (s 22(1)(d))
- (2) Motion proceedings must be used, because review of a decision of a magistrates' court is being sought.
- (3) Please refer to 31.1.2 above to answer this question.
- (4) The court will interfere in the following instances:
- (a) If a public body or individual exceeds its powers, the court will exercise a restraining influence.
 - (b) If a public body, although confining itself within the scope of its powers, acts *mala fide* or dishonestly, or for ulterior reasons which ought not to influence its judgment.

APPEALS

Jane Smith institutes proceedings in a magistrates' court against John Richards for damages arising out of breach of contract. The magistrate grants judgment against John. John is dissatisfied, and takes the matter on appeal.

Fanie Botha institutes an action for damages against Solly Sibeko in the High Court. Both the court *a quo* and, on appeal, the full bench of the provisional division, reject his claim. Fanie now wishes to appeal to the Supreme Court of Appeal.

Overview

- 32.1 Introduction
- 32.2 Appeals from magistrates' court decision
 - 32.2.1 When can an appeal be noted?
 - 32.2.2 The effect of noting an appeal
 - 32.2.3 Peremption (lapse) of appeal
 - 32.2.4 Abandonment of judgment
 - 32.2.5 The court hearing the appeal
 - 32.2.6 The procedure on appeal
 - 32.2.7 Powers of the court of appeal
- 32.3 Appeals from the High Court
 - 32.3.1 General
 - 32.3.2 The effect of noting an appeal
 - 32.3.3 Peremption (lapse) of appeal
 - 32.3.4 Abandonment of judgment
 - 32.3.5 Courts hearing the appeal
 - 32.3.6 Procedure on appeal to full bench
 - 32.3.7 The procedure on appeal to the Supreme Court of Appeal

Learning outcomes

After you have finished studying this study unit, you should

- explain what is meant by “appeal”
- explain how one can appeal against a magistrates’ court decision
- discuss appeals from decisions of superior courts
- discuss the effect of noting an appeal against judgments in the magistrates’ courts and the higher courts respectively
- identify the various courts of appeal
- discuss procedure on appeal
- apply the contents of this study unit to solve problems

Compulsory reading material

Sections 78; 82; 83; 85; 86; 87 of the Magistrates’ Courts Act of 1944

Rule 51(1)–(4); 51(8) of the Magistrates’ Courts Rules

Sections 12(1)(a)–(b); 13(1)(2); 20(1)–(3); 20(4) of the Supreme Court Act of 1959

Uniform Rule 49(1)(a)–(b); 49(6)(a); 49(7); 49(11); 41(2); 50(1); 50(4)(a)

Rules 6–13 of the Rules of the Supreme Court of Appeal of 1998

32.1 INTRODUCTION

Before dealing with this topic in greater detail, a few preliminary points must be made.

A litigant who is not satisfied with the decision of a court of first instance may appeal against such decision to a higher court. An appeal lies to the appropriate division of the High Court from judgments of magistrates’ courts and certain other lower courts. Moreover, appeals against the judgments of superior courts may be brought, if leave to appeal is granted, either to the full bench of the appropriate division, or to the Supreme Court of Appeal.

Note that, in respect of the decisions of magistrates’ courts, an aggrieved litigant is allowed only one appeal as of right. No appeal as of right is available to an aggrieved litigant in respect of decisions of the High Court, and leave to appeal from the court concerned (or failing that, leave from the Supreme Court of Appeal) must be obtained.

You should also note the meanings attached to the following phrases:

- “court of first instance” – the court before which a matter was first heard
- “court *a quo*” – the court against whose decision an appeal is noted
- “full bench/full court” – usually, three judges of the relevant division

32.2 APPEALS FROM MAGISTRATES' COURT DECISION

32.2.1 When can an appeal be noted?

A party's right to appeal from a magistrate's court entails that leave to appeal need not be obtained. This right to appeal may, however, be excluded by a written agreement by the parties before the trial commences that the decision of the court will be final (s 82). In terms of section 83, the right of appeal accrues only to a party to a civil suit or proceeding, and this section also provides that appeals may be brought only against the following three types of decision:

Study section 83

- (1) any judgment described in section 48
- (2) any rule or order having the effect of a final judgment, including an order relating to execution in terms of Chapter IX of the Act and on an order as to costs
- (3) in certain circumstances, any decision overruling an exception

Study this section carefully.

The second type of decision requires further attention.

