

Mag court

- Now has same jurisdiction as High court in matters determining the nullity of marriage and divorce and related matters.
- R100,000 to R300,000 claim jurisdiction
- All applications to be supported by an affidavit
- two types of applications 1) notice of motion with affidavit 2) application which special form is prescribed
- Notice of set down to be given 5 court days before day of hearing
- Address appointed by both parties must be within 15kms of courthouse
- Respondents answering affidavit to be filed within 10 days of filing his notice of intention oppose
 - **Application proceedings:** made by notice of motion and supporting affidavit issued, the respondents may oppose application with responding affidavit
- Applicant may issue a reply to adduce new facts and reply to the respondents defence
- Further affidavits may be filed if necessary by courts discretion
- Ex parte (notice not given to the person against whom legal relief is sought). Applicant may be the only interested or affected party. General rule is that ex parte used when applicant cannot request an order against a person. Applicant must show that it is really not necessary to bring the application without notice to the respondent, or show some urgency for the matter to be heard ex parte. Founding affidavit will contain reasons for application namely facts upon which cause of action is based and why no notice is given to respondent. Tanquam suspectus de fuga now invalid (it violated a debtors right to personal freedom)
Use ex parte app in mandamenten van spolie, interdicts, attachments to secure claims.
It is an exception to the audi alteram partem rule (to hear the other side) therefore court will not issue final order without the person concerned being given an opportunity to respond and state their case. Rule nisi can be issued (return date for respondent to state why order should not be made)
Any affected person by the ex parte can apply after 24 hours to have the order discharged.
Ex parte provides speedy remedy where relief is urgently sought.
- Note: mandamenten van spolie (to restore possession of property to the owner)
 - **Summons proceedings: made by way of summons issued (can be a simple or combined summons)**
- When does a power of attorney need to be filed? No power of attorney required to be filed to act in a magistrates court unless the attorneys authority to act is challenged
- Defendant must enter appearance to defend within 10 days of receipt of summons
- Attorney and plaintiffs fax no and email add should be included with address
- Address must be within 15km of the courthouse
- Particulars of claim : Simple summons can contain a bare allegation that compliance with legislation has been met but declaration in the case of a combined summons must allege full particulars of such compliance. Where applicable compliance with the NCA must be stated.
- If a plaintiff relies on the jurisdiction of the court, they must state that the whole cause of action arose within the district or region of the court and set out particulars as proof
- Sheriff or person serving summons must explain the nature and content to the person being served
- Summons can now be served by edictal citation or substituted service. (previously could serve within the Republic)
- Summons addressed to defendant
- Service by fax or email is possible
- When can issue of summons be refused? Clerk of court can refuse to issue a summons if excessive amount is claimed for attorneys cost or court fees or if the address of service does not comply with the provisions of the Act.
- Note that a summons will NOT lapse after 12 months
- Action is instituted at issue of summons and by service
- Issuing of summons does not interrupt prescription. It is only interrupted by service of the summons.
- Summons can be amended any time before service. Amendments may be initialled by clerk of court or registrar. If not initialled, it will have no effect.
- Who issues a summons? Summons is issued by Clerk of the court
- What procedure must be followed to amend a summons after service ? follow rule 55A
 - **Security for costs**
- Party requesting security for costs must deliver notice stating grounds for request and how much to be secured. If a party fails to furnish security within 10 days of the demand, the requesting party may apply for order for security to be given and the proceedings to be stayed until security is given. If no security is given, proceedings can be dismissed or defaulting partys pleading can be struck out.
- When can a party request costs? If other party :
 - Is not a resident or workin within the Republic
 - Is an unrahabilitated insolvent
 - Is a registered or incorporated company of a close corporation
 - Has no substantial interest in the cause of action

- Is a person where the court has made an order in terms of s74
- Is a person whom assistance is rendered in terms of Agricultural Credit Act
- Defendant can admit that she owes the amount claimed and can pay the amount (consent to judgment). This excludes actions in terms of Divorce Act or nullity of marriage. If consent given before notice of intention to defend given, it must be lodged with the registrar or clerk. It can be given after a notice of intention to defend given. Can consent to a lesser amount and still defend balance of claim. No further costs payable after consent is given. Consent by defendant will result in plaintiff getting judgment in their favour.

