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QUESTION 1: M issues summons against N for **damages as a result of breach of contract**. The *nature of the claim* that M has against N is - Indicate the most accurate statement.

(1) a liquidated claim

(2) an illiquid claim

(3) an unliquidated claim

(4) a liquid claim

The most accurate statement is: (3)

A claim for damages due to breach of contract is an unliquidated claim which refers to any claim in respect of which the quantum must be determined, or where the status of the parties is affected.

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”) (See Uniform Rule 17(2)). (Also see study unit 6.3.2 – 6.3.3).

_____000_____

Option (1) is incorrect because **a claim for damages is not a liquidated claim**.

The expression “liquidated claim” has been interpreted as *“a claim for a fixed or definite thing, as, for instance, a claim for transfer or ejectment, for the delivery of goods, for rendering an account by a partner, for the cancellation of a contract or the like”*.

The courts have also indicated that the ***debt is liquidated where it is admitted or where the monetary value is capable of being ascertained speedily.***

The meaning of the phrase “liquidated demand” may be understood more fully if it is contrasted with what is known as an “unliquidated claim”. *Simply stated, an unliquidated claim is incapable of speedy ascertainment or mathematical calculation.*

Often a trial court is able to dispose speedily of the legal aspects relating to liability since the relevant law is clear and settled. However, *a great deal of time is consumed by leading evidence to ascertain the quantum of damages*, which in most instances involves highly technical evidence that is adduced from expert witnesses.

(See study unit 6.2.2).

_____000_____

Option (2) is incorrect, in that **there is no such claim as an “illiquid claim”**. However, the concept **illiquid summons procedure** does exist (See study unit 3.2 and 6.1), which is a species of the summons procedure (as opposed to the application procedure) and **consists of two types of summonses**: the **simple summons** and the **combined summons**.

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Option (4) is incorrect in that **a liquid claim must be based on a liquid document**. **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.

A cheque is the most common form of a liquid document – the payee (debtor) acknowledges by means of his or her signature, liability for payment of a fixed and ascertainable amount of money. (See study unit 7.2.2.1).

QUESTION 2: M issues summons against N for **damages** as a result of breach of contract. The facts in Question 1 remain the same. ***In order to commence proceedings, M must issue one of the following summonses:***

Indicate the most accurate statement.

(1) an illiquid summons

(2) a combined summons

(3) a simple summons

(4) a provisional sentence summons

The most accurate statement is: (2)

A combined summons is used where the nature of the plaintiff's claim is unliquidated, that is, where it is not a claim for a debt or liquidated demand. See Uniform Rule 17(2)(a) – Rule 5(2)(a) is the equivalent rule in the Magistrates' Court).

_____ooo_____

Option (1) is incorrect, *an "illiquid summons" contains a reference to a species of the genus "summons proceedings"* (ie, illiquid summons procedure). (See study unit 3.2)

The illiquid summons **proceedings** are instituted by means of a simple summons and combined summons.

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

- **The simple summons is used** where the plaintiff's claim is for a debt or liquidated demand and
- **The combined summons is used** where the plaintiff's claim is unliquidated. There is no such thing as an "illiquid summons". (See study units 6.2.1 and 6.3.1).

_____ooo_____

Option (3) is incorrect. **Simple summons** - Uniform Rule 17(2)(b) specifically provides that in every case "**where the claim is for a debt or liquidated demand**" the summons used **shall** be "as near as may be in accordance with Form 9 of the First Schedule". This summons is called the simple summons.

_____ooo_____

Option (4) is incorrect in that **the claim is not based on a liquid document**. **A provisional sentence summons can only be used if the cause of action is based on a liquid document**. (See study unit 7.2.).

QUESTION 3: Determine which of the following **groups of procedures are not related to each other:**

- (1) default judgment and summary dismissal
- (2) an exception and an application to strike out
- (3) an *ex parte* application and a *rule nisi*
- (4) a notice of motion and a declaration**

The groups of procedures which are **not** related to each other is: (4)

The notice of motion is simply a prescribed form which is used in application proceedings, and which is used **to institute an application**. It is also a “process”. (See study unit 2.1).

In contrast, **the declaration is a pleading which is served and filed on the defendant** at the start of litigation proceedings that have been instituted by way of a simple summons. It is served and filed after a defendant delivers a notice of intention to defend. (See study unit 6.2.3).

_____ooo_____

The option (1) [default judgment and summary dismissal]

groups of procedures are related to each other in that **default judgment and summary dismissal are examples of pre-trial judgments** that may effect a disposition of an action without trial. (See study unit 12.3 and 12.4.6).

_____ooo_____

The option (2) [an exception and an application to strike out]

groups of procedures are related to each other in that **both are remedial steps, that may be taken if pleadings are defective.** (See study unit 10.3 and 10.5).

_____ooo_____

The option (3) [an *ex parte* application and a *rule nisi*] : groups of procedures are related to each other in that **a rule nisi is issued in ex parte application proceedings if an order is issued which affects the rights of other persons** (other than the applicant). *By issuing this order such other person is granted the opportunity on the return day to show cause why the order should not be made final.*

Therefore there is a clear connection between a *rule nisi* and the *ex parte* application. (See study unit 2.2.1).

QUESTION 4: Indicate the most accurate statement.

- (1) *One of the rules for the drafting of processes is that only facts, and not the law, must be pleaded.*
- (2) To be defined as a liquid document, *payment of the debt** must be unconditional and must appear *ex facie* the document.
- (3) In the High Court, the amount tendered in settlement need only be available for payment and need not be paid into court.
- (4) The Uniform Rules of Court provide that the plaintiff has the sole responsibility to apply for the set-down of a matter.

_____ooo_____

The most accurate statement is: (1)

It is a standard rule for the drawing up of pleadings that *facts, and not the law, must be pleaded. Evidence must, however, not be pleaded.* (Study Uniform Rule 18(4), and also see study unit 8.3).

_____ooo_____

Option (2) is incorrect, because for a document to constitute a liquid document, the *indebtedness* (and not the payment!) *must appear unconditionally* and clearly *ex facie* the document. (See study unit 7.2.2.1).

_____ooo_____

Option (3) is incorrect, because Uniform Rule 34 does not make provision for *payment into court*. In fact, *no court rule makes provision for such a step*. (See Uniform Rule 34).

_____ooo_____

Option (4) is incorrect: *The plaintiff does not have the sole responsibility to apply for the set-down of a matter.* Because 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.* (See study unit 13.3.7).

QUESTION 5: Indicate the most accurate statement.

In the High Courts the position is as follows:

- (1) Pleadings are deemed closed only after the plaintiff has filed his or her replication.
- (2) In reply to a defendant's counterclaim, a defendant in reconvention may file a replication in reconvention.
- (3) An exception may be lodged *only* against a declaration or particulars of claim.
- (4) *It is possible to inspect a clearly specified document or tape recording in a party's possession and relating to a reasonably anticipated issue in the action before the close of pleadings.***

The most accurate statement is: (4)

Uniform Rule 35(14) ***expressly provides for inspection in these circumstances.***

Uniform Rule 35(14) provides as follows:

"After appearance to defend has been entered, any party to any action may, for purposes of pleading, require from the other party to make available for

inspection within five days a clearly specified document or tape recording in his possession which is relevant to a reasonably anticipated issue in the action and to allow a copy or transcription to be made thereof.”