Pretoria Garrison Institute v Danish Variety Products (Pty) Ltd 1948 1 SA 839 (A)

What is meant in section 83(b) by a rule or order "having the effect of a final judgment"? The leading case here is *Pretoria Garrison Institute v Danish Variety Products (Pty) Ltd* 1948 1 SA 839 (A), in which it was held that the test for determining whether a rule or order has this effect is whether it disposes of any issue, or any portion of any issue, in the main action, or irreparably anticipates or precludes some of the relief which would, or might, be given at the main hearing.

If the effect of a rule or order is final, this means that the matter has ended for one of the parties. Therefore, he or she can appeal against that order or rule. This differs from an interim order, in that the granting of an interim order does not mean that a party has lost the case. Thus the party may not appeal against a provisional or interim order.

Example
Makhetha v Libamba 1998 2 All SA 496 (W); 1998 4 SA 143 (W)

Examples of orders that are final and definitive are the granting or refusal of a final interdict, the granting of a summary judgment, the upholding of a special plea that the court lacks jurisdiction, and the upholding of a defence of prescription. In *Makhetha v Libamba* 1998 2 All SA 496 (W); 1998 4 SA 143 (W), it was held that the granting of provisional sentence in a manner that would render it pointless to go into the principal case, had the effect that the provisional sentence order was final in effect and accordingly appealable.

Example

Examples of orders which are interlocutory with no final effect are: a refusal to grant absolution from the instance at the end of the plaintiff's case, or an order for (or refusal to order) further particulars.

Livanos v Absa Bank Ltd 1999 3 All SA 221 (W)

In *Livanos v Absa Bank Ltd* 1999 3 All SA 221 (W), the court held that an order granting leave to execute subject to security *de restituendo* is interlocutory and not appealable.

Note that a judgment which may be rescinded or varied in terms of section 36 is not immediately appealable; a party must first exhaust his or her remedies in the lower court before appealing.

A somewhat anomalous position exists when it comes to an appeal against the costs awarded in pursuance of a non-appealable judgment or order. In terms of section 83(b), "... a party ... may appeal ... against ... any order as to costs". Thus section 83 also renders appealable any order as to costs.

Koen v Baartman 1974 3 SA 419 (C)

In deciding whether the award of costs was correctly made, however, “the merits of the dispute in the Court below must be investigated in order to decide whether the order as to costs made in that dispute was properly made or not”, per Watermeyer CJ (with whom Tindall and Centlivres JJA concurred) at page 863 of the *Pretoria Garrison* case (see, too, *Koen v Baartman* 1974 3 SA 419 (C)). The result is that a court of appeal may allow an appeal as to costs where it is of the opinion that the dispute in regard to which the costs were awarded was wrongly decided, but it cannot alter the judgment or order even if it is of the opinion that such judgment or order was incorrectly made.

32.2.2 The effect of noting an appeal

The noting of an appeal automatically suspends execution of the judgment, pending the outcome of the appeal. Upon application, however, the court may order that the judgment be put into effect (see, generally, s 78 of the Magistrates’ Courts Act). Therefore, the onus rests on the successful party who is now seeking to execute, to approach the court for an order allowing execution despite the noting of an appeal.

32.2.3 Peremption (lapse) of appeal

Study section 85

Section 85 must be studied. This section provides that there is no “peremption of appeal” in the circumstances detailed therein. A party does not lose the right of appeal if he or she satisfies the judgment in respect of which he or she appeals. Under common law, peremption of appeal may be brought about by the conduct of the unsuccessful litigant, which necessarily points to the conclusion that he or she has acquiesced to the judgment (i.e. accepted the judgment). This rule applies generally to all appeals. However, section 85 introduces an exception to the rule in the circumstances indicated.

32.2.4 Abandonment of judgment

It sometimes happens that, on an appeal being noted or anticipated, the party in whose favour the judgment in the lower court was given decides that he or she cannot support the judgment on appeal. He or she can use the provisions of section 86 to avoid being liable for the costs of appeal by abandoning the judgment in whole or in part. This he or she may do by filing with the clerk of the court and serving on the opposite party a written notice of abandonment stating whether he or she abandons the whole, or part of, the judgment – and, if the latter, what part.

On abandonment by the defendant or respondent, judgment in respect of the part abandoned is entered for the plaintiff or applicant in terms of the claim in the summons or application. On abandonment by the plaintiff or applicant, judgment in respect of the abandoned part is entered for the defendant or respondent, with costs. Such judgments have the same effect as if they were originally pronounced by the court.