- **Notice of intention to defend**

- Given if defendant wants to defend the action within 10 days of receipt of summons
- Must state fax and email address if available in addition to physical and postal address
- When is the notice defective? If registrar or clerk notices that the notice is defective in that it has not:
 - been properly delivered
 - Been properly signed
 - Does not set out postal address of person signing it or an address for service as required
 - If it has 2 or more of these defects

He shall not enter judgment against defendant. Plaintiff must deliver notice in writing bringing the defects to the defendants notice and a request to deliver a proper notice of intention to defend within 5 days. If defendant still does not comply then request for judgement can be made

- What is the position if appearance to defend is entered late but before lodgement of a request for judgment? A late notice is still valid provided judgment has not been granted. (In high court plaintiff can apply for its rescission but not in mag court)

- **Judgment by default (What is it? A judgment given in the absence of the party against whom it is given)**

- In actions based on liquid documents, original must be provided or affidavit stating why it cannot be produced
- Defendant can apply for judgment by default if plaintiff is barred from delivering a declaration
- Judgment by default must be considered by a magistrate and not the clerk or registrar
- Judgment given if:
 - Defendant fails to give notice to defend within stipulated time
 - Defendant enters appearance to defend but fails to plea (must be given 5 days notice of bar)
 - If a part does not appear at hearing
 - If party does not comply with a court order eg to furnish particulars

- What documents are required to obtain a judgment by default?

Original summons, return of service, written request for default judgment in duplicate, affidavit (for unliquidated claims), original documents (in case of a claim based on a liquid document), agreement and affidavit (if claim based on NCA)

- What action may the court take when a request for judgment by default is referred to it?

- Can call upon plaintiff to give evidence (written or oral) to support their request/claim
- Call upon plaintiff to give evidence that consent by defendant is signed
- Give judgment for the plaintiff
- Give judgment in terms of defendants consent
- Refuse judgment
- Make any order that may be just

- **Payment into court and tender**

- Defendant can try to settle with plaintiff at any time unconditionally or without prejudice where claim is a sum of money or for the performance of an act (not just any type of claim)
- Offer must be given to all parties and signed by defendant or legal rep
 - Offer must state if unconditional or without prejudice
 - Is an offer to pay all or just part of the costs
 - If will settle claim and costs or just claim
 - If disclaims liability for costs or part of it
- Plaintiff may accept within 15 days
- If accepted, plaintiff cannot recover the balance of claim
- If defendant fails to deliver with 10 days after delivery of the offer, plaintiff can give 5 days notice to defendant, then apply for judgment for the offer to be carried out and for costs.
- Note that the offer or tender made without prejudice shall not be disclosed to the court before judgment given or any reference made to it. Can notify court of it after judgment so it can consider it when making an order as to cost.

- **Interim Payments**

- May be ordered in actions for damages for personal injuries or the death of a person.
- Can be made at any time after the expiry of the period for notice of intention to defend
- Applies to damages relevant to plaintiffs medical costs, plaintiffs loss of income due to physical disability or plaintiffs loss of income due to death
- Made by application
- Affidavit must contain amount of damages claimed, grounds for application, all documentary proof on which applicant relies
- Court will grant application for interim payment if satisfied that:
 - o Defendant has admitted liability in writing for plaintiffs damages
 - o Plaintiff has obtained judgment against defendant for damages
 - o Defendant is insured in respect of claim or has the means to pay

- **Summary judgment (within 15 days of delivery of notice to defend)**

- As in High court, the plaintiff may apply for summary judgment after defendant has given notice of intention to defend. If plaintiff is successful, the matter will end. Procedure protects plaintiff against defendant who tries to enter notice to defend purely to delay matter
- May be made of the following types of claims:
 - o Liquid document (acknowledges a debt or undertaking to pay where no evidence required to prove the debt)
 - o Liquidated amount of money (fixed, certain sum, capable of determining by mathematical calculation)
 - o Delivery of specified movable property
 - o For ejection
- Must be supported by affidavit
- How does one apply for summary judgment? By application procedure using a special form, namely the Summary Judgment along with notice of motion and affidavit
- What are the 3 requirements for the supporting affidavit which must be filed with the notice?
 - o Must be signed by plaintiff stating their personal knowledge of the facts or by legal rep stating their capacity
 - o Must confirm or verify the amount or cause of action
 - o Must state that there is no bona fide defence to claim & that appearance has been entered solely for the purpose of delaying the action
- What step can the defendant take to ward off judgment? Defendant can submit an answering affidavit and deliver it before noon on the day before the day on which the application is to be heard. (no option of paying into court as previously)
- What allegation can the defendant make in their opposing affidavit?
 - o That he has a bona fide defence
 - o A denial that appearance has been entered to delay the action
 - o A disclosure of the nature and grounds of his defence or counterclaim
- What order may the court make at the hearing of the summary judgment?
 - o Give defendant leave to defend if entitled or deny defendant leave to defend if not entitled
 - o Give defendant leave to defend part of the claim and give judgment against him for the balance
 - o Can make both of these orders