_____000_____

Option (1) is incorrect. Pleadings are regarded as closed **only** in the circumstances set out in Uniform Rule 29. (Also see Rule 21A for the position in the Magistrates' court).

29 Close of Pleadings

Pleadings shall be considered closed-

- (a) if either party has joined issue without alleging any new matter, and without adding any further pleading;
- (b) if the last day allowed for filing a replication or subsequent pleading has elapsed and it has not been filed;
- (c) if the parties agree in writing that the pleadings are closed and such agreement is filed with the registrar; or
- (d) if the parties are unable to agree as to the close of pleadings, and the court upon the application of a party declares them closed.

_____000_____

Option (2) is incorrect. ***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 plaintiff (now the defendant in reconvention) responds to the defendant's (now the plaintiff in reconvention) counterclaim by means of a plea in reconvention. As is the case in convention where the defendant must respond to the plaintiff's claim, so must the defendant in reconvention also respond to the counterclaim.*** If not, he or she runs the risk of a default judgment being granted against him or her. (See study unit 9.3 and 9.4).

_____000_____

Option (3) is incorrect because ***a party may in terms of the court rules raise an exception to any pleading on one of the following grounds:*** ... *that the pleading...*

- *that the pleading as drafted is vague and embarrassing, and/or*
- *that it discloses no cause of action or defence.*

No such stated restriction does in fact exist. (See study unit 10.5 and 23.2).

QUESTION 6: Indicate the most accurate statement.

Summary judgment is relevant in the following circumstances:

- (1) where the defendant gives notice of his intention to defend on time
- (2) where the defendant fails to timeously deliver a notice of intention to defend
- (3) where the defendant has no bona fide defence to the plaintiff's claim***
- (4) where the action was instituted by means of a provisional sentence summons

The most accurate statement is: (3)

The relevant rules (Uniform Rule 32(2) and Magistrates' Court rule 14(2)) provide 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, if:*

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

(See study unit 12.4.2 and 22.1).

_____ooo_____

Option (1) is incorrect, in that *a notice of intention to defend will not always give rise to an application to court for summary judgment.* For example, *when the claim in the summons is not based on one of the following causes of action:*

- a liquid document; ➤ a liquidated amount in money;
- for delivery of specified movable property, or ➤ for ejection.

(See Uniform Rule 32(1) and Magistrates' Court rule 14(1).)

_____000_____

Option (2) is incorrect, because.... where the defendant fails to timeously deliver a notice of intention to defend.... *the plaintiff may then apply for default judgment.*

(See study unit 12.3.2 for a detailed discussion thereof).

_____000_____

Option (4) is incorrect, in that ***a provisional sentence summons is already an extraordinary and summary 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*). (See study unit 7.2 for a detailed discussion).

QUESTION 7: Indicate the most accurate statement.

- (1) Some of the items of property exempt from execution in terms of section 67 of the Magistrates' Courts Act 32 of 1944 are "professional books, documents or instruments necessarily used by the debtor" in his or her profession, in so far as the value of these items does not exceed R2 000.***
- (2) A cost order *de bonis propriis* is granted if a party to the action has been guilty of bad behaviour in conducting the action.
- (3) The National Credit Act 34 of 2005 *requires a written notice by way of a summons to be properly served on the defendant.*

(4) The *plaintiff's summons must contain a reference to section 26(1) of the Constitution* in instances where he or she *seeks an order for movable property* *
to be declared executable in the magistrates' court.

The most accurate statement is: (1)

Section 67 specifically excludes these items from execution. (See study unit 29 and activity question 2 at the end thereof).

_____ooo_____

Option (2) is incorrect, in that **costs de bonis propriis** are costs which the **court directs the unsuccessful party to pay out of his or her own pocket**, where he or she instituted proceedings or defended the matter **in a representative capacity** (for example, as attorney or executor). This usually applies where the litigation in question was conducted in a **mala fide, negligent or unreasonable manner**. (See study unit 28).

_____ooo_____

Option (3) is incorrect, because **the plaintiff must send a notice as contemplated in section 129(1) of the National Credit Act, 2005. There is no provision indicating that a summons must be used.** (See section 129(1) of the National Credit Act, 2005).

_____ooo_____

Option (4) is incorrect, in that such a notice [i.t.o S26(1) of the Constitution] is required in the instance of a summons in which an order is sought to declare, **immovable property, which is the home of the defendant, executable.**

(See study unit 18).

QUESTION 8: Indicate the most accurate statement.

- (1) The National Credit Act 34 of 2005 requires that the debt collection process must start with a letter of demand.
- (2) The request for further particulars in the magistrates' court is *meant only to allow a party to prepare a plea on the merits.*
- (3) An *exception in the magistrates' court is raised* on a pleading which contains *scandalous or vexatious allegations.*
- (4) A ***replication or subsequent pleading***, which would amount to ***a mere denial of allegations in the previous pleading, is unnecessary and pleadings will be deemed closed*** in terms of rule 21A(b) of the Magistrates' Court Rules.16

The most accurate statement is: (4)

The reading of Magistrates' Court rule 21 is essentially the same as Uniform Rule 25, and the procedures in the two courts are the same.

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 not be necessary, because a defendant will either admit the various allegations, or deny them and no new allegations are made.***

_____000_____

Option (1) is incorrect in that ***the National Credit Act, 2005 requires the debt collection process to commence with a notice*** contemplated in section 129(1) of the Act. (See study unit 18.4)

_____000_____

Option (2) is incorrect, as this procedure is no longer available to a defendant in terms of the Magistrates' Court rules. ***A request for further particulars may now only be requested after close of pleadings***, by any of the parties, for trial purposes.

See Magistrates' Court rule 16(2) in this regard.

_____000_____

Option (3) is incorrect, because Magistrates' Court rule 19(1) is a mirror image of Uniform Rule 23. As you will recall, ***an exception may 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.** (See study unit 23.2)

QUESTION 9: Indicate the most accurate statement.

- (1) In terms of Rule 42 of the Uniform Rules of Court, *any variation of judgment sought* ✗ *under this Rule must be done by way of the action procedure.*
- (2) Although ***the noting of an appeal*** against a decision of the High Court ***automatically suspends the execution of the judgment pending the outcome of the appeal, the party in whose favour judgment was given may approach the court that granted the original order for an order allowing execution.***
- (3) In terms of "section 14(3) of the Superior Courts Act, 2013" *a court hearing an appeal from a lower court may consist of only one judge.*
- (4) In terms of "section 16(1)(a)(i) of the Superior Courts Act, 2013" *a person has a right of appeal to the Supreme Court of Appeal against the judgment of a single judge.*

The most accurate statement is: (2)

The noting of an appeal automatically suspends the 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. (See study unit 32.2.2).