32.2.5 The court hearing the appeal

In terms of section 83, a party may appeal to the division of the High Court having jurisdiction to hear the appeal.

32.2.6 The procedure on appeal

An appeal may be noted either by an appellant in person or by his or her duly authorised legal representative. The appeal procedure can be divided into two phases: the first is governed by rule 51 and refers to the procedure in the magistrates' court, while the second is governed by Uniform Rule 50 and refers to the procedure in the High Court.

The procedural steps to be taken in an appeal from a magistrate's court decision are the following:

Study Rule 51(1)

- (1) **Reasons for judgment before noting an appeal.** Rule 51(1) must be studied carefully. Rule 51(1) provides that the appellant must within ten days after judgment in writing request the judicial officer against whose judgment he or she wishes to appeal to hand to the clerk of the court a written judgment, which becomes part of the record in the case. The judicial officer must furnish the written judgment within 15 days of the request to the clerk of the court.

Example

The following is an example of a written request:

<p>(Heading)</p> <hr/> <p>REQUEST FOR REASONS FOR JUDGMENT</p> <hr/>
<p>Kindly take notice that the Plaintiff in the abovementioned case hereby requests that the Honourable Magistrate within 15 days of the date hereof hands to the clerk of the court a written judgment in the abovementioned case forming part of the record showing:</p> <p>(a) the facts he found to be proved, and</p> <p>(b) his reasons for judgment.</p> <p>Dated at on this ... day of 20....</p> <p style="text-align: right;">----- Plaintiff's attorneys Address</p> <p>TO: The Clerk of the Court</p>

- (2) **Noting an appeal.** This matter is regulated by rule 51(3).

- (a) If a party wishes to appeal, he or she must note the appeal within 20 days of the date of the judgment appealed against, or within 20 days of the clerk of the court providing a copy of the written judgment, whichever period is the longer. He or she notes the appeal by delivering a notice, and, unless the court of appeal directs otherwise, by furnishing security for the respondent's costs of appeal to an amount of R1 000. No security is required from the state.
- (b) A notice of appeal must state

- whether the judgment as a whole, or only part of the judgment or order, is being appealed against, and if only part, then what part
- the grounds of appeal, specifying the findings of fact or rulings of law appealed against

Note that the grounds of appeal must be clearly specified. A notice which merely sets out that “the judgment is bad in law and against the weight of the evidence” will generally be regarded as fatally defective and the appeal will be struck from the roll. Where it is absolutely clear what the grounds of appeal as to facts and law are, so that the respondent will not be taken by surprise, then such a notice will be allowed.

Example

The following is an example of a notice of appeal:

(Heading)

NOTICE AND GROUNDS OF APPEAL

Kindly take notice that the Appellant hereby gives notice of appeal against the entire judgment of the Magistrate delivered on in case no held in the magistrate’s court for the District of at, in which he dismissed the Plaintiff’s claim for damages in the amount of R with costs.

The grounds of appeal are as follows:

1. The Honourable Magistrate incorrectly decided that the Plaintiff failed to discharge the onus of proof resting upon him.
2. The Honourable Magistrate erred in law in finding that,.....
3. The Honourable Magistrate erred in making the following findings of law:
 - (i) in deciding that
 - (ii) in deciding that
4. The Honourable Magistrate erred in making the following findings of fact:
 - (i)
 - (ii)

(3) Reasons for judgment after the appeal has been noted:

Within 15 days after the notice of appeal has been delivered, the judicial officer must deliver to the clerk of the court a statement in writing showing (as far as may be necessary, having regard to any written judgment already delivered by him or her)

- (a) the facts he or she found to be proved (i.e. found but did not include in his or her original judgment; not facts which he or she now finds)
- (b) the grounds upon which he or she arrived at any finding of fact specified in the notice of appeal as appealed against

- (c) his or her reasons for any ruling of law, or for the admission or rejection of any evidence, so specified as appealed against (rule 51(8)).

This statement becomes part of the record. The same procedure applies to the noting of a cross-appeal.

Regent Insurance Co Ltd v Maseko 2000 3 SA 983 (WPD)

In *Regent Insurance Co Ltd v Maseko* 2000 3 SA 983 (WPD), the court held that rule 51(8) was peremptory and had to be complied with. The magistrate's written explanation formed an integral part of the appeal record. The reasoning behind this was to encourage the speedy and effective disposal of appeals by placing the court of appeal in a position to get to the heart of the appeal and deal with it in a speedy, efficient and cost-effective manner. Failure to comply with the provision undermined and delayed effective legal administration.