- **Provisional sentence**

- Provides speedy remedy for a creditor in possession of liquid document. Debtor must not be able to dispute the validity of the document.
- Defendant can oppose on grounds of the authenticity of the signature or authority of person signing or the merits of the claim
- Defendant can admit liability (must be signed and witnessed) and then judgment will be for the plaintiff
- If defendant opposes and does not succeed, plaintiff is awarded provisional sentence. It is provisional in the sense that the defendant can take the matter to full trial. Must initiate proceedings within two months of the granting of the prov sentence by notice of intention to enter principal case along with plea 10 days after the notice or provisional sentence will become final.
- What is a defence against provisional sentence based on? The authenticity of the signature on the document or the authority of the person signing it or the merits of the claim itself
- What is meant by the term 'security de restituendo'? Security which the plaintiff must give for the restitution of money he or she has received from the defendant in terms of judgment in the event of the defendant defending and succeeding in the main case.

- **Declaration**

- When simple summons is issued, defendant must enter appearance to defend, plaintiff must furnish declaration with 15 days of receipt of notice of intention to defend. If plaintiff fails to do this, or can be placed under bar if fails to do this and subsequent default judgment will follow. Defendant must also give 10 days notice to plaintiff of his application for default judgment.

- **Further particulars**

- A party is no longer entitled to request further particulars for purposes of pleading. The request must be made only for purposes of trial. Any party to make request within 20 days before trial but after close of pleadings. Request must be complied within 10 days.
- Note that further particulars are pleadings
- Cannot be requested to establish other party's evidence
- If party does not comply within stipulated time, court can grant judgment upon application

- **Exception to a summons**

- Where pleading is vague and embarrassing or lacks cause of action
- Used to object to plaintiff's claim if the defective summons is unfair to defendant or will cause him prejudice
- Can be made before or after a request for further particulars.
- If vague and embarrassing- party must afford other party to remove the cause of complaint within 15 days before excepting to it.

- **Striking out**

- When pleading contains averments which are scandalous, vexatious, irrelevant
- Court must be satisfied that applicant will be prejudiced in their claim if application to strike out is not granted.

- **Pleadings by the defendant**

- Defendant can state their case of their defence against the plaintiff's claim by means of a plea.
- What pleading must be entered by a defendant to disclose their defence? A plea
- Can also institute a counterclaim
- A party relying on an agreement governed by legislation must state the nature and extent of his compliance with the provisions of the legislation.

- **Plea on the merits**

- Defendant can defend a matter by raising a defence on the merits. The plea contains the defence and the answer to the plaintiff's averments.
- The plea must have a case number, be in writing, be dated and signed by defendant or legal rep, must comply with provisions of Act, be clear and concise
- Defendant may file one plea only. (except, special plea, plea on the merits)
- Defendant has 20 days to deliver his plea as opposed to the previous 10 days.
- Plea must be clear, bare denial not permissible (must be clear). Every allegation to be dealt with separately.
- Plea can:
 - o Admit
 - o deny
 - o confess and avoid the material facts alleged (admits all or some facts but raises other facts)
 - o provide all material facts on which defence rests

- Facts admitted expressly or by necessary implication will not have to be proved at trial
- Defendant may withdraw an admission with court's permission

- **Special Plea**

- Is a defence which is not an answer to the factual allegations made by plaintiff but which goes beyond merits.
 - o Eg: court has no jurisdiction
 - o plaintiff's claim prescribed
 - o party had no locus standi (legal capacity to institute action)
 - o special defence of *lis pendens* (action already instituted betw same parties from same cause of action)
 - o *Res judicata* (special defence that matter is *res judicata*. A plea that judgment has already been given by competent court on the same dispute)
 - o Arbitration
 - o Splitting of claims
 - o Non joinder (where plea will be successful where only one owner property owned by several co-owners is sued or where there is joint financial or proprietary interest not based upon co-ownership) and misjoinder

- **Claims in reconvention (counterclaim)**

- An action may be stayed where the claim in reconvention exceeds the jurisdiction of the mag court (300,000)
- Same time limits as delivering a plea
- Defendant who institutes a counterclaim is known as the plaintiff in reconvention and the plaintiff will then be known as the defendant in reconvention- unnecessary for the defendant in reconvention to enter appearance.
- Counterclaim can be delivered at the time as a plea or at a later stage if the court allows it
 - What is the final pleading that may be delivered by parties in exchange of pleadings? A reply to a plea (replication)
 - What is the purpose of the reply to a plea (replication)? If the defendant raises new factual allegations in his plea and the plaintiff may file a reply.