_____000_____

Option (1) is incorrect, since Uniform Rule 42 specifically provides for the use of the application procedure. ***If the setting aside of a judgment in terms of common law is sought, it is done by means of the action procedure.*** (See study unit 30.3.2). NB: not a variation of judgment.

_____000_____

Option (3) is incorrect, because section 14(3) of the Superior Courts Act, 2013, provides that ***a court which hears the appeal must consist of two judges. One judge therefore cannot hear such an appeal.*** (See section 14(3) of the Superior Courts Act, 2013).

_____000_____

Option (4) is incorrect. ***No [automatic] right to appeal right exist in the High court and each time application for leave to appeal must always be sought.*** A right to appeal only exists in the Magistrates' court. (See study unit 32.2.1).

QUESTION 10: Indicate the most accurate statement.

- (1) **Review of the proceedings and decisions of quasi-judicial bodies takes place in terms of both common law and legislation.**
- (2) *Review of the proceedings of a lower court takes place by way of an ordinary opposed application and corresponds in all respects to ordinary opposed application proceedings.*
- (3) *If review proceedings are successful, the High Court which reviewed the proceedings will always refer the matter back to the particular body for a decision according to the correct procedure.*
- (4) *Both **appeal** and review must take place within a reasonable time^x.*

The most accurate statement is: (1)

A superior court has inherent jurisdiction to entertain all causes arising within its area 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.** (See study unit 31.2.2)

Option (2) is incorrect. The procedure pertaining to review is set out in Uniform 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**, however it does not state that it should be opposed motion proceedings.* (See Uniform Rule 53).

_____000_____

Option (3) is incorrect. *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 for decision 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)

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. (See study unit 31.4).

_____000_____

Option (4) is incorrect, in that the Uniform Rules of Court (for example, Uniform Rule 50) *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 specified 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”***.

(See study unit 31.1.2).

4 September 2014: Unique number: 770087

QUESTION 1: Indicate the most accurate statement.

X issues a combined summons against Y in which X claims damages from Y. During the course of the litigation process the following occurs:

- (1) X avers in the particulars of the claim that a breach of contract occurred on 1 March 2010 instead of on 1 March 2011. Y notices the error and applies for the amendment of the particulars of claim. ✘
- (2) Y delivers a plea on the merits because he wishes to give notice of intention to defend the action. ✘
- (3) X is of the opinion that Y does not have a *bona fide* defence and that he has entered an appearance simply to delay the action. Consequently, X applies for a summary judgment. ✘
- (4) X is of the opinion that Y's plea does not disclose a defence and, therefore, she objects to Y's plea by raising an exception. ✓**

Most accurate statement: (4)

This is one of the grounds contained in Uniform Rule 23 on which ***an exception may be raised*** – being:

- *the plea does not disclose a defence* The other ground is of course that
- *the pleading is vague and embarrassing.*

It is important to note that ***this remedial procedure [an exception]*** applies to a ***pleading***. Magistrates' courts rule 19 is the mirror image of Rule 23. See study unit 10.5 and 23.2.

_____ooo_____

Statement (1) is incorrect. The error is clearly a factual error, and although the amendment procedure was designed to correct such errors, the principle is that ***a party may amend only his own pleading.***

Therefore it is X, the plaintiff, who must amend the particulars of claim and Y as the defendant may not do so. ^{See study unit 10.4 in this regard.}

_____000_____

Statement (2) is incorrect because **the purpose** of the **plea on the merits** is **not to indicate that a defendant wishes to defend the matter that has been instituted against him**, **but to disclose his defence fully**.

A **notice of intention to defend** is simply a notice, indicating that the matter will be opposed. It thus follows that **a notice of intention to defend must precede a plea on the merits**. ^{See study unit 9.2 and 9.3.}

_____000_____

Statement (3) is incorrect because the nature of the claim is clearly unliquidated, and also falls outside the ambit of Uniform Rule 32(1). **Summary judgment may only be used when a claim relates to one of the claims as provided for in Uniform Rule 32(1)**. ^{See study unit 12.4 (and study unit 22.1 dealing with the corresponding magistrates' courts rule 14).}

Rule 32- Summary Judgment-

- (1) Where the defendant has delivered notice of intention to defend, **the plaintiff may apply to court for summary judgment** on each of such claims in the summons as is only-
- (a) on a liquid document;
 - (b) for a liquidated amount in money;
 - (c) for delivery of specified movable property; or
 - (d) for ejectment;
- together with any claim for interest and costs.

QUESTION 2: Indicate the most accurate statement:

- (1) The term “combined summons” bears reference to the distinctive composition of the summons, namely that it combines in one document the summons and the declaration. ✘
- (2) Where a final interdict is sought, the court is *always* ✘ approached by way of the summons procedure. ✘

(3) Although the general rule is that evidence must be given viva voce and in open court, the court may, for sufficient reasons, order that evidence be given on affidavit. ✓

(4) An interlocutory application is brought by way of a notice of motion. ✗

Most accurate statement: (3)

When it is not possible for a witness to give evidence in person, and provided the necessary circumstances are present, he may be allowed to give evidence in other ways, such as by way of affidavit. It is **within a court's discretion** to allow this – see Uniform Rule 38(2), as well as study unit 13.4.2.

_____ooo_____

Statement (1) is incorrect, because **the combined summons is composed of...**

- **the summons and**
- **the particulars of claim.**

The **declaration is used only** when an action has been instituted by way of a **simple summons**, and refers to the **pleading that the plaintiff must deliver after** receipt of the **defendant's notice of intention to defend** (and there is no application for summary judgment). See study unit 6.2 and 6.3 respectively.

_____ooo_____

Statement (2) is incorrect, because although a **final interdict is usually sought by way of action**, it may also be sought by way of application if there is no factual dispute. The word “always” thus renders this statement incorrect. See study unit 16.1.3.

_____ooo_____

Statement (4) is incorrect, because **a notice of motion is used to commence a matter: a matter cannot be commenced by way of an interlocutory application**, and this type of application is used only when proceedings have already commenced.

An interlocutory application is simply brought on notice. See study unit 2.2.3.

QUESTION 3: Indicate the most accurate statement:

- (1) The *basic rule for the drafting of pleadings* is that the *material facts upon which the claim or defence is based must be fully pleaded*. Evidence is, therefore, also pleaded. ✘
- (2) A notice of intention to defend is the first pleading delivered by a defendant who wishes to defend an action. ✘
- (3) *Whether an action is instituted by way of a combined or a simple summons, the prescribed dies induciae for the delivery of a plea (with or without a counterclaim) is the same.*** ✓
- (4) In the High Court pleadings are deemed to be closed as soon as the plaintiff has delivered a replication. ✘

Most accurate statement: (3)

*Uniform Rule 22(1) specifically provides that **where a defendant entered an appearance, he must within 20 days either...***

- ***after receipt of a declaration,***
 - ***or after delivery of his notice of intention to defend***
- deliver a plea on the merits with or without***
- ⇒ *a counterclaim, or*
 - ⇒ *an exception*
 - ⇒ *application to strike out. See Uniform Rule 22(1).*

_____ooo_____

Statement (1) is incorrect because the rule is that **evidence may not be pleaded: only facts are pleaded**, and therefore **pleadings should not contain**

- *statements of law or*
- *the evidence required to establish the facts.* See study unit 8.2 and 8.3.