- (4) **Prosecution of appeal.** Once the appeal has been noted, it remains to prosecute it. The first step is to have it set down for hearing. Application must be made to the Registrar for a date within 40 days of noting the appeal, on notice to all other parties (Rule 50(4)). Should the appellant fail to apply for a date within this period, the respondent may apply for a hearing date within the next 20 days. If neither party has applied within the relevant time limits, the appeal will lapse. On receipt of the application, which must be accompanied by two copies of the record of the proceedings, the Registrar selects a date for the hearing. The Registrar must immediately give the applicant written notice of such date, whereupon the applicant must immediately deliver a notice of set-down, and give notice in writing thereof to the clerk of the court from which the appeal emanated.

At the hearing of the appeal, the parties must be represented either in person or by counsel. The appeal must be heard by at least two judges.

If the appellant is in default on the day of the hearing, the respondent is entitled to an order that the appeal be struck off the roll, with costs. If the respondent is in default, the appellant will have to persuade the court of appeal that the judgment of the lower court ought to be reversed.

Study section 87

The powers of the High Court when hearing an appeal from a magistrate are set out in section 87. Study this section carefully.

- (5) **Further appeal.** As we have stated, there is, as a general rule, only one appeal as of right. If a magistrate's decision has been taken on appeal to a provincial division, there is a further appeal to the Supreme Court of Appeal, but only with the leave of the division appealed to in the first instance, or, if it refuses leave, with the leave of the Supreme Court of Appeal. Note that an appeal does **not** lie to the full court of the particular division of the High Court – this court does not possess such jurisdiction, and a noting to the full court is a nullity: see *Enslin v Nhlapo* 2008 5 SA 146 (SCA).

32.2.7 Powers of the court of appeal

Section 87 of the Magistrates' Courts Act of 1944 specifically provides that a court of appeal may

- confirm, vary or reverse the judgment appealed from, as justice may require
- remit the matter to the court *a quo* so that further evidence may be taken and the appeal be determined
- if desirable, order any party to produce further proof
- take any course which may lead to the just, speedy and inexpensive settlement of the case
- make such order as to costs as justice may require

ACTIVITY

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

- (1) Must John apply for leave to appeal to a High Court?

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.....
.....
.....

- (2) Describe how John must note his appeal to a High Court.

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.....

- (3) Explain the implications for John if Jane abandons part of the judgment granted in her favour.

.....
.....
.....
.....

- (4) How does the noting of the appeal affect the execution of the judgment given in the magistrates' court?

.....
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.....
.....
.....

FEEDBACK

- (1) No, John is allowed one appeal as of right in terms of section 83 of the Magistrates' Courts Act of 1944. The appeal lies to the appropriate provincial or local division of the High Court from judgments of magistrates' courts. See section 83.
- (2) This matter is regulated by rule 51(3). John must note the appeal within 20 days of the date of judgment appealed against, or within 20 days of the clerk of the court providing a copy of the written judgment, whichever period is the longer. John notes the appeal by delivering a notice and, unless the court of appeal directs otherwise, by furnishing security for the respondent's costs of appeal to an amount of R1 000. A notice of appeal must state the following:

- whether the judgment as a whole, or only part of the judgment or order, is being appealed against, and if only part, then what part
- the grounds of appeal, specifying the findings of fact or rulings of law appealed against

The grounds of appeal must be clearly specified in order for the notice to pass muster. See 32.4.1 to answer this question.

- (3) Jane was the plaintiff in the original application. If a plaintiff abandons any part of a judgment granted in his or her favour, judgment in respect of the part abandoned is entered for the defendant (John) with costs in terms of section 86(2) of the Magistrates' Courts Act 32 of 1944. See section 86(2).
- (4) The noting of an appeal automatically suspends execution of the judgment, pending the outcome of the appeal. Upon application, however, the court may order that the judgment be put into effect. The court's discretion will be made on such terms as the court may determine about security for the due performance of any judgment which may be given upon the appeal or application. See section 78 of the Magistrates' Courts Act.

32.3 APPEALS FROM THE HIGH COURT

32.3.1 General

There is no right of appeal against a decision of a High Court, and leave to appeal is required each time, either from the court that gave the judgment, or from the Supreme Court of Appeal.