- What is the difference between a special plea and an exception?

EXCEPTION

1. Exception must appear ex facie (on the face of it) the pleading to which the exception is raised
2. Can be raised against any pleading
3. Raised against a pleading as a whole and not merely against a portion

SPECIAL PLEA

1. Used to raise an exception on the basis of certain facts which do not appear in certain of the plaintiffs specific pleadings
2. Can be raised only against a plaintiffs declaration or particulars of claim
3. Purpose is to destroy the action or postpone action

- **Steps by the plaintiff after the service of a plea**

- Request for further particulars for purposes of trial
- Exception
 - can except to a plea that does not disclose a defence
 - When will a court uphold an exception? The court will not uphold any exception unless satisfied that plaintiff would be prejudiced in conduct of his case if plea were allowed to stand or if plea is vague and embarrassing unless the plaintiff has given defendant an opportunity to remove the cause of complaint if it is vague and embarrassing
- Striking out
- Replication and plea in convention (plaintiff shall deliver a replication to the plea and a plea to any claim in reconvention within 15 days after service of a plea). A plaintiff in reconvention may within 10 days after delivery of the plea in reconvention, deliver a replication in reconvention)
- Close of pleadings- will be considered if:
 - Either party has joined issue without alleging any new matter and without adding any further pleading
 - The last day allowed for filing a replication or subsequent pleading has elapsed and it has not been filed
 - The parties agree in writing that the pleadings are closed and such agreement is filed with the registrar or clerk of the court
 - The parties are unable to agree as to the close of the pleadings and the court upon the application of a party declares them closed.

- **Amendment of pleadings**

- A party may amend before judgment, an error in their pleadings (amendment of notice of motion, summons will also be allowed if unless mala fide where order for costs won't cure prejudiced party)
- Note amendment done by rule 55 A (must deliver a notice) and in terms of section 111 (at any time before judgment)
- How will the amendment be effected? In terms of section 111 and Rule 55A
- If the error appeared in further particulars, could it be amended? Yes, because further particulars are pleadings
- What procedure must be followed if a party objects the proposed amendment? The party wishing to amend must within 10 days lodge an application for leave to amend
- What are the grounds for refusal of an amendment? 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
- Who is responsible for the costs of an amendment? The party giving notice of such amendment unless the court directs otherwise.

- **Preparation for trial**

- Plaintiff is dominus litus -must set down matter within 15 days = 3 weeks (days refer to court days) after the pleadings have closed
- No notice of set down needs to be served upon the defendant

- **Discovery of documents**

- What is the reason for discovery? Each party can compel the other to reveal documentary evidence which it hopes to adduce at the trial and to reveal other documents in its possession which tend to prove or disprove its case so that parties can prepare for trial and not be taken by surprise.
- Includes documents, tape, electronic, digital or other forms of recordings
- Definition of tape recording is wide enough to include all the different kinds of material on which visual images, sound or other information can be stored
- Discovery must be requested from the opposite party (no automatic discovery)
- Documents in respect of which privilege is claimed must be listed separately with the grounds of the privilege

- Grounds for legal privilege to apply are:
 - Communication must be made in a professional capacity
 - Communication must be made in confidence
 - For the purposes of obtaining legal advice
 - Not for the intention of furthering a crime
 - Privilege must be claimed and does not automatically apply
- When does discovery take place? After the close of pleadings
- When is it necessary to submit to a medical examination? It is relevant when 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.
- What matters may be discussed at a pre-trial conference? 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 legal reps to appear before it in chambers for a pre trial conference to discuss the flg matters:
 - Simplification of the issues
 - Necessity or desirability of amendments to the pleadings
 - Possibility of obtaining admissions of fact and of documents with a view to avoiding unnecessary proof
 - The limitation of the number of expert witnesses
 - Any other matters which will aid in the disposal of the action
- **Trial**
- Must take place in open court from which summons was issued
- A witness not a party to the action may be ordered by the court either to leave until his evidence is required or after his evidence has been given or to remain in court after the evidence has been given until the trial is terminated or adjourned
- The party on whom the onus of proof rests according to the pleadings has the duty to lead his evidence first to prove a cause of action and establish the facts giving rise to her cause of action.
- The court is not competent to call any new witnesses in civil proceedings but may recall any witness to be cross examined.
- Case is proved on a balance of probabilities
- What happens if the parties disagree regarding the question of on whom the onus of proof rests? The court will direct which party must first adduce evidence