_____ooo_____

Statement (2) is incorrect because a **notice of intention to defend** is clearly **not a pleading** – see study unit 8.1 for a definition of a pleading and a process, and **study** study unit 8.2 in conjunction with study unit 8.1 for a full understanding of what a pleading entails.

_____ooo_____

Statement (4) is incorrect because Uniform Rule 29, which provides for the circumstances when close of pleadings occur, does not make provision for such an event. [where the plaintiff has delivered a replication]

Uniform Rule 29(b) requires the *last day allowed for a “subsequent pleading” to have elapsed where a replication has been delivered before [the last day] pleadings can be considered closed*. See Rule 29(b) in this regard.

Rule 29u- Close of Pleadings:

Pleadings shall be considered closed-

- (a) if either party has *joined issue without alleging any new matter*, and *without adding any further pleading*;
- (b) if the *last day allowed for filing a replication or subsequent pleading has elapsed* and it has not been filed;
- (c) if the *parties agree in writing that the pleadings are closed* and such agreement is filed with the registrar; or
- (d) if the *parties are unable to agree* as to the close of pleadings, and the *court upon the application* of a party *declares* them closed.

QUESTION 4: Indicate the most accurate statement:

Default judgment is relevant in the following circumstances:

- (1) if the defendant gives notice of intention to defend timeously
- (2) if a party fails to appear at the trial ✓**
- (3) if a party fails to timeously deliver a special plea
- (4) if a party fails to timeously request further particulars for purposes of trial

Most accurate statement: (2)

Uniform Rule 39(1) provides that *if a defendant does not appear at the trial, the plaintiff may prove his claim so far as the burden of proof lies upon him, and the court will give [default] judgment accordingly*.

See also Rule 39(3) for the situation when a *plaintiff does not appear at the trial – the court may either grant absolution of the instance, or judgment, as the case may be*.⁴

Statement (1) is incorrect, because ***the defendant is clearly not in default*** as the notice was given within the stated *dies induciae*. The defendant will only be in default if the notice was not delivered timeously. See study unit 12.3.2.1.

_____ooo_____

Statement (3) is incorrect because ***default judgment simply does not apply to a special plea: a special plea is required only when an objection is raised to the absence of certain facts which do not appear in a plaintiff's declaration or particulars of claim.***

A party is thus not compelled to deliver a special plea, and it does not form part of the series of pleadings that must be exchanged between the parties in order to record the issues in dispute between the parties. See study unit 10.6 read with study unit 8.2.

_____ooo_____

Statement (4) is incorrect because as in the case of statement (3) above, ***the request for further particulars for purposes of trial does not form part of the pleadings exchanged between the parties, and failure to request such particulars will simply result in the party not being able to prepare adequately for trial, but cannot result in judgment being given because of such failure.*** See study unit 13.3.1.

QUESTION 5: Indicate the most accurate statement:

- (1) ***An offer to settle in terms of Rule 34 of the Uniform Rules of Court can be used in both summons and application proceedings. ✓***
- (2) A judgment can only be delivered at the end of a trial, because the court is only competent to deliver a judgment after hearing and properly considering the evidence.
- (3) If a party intends instituting an action and a document which is vital in support of the claim is in the possession of a party who is to become the defendant in such an action, the prospective plaintiff may request the prospective defendant to make discovery thereof in terms of Rule 35 of the Uniform Rules of Court.
- (4) Only *viva voce* evidence may be given by a witness in open court.

Most accurate statement: (1)

The reason is found in Uniform Rule 34(14): this Rule specifically provides that ***an offer to settle*** in terms of Rule 34 applies ***whether an action is instituted*** by way of ***summons*** or ***application***. In fact, it also applies in third party proceedings in terms of Uniform Rule 13. Read this particular Rule.

_____ooo_____

Statement (2) is clearly incorrect because ***not only can default judgment be obtained prior to a trial, but also summary judgment***. *Moreover, in neither instance is evidence presented and a full hearing of the matter conducted.* See study unit 12.3 with regard to default judgment, and study unit 12.4 with regard to summary judgment, and note the procedure followed in each instance.

_____ooo_____

Statement (3) is incorrect because ***the rules of court do not make provision for discovery prior to the commencement of litigation proceedings***. ***Discovery is, with the exception of Rule 35(14), used after close of pleadings*** (see Rule 35(1)) and forms part of preparation for trial. See also study unit 13.3.3 (and 25.3 with regard to the position in the magistrates' court).

_____ooo_____

Statement (4) is incorrect because Uniform Rule 38 and section 40 of the Superior Courts Act, 2013 ***makes provision of evidence on commission, by way of interrogatories and by way of affidavit when it is not possible to give viva voce evidence***. See study unit 13.4.2 in this regard.

QUESTION 6: Indicate the most accurate statement:

- (1) If a defendant fails to timeously give notice of his intention to defend, the plaintiff must give a notice of bar before he may apply for default judgment against the defendant.
- (2) In the High Court, the amount tendered in settlement in terms of Uniform Rule 34 need only be available for payment, and need not be paid into court. ✓**
- (3) An exception may be raised only against a declaration or the particulars of claim.

(4) *Lis pendens* is an example of a plea in abatement, because it seeks to destroy an action.

Most accurate statement: (2)

Uniform Rule 34 **does not make provision for the payment into court of the amount offered in settlement. The amount need only be available, as on receipt of the acceptance of the offer by the plaintiff the defendant must pay the amount, or risk judgment plus costs being given against him** – see Rule 34(7). See also study unit 11.2 for a discussion of the offer to settle.

_____ooo_____

Statement (1) is incorrect because

- **a notice of bar applies only to pleadings**, and
- **a notice of intention to defend is not a pleading, but a process.**

Consequently, if a defendant fails to timeously deliver a notice of intention to defend, a plaintiff may immediately proceed to apply for default judgment against the defaulting defendant.

See study unit 8.1 for the definitions of a pleading and a process, and **study** Uniform Rule 26 thoroughly with regard to when a notice of bar must be given. See study unit 12.3.1 in this regard. It is important that you learn to read the wording of court rules accurately.

_____ooo_____

Statement (3) is incorrect: this statement ignores the explicit provision in Uniform Rule 23 that **an exception may also be raised if a pleading lacks averments which are necessary to sustain a defence – thus a clear reference to a plea on the merits.**

Be careful of absolute statements, (for example, those containing words such as “always” or “only”) when reading statements, because they are often incorrect. Read Uniform Rule 23 and see also study unit 10.5.