Section 20 of the Supreme Court Act of 1959 refers to an appeal against "a judgment or order" of a court. The meaning and effect of this expression has on various occasions been considered by the court, and the Supreme Court of Appeal has repeatedly held that "judgment" is used when referring to a decision of a court in respect of relief claimed in an action, and "order" refers to a similar decision in respect of relief claimed by way of an application (and not an action). The terminology is, however, not used in a consistent manner, but in *Holland v Deyssel* 1970 1 SA 90 (A) 92–93 it was held that "*die woorde 'uitspraak', 'bevel', 'beslissing' en 'vonnis' almal dui op die uitsluitel wat 'n hof gee in verband met die bepaalde regshulp wat in gedingvoering deur 'n party aangevra is'*".

32.3.2 The effect of noting an appeal

Firstly, it should be noted regarding this provision, that it is not merely the right to levy execution which is suspended, but the "operation and execution" thereof.

South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd 1977 3 SA 534 (A)

The common law rule of practice in the higher courts is that the execution of a judgment is automatically suspended upon the noting of an appeal (*South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 3 SA 534 (A)).

Study Rule 49(11)

This common law rule of practice is reflected in both the Rules and the Supreme Court of Appeal Rules. Rule 49(11) must be studied.

It should first of all be noted in regard to this provision that it is not merely the right to levy execution which is suspended, but "the operation or execution" thereof. This has the result that, pending the appeal, the judgment cannot be carried out and no effect can be given to it.

Secondly, to obtain leave to execute the judgment, the party in whose favour judgment was

given must apply to the court which gave the judgment, and only this court is competent to grant leave to execute.

Finally, it should be noted that the applicant bears the onus of showing why the judgment should be carried into execution, and, if his or her application is successful, he or she will be required to furnish security *de restituendo*.

Rule 49(11) relates to appeals to a full bench, but it is clear from Supreme Court of Appeal Rule 6(1) that the foregoing also reflects the position with regard to appeals to the Supreme Court of Appeal.

32.3.3 Peremption (lapse) of appeal

The Supreme Court Act of 1959 does not contain a section that corresponds with section 85 of the Magistrates' Courts Act of 1944. The position in regard to the peremption of appeals is therefore governed by the common law, in terms whereof a person who has acquiesced to a judgment cannot subsequently appeal against it. Such acquiescence will be inferred from any act which is inconsistent with the intention to appeal, for example payment, or acceptance of payment, in terms of a judgment. If peremption of appeal is raised during proceedings, the onus of proof is on the person alleging such acquiescence.

32.3.4 Abandonment of judgment

Study Rule 41(2)

Rule 41(2) must be studied.

Unlike the corresponding provisions in the Magistrates' Courts Act, this subrule makes no mention of a party's liability for costs. It appears that the party abandoning would be liable for costs up to the date of abandonment.

32.3.5 Courts hearing the appeal

The position is as follows:

Appeal to the full bench

When a matter is heard for the first time in the High Court, it is normally heard by a single judge (section 13(1)(a)). If a party wishes to appeal against this judgment, section 20(4)(b) provides that leave to appeal must be obtained either from the court against whose judgment the appeal is to be made (i.e. that of the single judge), or, if refused, from the Supreme Court of Appeal. If leave to appeal is granted, the appeal will be heard either by the full court of the provincial division, or by the Supreme Court of Appeal. The court granting leave must direct that the appeal be heard by the full court unless it is satisfied that the questions of law and of fact are of such a nature that the appeal requires the attention of the Supreme Court of Appeal (section 20(2)(a)).

All former provincial divisions of the High Court have appeal jurisdiction. No former local division, except the South Gauteng High Court, Johannesburg (previously known as the Witwatersrand Local Division), has appeal jurisdiction (s 20(3)(c)). The South Gauteng High Court, Johannesburg does not, however, have appeal jurisdiction comparable with that of a former provincial division. An appeal against the decision of a single judge of the South Gauteng

High Court, Johannesburg must be heard by a full bench of the North Gauteng High Court, Pretoria (previously known as the Transvaal Provincial Division), unless the Judge President of the North Gauteng High Court, Pretoria directs that a full bench of the South Gauteng High Court, Johannesburg must hear the appeal.

A court of first instance is usually constituted before a single judge (s 13(1)(a)). A court hearing an appeal from an inferior court must comprise at least two judges (s 13(2)(a)(i)).