_____ooo_____

Statement (4) is incorrect because ***lis pendens* [“pending action”] is an example of a dilatory plea.** As the name indicates, **such a type of plea seeks to postpone a matter, not to destroy it.** See study unit 10.6.2.1 in this regard.

QUESTION 7: Indicate the most accurate statement:

- (1) Default judgments in the magistrates' courts must now be considered by registrars or clerks of the court in instances when such claims are based on an agreement governed by the National Credit Act 34 of 2005.
- (2) The defendant in the magistrates' court has an option of paying into court to ward off a summary judgment application.
- (3) A party may request further particulars for purposes of pleading in terms of rule 16 of the Magistrates' Court Rules.

(4) *No provision is made in the Magistrates' Court Rules for automatic discovery.*

Most accurate statement: (4)

This is of course correct because the magistrates' courts rules, as do the Uniform Rules, *provide that a notice to discover may be given to a party in order to persuade a party to discover documents and tape recordings.* Discovery does therefore not automatically take place after close of pleadings, but *on request.* ^{Read} rule 23(1) in this regard, as well as Uniform Rule 35(1).

_____ooo_____

Statement (1) is incorrect because magistrates' courts rule 12(5) specifically provides that *the registrar or clerk of the court must refer a request for default judgment in these circumstances to the court for consideration and judgment or appropriate order.* Read this rule attentively and see also study unit 22.2.

_____ooo_____

Statement (2) is incorrect. In terms of magistrates' courts rule 14(3) *a defendant has only two options:*

- either to give security, or to
- satisfy the court on affidavit of his *bona fide* defence.

There is clearly no provision for payment into court. Read this rule attentively and see also study unit 22.1.3 in this regard.

_____ooo_____

Statement (3) is incorrect because no such procedure is available to a party in the magistrates' courts. *A request for further particulars may only be requested after close of pleadings and only for purposes of trial.* See Magistrates' Courts rule 16(2) as well as study unit 25.8 in this regard.

QUESTION 8: Indicate the most accurate statement:

- (1) *If a party fails to respond to a request for discovery in the magistrates' courts, the party requesting discovery may enforce such request in terms of rule 23(8).*
- (2) In terms of rule 21A of the Magistrates' Court Rules only the court may declare pleadings closed, and parties may not agree that pleadings have closed.
- (3) A party may request further particulars for purposes of pleading in the magistrates' courts in terms of rule 16 of the Magistrates' Court Rules.
- (4) The grounds on which a party may raise an exception in the magistrates' courts *differ substantially* ✕ from those that apply in the High Court for the same purpose.

Most accurate statement: (1)

As in the case of the High Court, *a party must within a certain period after close of pleadings give notice to the other party requiring discovery of documents in the possession of such party or under his control. Discovery therefore takes place at the request of a party.* Rule 23(8) specifically provides that ***if a party fails to make discovery, the party requesting discovery may apply to court for an order ordering compliance.***

Failing compliance, the court may:

- then either dismiss the action or
- strike out the defence, whichever is applicable. See rule 23(8).

_____ooo_____

Statement (2) is incorrect because rule 21A clearly provides that the court will only declare pleadings closed on the application of a party if the parties are unable to agree that pleadings are closed: see rule 21A(c) in this regard.

_____ooo_____

Statement (3) is incorrect. ***The rules of court make no provision whatsoever for further particulars for purposes of pleading.*** See also the comment under Question 7 option (3) above.

_____ooo_____

Statement (4) is incorrect because ***the opposite is true***: after the recent introduction of the new magistrates' ***courts rules the grounds for an exception in the magistrates' courts are similar to those for an exception in the High Court.*** ^{Compare}

Uniform Rule 23 and magistrates' courts rule 19. 6

QUESTION 9: Indicate the most accurate statement:

- (1) A cost order ***de bonis propriis*** is granted if a party to the action has been guilty of bad behaviour in conducting an action.
- (2) *Some of the items of property exempt from execution in terms of section 67 of the Magistrates' Courts Act 32 of 1944 is "professional books, documents or instruments necessarily used by the debtor in his profession, in so far as the value of these items does not exceed R2 000".***
- (3) The National Credit Act 34 of 2005 requires a written notice *by way of a summons* ✕ to be properly served on the defendant.
- (4) The plaintiff's summons must contain a reference to section 26(1) of the Constitution in instances where he seeks an order for *movable property* ✕ to be declared executable in the magistrates' court.

Most accurate statement: (2)

Section 67 of the Magistrates' Courts Act, 1944 specifically ***excludes these items from execution*** being: "*professional books, documents or instruments necessarily used by the debtor in his profession, in so far as the value of these items does not exceed R2 000*". ^{See study unit 29 and activity question 2 at the end thereof in this regard.}

_____000_____

Statement (1) is incorrect, in that costs ***de bonis propriis*** are costs which the court directs the unsuccessful party to pay out of his own pocket where he instituted proceedings or defended the matter in a representative capacity (for example, as an attorney or an executor). This usually applies where the litigation in question was conducted in a *mala fide*, negligent or unreasonable manner by the person acting in a representative capacity. ^{See study unit 28.}

Statement (3) is incorrect because the **plaintiff must send "a notice"** as contemplated in section 129(1) of the National Credit Act, 2005. There is no provision indicating that a summons must be used. Read this section attentively. ^{See also Part 1 study unit 2.2.}

_____ooo_____

Statement (4) is incorrect: such a notice [i.t.o section 26(1) of the Constitution] is required in the instance of a summons in which an order is sought to declare **immovable property** that is the home of the defendant, executable. ^{See Part 1 study unit 2.}

QUESTION 10: Indicate the most accurate statement:

- (1) The parties are not restricted on appeal to the record of the proceedings appealed against.
- (2) A High Court has inherent jurisdiction to *review the proceedings of High Courts* ✗ as well as of lower courts.
- (3) Leave to appeal against a decision of a full bench sitting as court of first instance must be obtained from the court appealed against, or, if refused, the leave of the Supreme Court of Appeal.**
- (4) Two judges of a High Court must hear an appeal against a decision of a magistrates' court.

Most accurate statement: (3)

This procedure is in accordance with the provisions of section 17(2) of the Superior Courts Act, 2013.

See also study unit 32.3.2.4. Please note that this answer can be located in the **amended** study unit 32 which was sent to you by way of Tutorial letter 102/3/2014. Please ensure that you replace study unit 32 in the study guide with this amended study unit before the examination, and that you **study the amended study unit for the examination and not the old version!**

_____ooo_____

Statement (1) is incorrect because **the complaint is not directed at the proceedings that took place** (as is the case when dealing with review), **but at the result of the trial. Therefore the parties are restricted on appeal to the record of the proceedings** appealed against. ^{See study unit 31.1.2.}

Statement (2) is incorrect because section 21(1)(b) of the Superior Courts Act, 2013 **authorises the High Court to review *only proceedings of lower courts***.

The High Court may also, in terms of the common law, review the proceedings of quasi-judicial bodies, such as the liquor licensing board which is not a court in the usual sense of the word. **Magistrates' courts do not have any powers of review.** ^{See}

study unit 31.2.

ooo

Statement (4) is incorrect because although section 14(3) of the Superior Courts Act, 2013 provides that two judges must in the normal course of events hear the appeal, it further provides that the Judge President may direct that a third judge be added to hear the appeal in the event of the two judges not being in agreement. Therefore, normally the appeal would be heard by two judges, **but not in all instances**. As an absolute statement this option is therefore incorrect. Read section 14(3).

Due date: 3 April 2013 - Unique number: 382648

QUESTION 1

As N's landlord, M wishes to **evict** N from industrial premises that N rents in terms of a contract of lease. The exact nature of the claim that M will have against N is **Indicate the most accurate statement.**

- (1) an illiquid claim
- (2) a liquid claim.
- (3) a debt or liquidated demand**
- (4) an unliquidated claim.

The most accurate statement is: (3)

A claim for eviction is a claim for a fixed or definite thing, and therefore falls within the meaning of **"debt or liquidated demand"** according to the guidelines provided by the courts. Thus, M would have a claim for a debt or liquidated demand against N. See study unit 6.2.2.

_____000_____

Option (1) is incorrect.

Summons proceedings comprise...

- **illiquid** summons proceedings and
- **liquid** summons proceedings.

However, summons proceedings are instituted by means of the

- **provisional sentence** summons,
- **simple** summons and
- **combined** summons.

Thus, **the term "illiquid" refers to simple summons and combined summons proceedings, and not to any specific type of claim.** See study unit 3.2.

_____000_____

Option (2) is incorrect.

As already stated, **summons proceedings comprise illiquid summons proceedings and liquid summons proceedings.**

However, **summons proceedings are instituted by** means of *the provisional sentence summons, simple summons and combined summons*.

Thus, the term **“liquid”** refers to **provisional sentence summons** proceedings, **and not to any specific type of claim.** See study unit 3.2.

_____000_____

Statement (4) is incorrect because **a claim for eviction is not an unliquidated claim.**

As already stated, **a claim for eviction is a claim for a fixed or definite thing, and falls within the definition of a liquidated claim.**

An unliquidated claim refers to any claim in respect of which **the quantum must be determined, or where the status of the parties is affected.** See study units 6.2.2 and 6.3.2.

QUESTION 2:

The facts in Question 1 remain the same. *As N’s landlord, M wishes to evict N from industrial premises that N rents in terms of a contract of lease. In order to commence proceedings, M must issue one of the following summonses:*

Indicate the most accurate statement.

- (1) an illiquid summons
- (2) a liquid summons
- (3) a combined summons
- (4) a simple summons.**

The most accurate statement is: (4)

As already stated, **a claim for eviction is a claim for a fixed or definite thing.** The claim is based on **“debt or liquidated demand”.**

The **simple summons is employed where** the plaintiff’s claim is for a **debt or liquidated demand** (conforms to Form 9). See study units 6.2.1- 6.2.2 and Rule 17(2)(b).

_____000_____

Statement (1) is incorrect. **Illiquid summons proceedings are instituted by means of the simple summons and combined summons.** The simple summons and combined

summons may be distinguished from each other on the basis of the nature of the claim in respect of which each is applied.

- The simple summons is applied where the plaintiff's claim is for a "debt or liquidated demand" and
- The combined summons is used where the plaintiff's claim is unliquidated.

There is no such thing as an "illiquid summons". Please note the correct terminology, as you will be penalized in the examination for using incorrect terminology. See study units 6.2.1 and 6.3.1.

_____ooo_____

Statement (2) is incorrect. ***Liquid summons proceedings are instituted by*** means of the ***provisional sentence summons only if the cause of action is based on a liquid document.***

The claim for eviction is not based on a liquid document. Again, the terminology is incorrect and one of the purposes of the question was to teach you the use of the correct terminology. See study unit 7.2.

_____ooo_____

Statement (4) is incorrect. ***As already stated, a combined summons is used where the plaintiff's claim is unliquidated. A claim for eviction is not an unliquidated claim, but falls within the definition of a "debt or liquidated claim".*** See S units 6.2.2 and 6.3.2

QUESTION 3: Indicate the most accurate statement:

- (1) Application proceedings may be instituted by way of the *ex parte* application, the "ordinary application" and the urgent application.
- (2) If a party wishes to oppose an application, he must deliver a notice of intention to defend within the *dies induciae*.
- (3) *The purpose of a special power of attorney essentially is to define the extent of an attorney's mandate.***
- (4) *Any* ~~x~~ *indigent person* may approach the registrar of his local High Court for *free legal services* in terms of Uniform Rule 40.

The most accurate statement is: (3)

A properly drafted power of attorney is important for the protection of both the attorney and the client, in that it...

- prevents the institution of a claim or defence in the name of a party that never authorised such action and
- it prevents a party from repudiating a properly authorised process afterwards or from denying that authority was given. See study unit 4.2.2.

_____ooo_____

Statement (1) is incorrect. There are **two specific types of application used to institute litigation**, namely the:

- “ordinary” application (Form 2(a)) and the
- *ex parte* application (Form 2).

The “ordinary” application is used when notice of the proceedings must be given to other parties, and

The *ex parte* application is used when it is unnecessary to notify another party of the proceedings.

The **urgent application is a further form of the application proceedings** and is used when **urgent relief is necessary** which the party cannot be afforded at a hearing in due course (conforms to Form 2(a)). See study units 2.2.1–2.2.3 and Rule 6(12)(b).

_____ooo_____

Statement (2) is incorrect. A party **opposes an application by delivering a notice of intention to oppose within the dies induciae**. It should be noted that the notice of intention to oppose fulfils the same function as the notice of intention to defend in summons proceedings. See study unit 2.3.2 and Rule 6(5)(d)(i).

_____ooo_____

Statement (4) is incorrect. Rule 40 sets out the procedure in terms of which **indigent persons** may obtain **free legal aid by approaching the Registrar**. Rule 40(2)(a) specifies who qualifies for legal aid (not all indigent persons). These proceedings are called **in forma pauperis proceedings**. See Rule 40 and study unit 4.5.

QUESTION 4: Indicate the most accurate statement:

- (1) A party who fails to timeously deliver a notice of intention to defend, is automatically barred.
- (2) A party who fails to timeously deliver a declaration and who despite having received a notice of bar, persists in such failure, is in default as well as barred.**
- (3) To enable a defendant to deliver her plea on the merits, she can request further particulars from the plaintiff in terms of Uniform Rule 21(2).
- (4) The objective of the pre-trial conference in terms of Uniform Rule 37 is to facilitate a settlement between the parties.

The most accurate statement is: (2)

A declaration is a pleading and one of the “any other pleadings” referred to in Rule 26 in respect of which a notice of bar must be given before an application for default can be brought.