A full bench hearing an appeal against the judgment or order of a single judge, must comprise at least three judges (s 13(2)(a)(ii)). However, the single judge whose judgment or order is being appealed against, is precluded from sitting on the full bench hearing the appeal (s 13(2)(b)).

Appeal to the Supreme Court of Appeal

Section 20(4)(a) provides that when a party wishes to appeal against the judgment of a full court sitting as a court of appeal, special leave of the Supreme Court of Appeal must be obtained. If the full court sits as a court of first instance (see s 13(1)): in the case when the Judge President (or Deputy) so directs and determines the number of judges, leave must be obtained from the court against whose judgment the appeal is to be made or, if refused, with the leave of the Supreme Court of Appeal.

The Supreme Court of Appeal is the final court of appeal in all matters, excepting constitutional matters. The Court is situated in Bloemfontein. The Supreme Court of Appeal is a court of appeal with general jurisdiction, unlike the Constitutional Court which may only hear constitutional matters. The Supreme Court of Appeal has jurisdiction to hear and determine an appeal against any decision of a High Court. Decisions of the Supreme Court of Appeal are binding on all courts of a lower order, and the decisions of the High Courts are binding on magistrates' courts within the respective areas of jurisdiction of the divisions.

The quorum of the Supreme Court of Appeal in all civil matters is five judges (s 12). However, the Chief Justice may direct that an appeal in a civil matter be heard before three judges (s 12(1)(bA)). The Chief Justice may also, in view of the importance of a specific matter, direct that such appeal be heard before a larger number of judges than is required in terms of the Act (s 12(1)(c)).

In certain instances, a right to appeal directly to the Supreme Court of Appeal has been created by statute, for example from the judgment of a water court or an income tax appeal court. These provisions remain unaffected by the amendments introduced by the Appeals Amendment Act of 1982.

The Supreme Court of Appeal also has jurisdiction at common law to grant special leave to appeal where no appeal lies, to prevent "substantial and grave injustice" (*Enyati Colliery Ltd v Alleson* 1922 AD 24). This would be the case where a provincial division wrongly allowed an appeal in a matter in which no right of appeal in fact exists. Here, the Supreme Court of Appeal would intervene and restore the *status quo ante*.

32.3.6 Procedure on appeal to full bench

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

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

The appellant must simultaneously file three copies of the appeal record with the Registrar and must provide the respondent with two copies (Rule 49(7)). At this stage, the appellant must also furnish security for the respondent's costs of appeal. If the parties cannot agree on the amount, the Registrar will determine the amount. Rule 49(13).

Rule 49(13) has been amended to allow the court on application to it, to release the appellant wholly or partially from the obligation to enter into good and sufficient security for the respondent's costs of appeal (GN R 1299 of 29 October 1999).

The Registrar then assigns a date for the hearing of the appeal, and gives both parties at least 20 days' notice thereof (Rule 49(7)(c)).

32.3.7 The procedure on appeal to the Supreme Court of Appeal

If leave of the Supreme Court of Appeal is necessary, an application for leave to appeal shall be lodged in triplicate with the Registrar within the time limits prescribed by that law. The application for leave to appeal must furnish all the information necessary to decide the application and must deal with the merits of the case only where it is necessary to explain and support the particular grounds upon which leave to appeal is sought or opposed.

The application must be accompanied by the following: a copy of the order of the court *a quo* appealed against; where leave to appeal has been refused, a copy of that order of the court *a quo*; a copy of the judgment of the court *a quo*; and where leave to appeal has been refused by that court, a copy of the judgment refusing such appeal.

The Registrar may, on written request, extend the period for filing a copy of the judgment or judgments for a period not exceeding one month. Every affidavit in answer to the application must be lodged in triplicate within one month after service of the application on the respondent. An applicant who has applied for leave to appeal, must within ten days after receipt of the aforesaid affidavit, lodge an affidavit in reply dealing only with new matters raised in the answer.

The application is then considered by the judges, who may request submissions or further affidavits; the record or portions of it; and additional copies of the application. The party concerned must lodge the required documents within the period prescribed by the Registrar. If the party concerned fails to comply with the Registrar's direction or fails to cure the defects in the application within the prescribed period, the application will lapse (Rule 8(8)).