Any party that fails to deliver the pleading referred to in the notice of bar within the time required therein shall be in default of filing such pleading, and ipso facto barred. See study unit 12.3.2.3 and Uniform Rule 26.

_____000_____

Statement (1) is incorrect because a party who fails to deliver a notice of intention to defend timeously is “in default” of delivering the notice (and not “barred”).

- **A plaintiff can thus immediately apply for default judgment.**
- **This notice is not a pleading, but a process, and bar applies only to pleadings.**
- **Automatic bar only applies to a replication and subsequent pleadings** - read Uniform Rule 26 carefully.

_____000_____

Statement (3) is incorrect because **the Uniform Rules do not provide for a request for further particulars for purposes of a plea – only after close of pleadings may further particulars be requested in terms of Rule 21(2), but only such particulars as are strictly necessary for preparation for trial.** See study unit 13.3.1 for a discussion of this step.

_____000_____

Statement (4) is incorrect because ***the purpose of the pre-trial conference is the curtailment of a trial.***

In fact, *if the court is of the opinion that a party failed substantially to advance the effective finalisation of the litigation, the court may penalise such party by awarding a special costs order.* See Uniform Rule 37 and study unit 13.3.2.

QUESTION 5: Indicate the most accurate statement.

(1) An offer to settle in terms of Rule 34 of the Uniform Rules of Court can be used in both summons and application proceedings.

(2) A judgment can only be delivered at the end of the litigation process, in other words, at the end of a trial, because the court is only competent to deliver a judgment after hearing and properly considering the evidence.

(3) If a party intends instituting an action and a document which forms a vital part of the claim is in the possession of a party who is to become the defendant in such an action, the prospective plaintiff can require the prospective defendant to make discovery thereof in terms of Rule 35 of the Uniform Rules of Court.

(4) Only *viva voce* evidence can be given by witnesses in open court.

The most accurate statement is: (1)

Uniform Rule 34(14) clearly stipulates that the provisions of this Rule [i.r.o an offer to settle] apply mutatis mutandis to application proceedings, claims in reconvention and proceedings in terms of Rule 13 (third party proceedings). See Uniform Rule 34(14).

_____ooo_____

Statement (2) is incorrect because ***it is possible for the court to give judgment disposing of a matter even before the hearing. This may occur if an application for summary judgment or for default judgment is successful.***

It is also possible for a party to consent to judgment, but judgment in such instance is normally not given in open court, but in chambers. See Uniform Rule 32 (study unit 12.4); Uniform

Rule 31 (study unit 12.3) and study unit 12.2 respectively.

_____ooo_____

Statement (3) is incorrect because **discovery** in terms of Rule 35 **is not possible before close of pleadings**. The **purpose of discovery is not to assist a prospective party to determine his prospects in respect of a prospective defendant – the purpose is to assist the court and the party to discover the truth, and in so doing, to effect a fair determination of the matter**. This can obviously only happen once the dispute has been adjudicated. See Uniform Rule 35 and study unit 13.3.3.

_____ooo_____

Statement (4) is incorrect because **oral evidence is only one method of many** in placing evidence before court. Although oral evidence must be heard unless special circumstances exist, **evidence can also be heard on commission, by interrogatories and on affidavit**. See study unit 13.4.2 for a full discussion.

[Note that this statement is a so-called absolute statement, denoted by the word “only”. Be careful of such statements – they are often incorrect (not always!) because either they contain half-truths, or they conveniently ignore exceptions].

QUESTION 6: Indicate the most accurate statement.

- (1) Only *two* ✗ types of summonses are found in the magistrates’ courts, namely the simple summons and the provisional sentence summons.
- (2) In the magistrate’s court it is *unnecessary* ✗ for a plaintiff to aver in a summons that a particular court has jurisdiction to hear a particular matter.
- (3) Payment into court in terms of Rule 18 of the magistrates’ courts rules, and tender, are methods for settling *any* ✗ claim in the magistrate’s court.
- (4) The grounds for exception in the magistrate’s court are essentially the same as those that apply in the High Court.**

The most accurate statement is: (4)

See study unit 21.4 and Tutorial Letter 102/3/2013.

Rule 19(1) of the Magistrates’ **Court Rules set out two grounds for an exception** which are essentially the same as those that apply in the High Court, namely:

- where *any pleading is vague and*
- *the pleading is embarrassing or lacks averments to sustain an action or defence.*

Statement (1) is incorrect. **There are now three types of summons used in the magistrates' courts**, namely:

- (i) a **simple** summons (debt or liquidated demand: ^{rule 5(2)(b)});
- (ii) a **combined** summons (unliquidated claims: ^{rule 5(2)(a)}) and
- (iii) a **provisional sentence** summons ^(rule 14A). See study units 18.4 and 20.2 and Tutorial Letter 102/3/2013.

_____ooo_____

Statement (2) is incorrect. There are **two instances** in which it is **compulsory for a plaintiff to aver in a summons that a particular court has jurisdiction to hear a particular matter**.

- (i) where a plaintiff 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** (rule 5(6)(a)), and
- (ii) 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 jurisdiction** (rule 5(6)(b)). ^{See study unit 18.4.5 and Tutorial Letter 102/3/2013}

_____ooo_____

Statement (3) is incorrect. This rule has been amended and is now in essence a copy of the Uniform Rules of Court. **These methods for settling a claim cannot be used in respect of "any" claim. Also note that payment into court is no longer possible.** **An offer to settle and tender can be used only in respect of monetary claims or the performance of some act.** It is also important to note that no offer or tender in terms of this rule **shall be disclosed to the court at any time before judgment has been granted**. ^{See study unit 19.6, rule 18 (1)–(2) and Tutorial Letter 102/3/2013.}

QUESTION 7: Indicate the most accurate statement.

- (1) The replication is the final pleading that can be exchanged in the magistrates' courts.
- (2) The defendant in the magistrates' courts has an option of paying into court to ward off a summary judgment application.

(3) Rule 19 of the magistrates' courts rules provides that an exception can be used in both summons proceedings and application proceedings.

(4) The plaintiff's summons must contain a reference to section 26(1) of the Constitution in instances where he seeks an order for immovable property on which the defendant lives to be declared executable in the magistrates' courts.

The most accurate statement is: (4)

Such a reference must be included in a summons where an order is sought to declare **immovable property** especially executable. This requirement is the result of the ruling in *Gundwana v Steko Developments* 2010^{3 SA 608 (CC)}. See Tutorial Letter 102/3/2013.

_____000_____

Statement (1) is incorrect. Rule 21 now introduces the concept of further pleadings following a plaintiff's replication (reply) in the magistrate's court. In this respect the position in the magistrate's court is now similar to that of the High Court, **where it is possible to exchange further pleadings.** See rule 21 and Tutorial Letter 102/3/2013.

_____000_____

Statement (2) is incorrect because:

firstly *payment into court has been done away with* and

secondly rule 14(3)(a) *provides that security may be given to the satisfaction of the registrar or clerk of the court.*

Security is not the same as payment into court. Read the provisions of the rules of court carefully and ensure that you always use the correct terminology. See rule 14(3)(a). See Tutorial Letter 102/3/2013.

_____000_____

Statement (3) is incorrect. **An exception is raised in respect of any pleading** being:

- vague and embarrassing or
- lacks averments which are necessary to sustain an action or defence.

Pleadings do not find application in application proceedings.

Pleadings find application in summons proceedings. See rule 19 and Tutorial Letter 102/3/2013.

QUESTION 8:

Indicate the most accurate statement.

- (1) ***A combined summons is preferred to the simple summons in matters relating to the National Credit Act 34 of 2005, as the National Credit Act requires many averments to show compliance.***
- (2) The effect of an *order for the absolution of the instance* is that the matter is considered *res iudicata*.✘
- (3) The National Credit Act 34 of 2005 requires the debt collection process to *commence with either a simple summons or a combined summons*.✘
- (4) The National Credit Act 34 of 2005 regulates consumer credit only in respect of goods sold and leased and credit granted.

The most accurate statement is: (1)

As the National Credit Act ***requires many averments to show compliance***, a ***combined summons is preferred in matters relating to the National Credit Act***. A summons for the enforcement of a debt in terms of the Act must contain sufficient particulars to determine whether the requirements set out in the Act have been met. See study unit 18.4 and Tutorial Letter 102/3/2013

_____000_____

Statement (2) is incorrect. The statement is incorrect because it creates the impression that a matter that has been heard and in relation to which an order of absolution of the instance has been given, is ***res iudicata***, *which would allow a defendant to raise a special plea should the plaintiff again issue a summons on the same cause of action.*

The effect of an order for absolution of the instance is that the parties are placed in the same position in which they would have been had the action not been instituted. This means that the plaintiff can re-issue a summons against the defendant on the same cause of action.

Remember, a matter is ***res iudicata*** only if a court makes a finding on the merits determining the rights of the parties.

This is precisely what does not happen in an instance where the court grants an order for absolution from the instance. See study unit 27.1.

_____000_____

Statement (3) is incorrect. The National Credit Act 34 of 2005 does not require the debt collection process to commence with either a simple summons or a combined summons. *The Act requires the debt collection process to commence with a letter of demand.* See study unit 18.4, section 129(1)(a)–(b) of the Act and Tutorial Letter 102/3/2013.

_____000_____

Statement (4) is incorrect. The National Credit Act *regulates consumer credit regarding goods to be purchased, leased or otherwise acquired, service rendered, or credit granted.* See Tutorial Letter 102/3/1013.

QUESTION 9: Indicate the most accurate statement.

- (1) If a party in a civil action is dissatisfied with the judgment of the Supreme Court of Appeal, such party can still appeal to the Constitutional Court.
- (2) An appeal from a lower court is heard by a provincial division of the High Court in terms of section 83 of the Magistrates' Court Act 32 of 1944.**
- (3) Lower court proceedings are reviewed by way of the summons procedure.
- (4) Both appeal and review must take place within a *reasonable time*.✘

The most accurate statement is: (2)

Section 83 of the Magistrates' Courts Act 32 of 1944 provides that a party to any civil suit or proceeding in a lower court may appeal to the provincial or local division of the **Supreme Court**. See section 83 of the Magistrates' Courts Act.

_____000_____

Statement (1) is incorrect because the statement is unqualified.

- The Supreme Court of Appeal is the highest court in non-constitutional matters;
- The Constitutional Court only hears constitutional matters.

Ordinary civil matters therefore cannot be taken to the Constitutional Court on appeal.

See study unit 32.4.3.2 as well as activity question 5 at the end of study unit 32. (Please note that this position has changed in the interim and the Constitutional Court will in future be the apex court. We will inform you of the implications of this amendment. See also Tutorial Letter 201/1/2013).

_____ooo_____

Statement (3) is incorrect. Rule 53(1) of the Uniform Rules of Court provides that the proceedings of **lower courts are reviewed by means of the application procedure.**

See study unit 31.3

_____ooo_____

Statement (4) is incorrect. One of the distinctions between appeal and review is that an **appeal is noted within a stipulated number of days**, whereas there is **no fixed period within which proceedings with regard to reviews must be brought, although this must be done within a reasonable time.** See study unit 31.1.2.

QUESTION 10: Indicate the most accurate statement.

- (1) The *proceedings of all courts* ✘ and *quasi-judicial bodies are subject to review.*
- (2) A court hearing an appeal from a lower court, as in the case of a court of first instance, consists of a single judge.
- (3) A litigant who is dissatisfied with the outcome of a matter in a magistrate's court always has one appeal as of right.**
- (4) An application for leave to appeal to the Supreme Court of Appeal must be lodged in *duplicate* ✘ with the *Chief Justice.* ✘

The most accurate statement is: (3)

The only time a right of appeal is mentioned, is when an appeal is noted against the judgment of a magistrate. An aggrieved litigant is allowed only **one** appeal as of right in respect of decisions of magistrates' courts. This right is derived from section 83 of the Magistrates' Courts Act 1944, which **provides that a party "may appeal to the provincial or local division of the Supreme Court having jurisdiction to hear the appeal ..."**

Contra this position, no appeal can be lodged against a judgment of a High Court without leave to appeal from an appropriate High Court. See study unit 32.1.1.

Statement (1) is incorrect. *The proceedings of a High Court are not subject to review by other High Courts*, and therefore statement (1) is incorrect when it states that the proceedings of **all** courts are subject to review. *Only the proceedings of lower courts and quasi-judicial bodies are subject to review and then only by the High Court.* See study units 31.1.1 and 31.2.1.

_____ooo_____

Statement (2) is incorrect. *A court hearing an appeal from an inferior court must be constituted before not less than two judges* (section 13(2)(a)(i)). Section 13(2)(a)(i) of the Supreme Court Act 1959 specifically provides that **at least** two judges must hear the appeal

(study unit 32.3.2). Please take note of the wording of the section! Please ensure that your preparation includes the accurate reading of provisions and court rules so that your answers in the examination reflect such detail.

Supreme Court Act 59 of 1959

Section 13(1)(2)- Constitution of courts of provincial or local divisions

- (2)(a) The court of a provincial or local division shall, except where it is in terms of any law required or permitted to be otherwise constituted-
- (i) for the hearing of any appeal against a judgment or order of an inferior court, be constituted before not less than two judges; and
 - (ii) for the hearing of any appeal against a judgment or order of a court of a provincial or local division constituted before a single judge of such provincial or local division, be constituted before three judges.

_____ooo_____

Statement (4) is incorrect on two grounds.

First, an *application for leave to appeal* to the Supreme Court of Appeal *must be lodged in triplicate with the Registrar*.

Secondly, because *the court is now presided over by the “President” and not the “chief justice”*. See study unit 32.4.3.2 and Tutorial Letter 102/3/2013.