A notice of appeal must then be lodged with the Registrar of the Supreme Court of Appeal and the Registrar of the court *a quo*. The notice of appeal must be lodged within one month after the date of granting of the judgment or order appealed against where leave to appeal is not required; the granting of leave to appeal where leave to appeal is required; or the setting aside of a High Court's direction in terms of section 20(2)(b) of the Supreme Court Act.

The notice of appeal and cross-appeal must state what part of the judgment or order is appealed against, and also state the particular respect in which the variation of the judgment or order is sought. The notice of appeal must be accompanied by a certified copy of the order (if any) granting leave to appeal. The parties to the appeal may extend the time limit for lodging the notice of appeal by written agreement.

The appellant must within three months of the lodging of the notice of appeal, lodge with the Registrar six copies of the record of the proceedings in the court *a quo*. The appellant must also deliver copies to the respondent. The respondent may decide on the number of copies that are necessary. The time limit for lodging of the record may be extended by written agreement of all the parties to the appeal, and by the Registrar upon written request, with notice to all the parties. However, the Registrar may not extend the period for more than two months. The appeal will lapse if the appellant fails to lodge the record within the prescribed period or within the extended period.

The appellant may be ordered by the court granting leave to appeal, to provide security for the respondent's costs of appeal. The appellant must furnish the requisite security before lodging the record with the Registrar, and inform the Registrar accordingly. If the parties contest the form or amount of security, the Registrar of the court *a quo* will determine the issue and this decision will be final.

Unless the President otherwise directs, the appellant must lodge six copies of his or her main heads of argument with the Registrar of the Supreme Court of Appeal within six weeks from the lodging of the record. The respondent must lodge with the Registrar of the Supreme Court of Appeal six copies of his or her main heads of argument within one month after receiving the appellant's heads of arguments. The heads of arguments will comprise the main points to be made in counsel's address to court, will be accompanied by a list of authorities to be quoted in support of the argument, and will define the form of order sought from the Court. A photocopy or printout from an electronic database of the statute, regulation or decree must accompany the heads of argument in a separate file: Rule 10(3)(f).

*Darries v Sheriff,
Magistrate's Court, Wynberg*
1998 3 SA 34 (SCD)

The President or the Court may *mero motu* or on application, extend or reduce any time period prescribed in these rules and may condone noncompliance with these rules. The Registrar shall notify each party by registered letter of the date of the hearing. If the appellant fails to appear on the designated date, the appeal will be dismissed for nonprosecution, unless the Court otherwise directs. The Court made pertinent remarks regarding an application for condonation in terms of Rule 12 in *Darries v Sheriff, Magistrate's Court, Wynberg* 1998 3 SA 34 (SCD). It held that condonation of the non-observance of the Rules of the Supreme Court of Appeal is not a mere formality and that some acceptable explanation must be given for any delay in seeking condonation. The appellant should apply for condonation as soon as possible, and the petition should set forth briefly and succinctly essential information which might enable the Court to assess the appellant's prospects of success. This is so because the appellant's prospect of success is one of the factors relevant to the exercise of the Court's discretion. However, where non-observance of the rules of court has been flagrant and gross, an application for condonation should not be granted, whatever the prospects of success might be.

All appeals are heard in Bloemfontein, although the court may sit elsewhere in exceptional circumstances.

The Court may make an order for costs to be borne personally by any party or attorney or counsel if the hearing of the appeal is adversely affected by the failure of that party or his or her legal representative to comply with the rules of the Supreme Court of Appeal (Rule 11A).

ACTIVITY

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

(1) What procedure must Fanie follow to apply to appeal to the Supreme Court of Appeal?

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.....
.....

(2) If leave to appeal is granted, what is the next step that Fanie must take?

.....
.....
.....

(3) What essential information must be included in a notice of appeal?

.....
.....
.....

(4) What is meant by the term “heads of argument”?

.....
.....
.....

FEEDBACK

- (1) An application for leave to appeal must be lodged in triplicate with the Registrar of the Supreme Court of Appeal within the time limits prescribed by the law.
- (2) A notice of appeal must be lodged with the Registrar of the Supreme Court of Appeal and with the Registrar of the court *a quo* within one month after the date of the granting of leave to appeal.
- (3) The notice of appeal must state what part of the judgment or order is appealed against and state the particular respect in which the variation of the judgment or order is sought.
- (4) The “heads of arguments” comprise the main points to be made in counsel’s address to court as well as a list of the authorities to be quoted in support of each point. The heads of argument will also define the form of order sought from the Court.