Civil Procedure II - Part II: Civil proceedings in the High Court

Activities - Study unit 1: Demand & Forms of Proceedings SG pp 16 & 17

A *material fact* is…

an occurrence, event, or information that is sufficiently significant to influence an individual into acting in a certain way, such as entering into a contract. In formal court procedures, a material fact is anything needed to prove one party's case, or tending to establish a point that is crucial to a person's position.

'Material' means that it matters. It is not trivial. For example, you are refusing to pay rent on an apartment because the roof leaks, which is important, not because there is a small scratch on the front door.

A *material issue* is…

a question that is in dispute between two parties involved in litigation, and that must be answered in order for the conflict to be resolved.

There is a dispute of fact when…

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

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

(3) the respondent concedes that he or she has no knowledge of the main facts stated by the applicant, but may deny them, putting applicant to the proof and himself or herself giving, **or** proposing to give, evidence to show that the applicant and his or her deponents are biased and untruthful, or otherwise unreliable, and that certain facts upon which the applicant and his or her deponents rely to prove the main facts are untrue. SG pp 16

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

A fact is said to be in dispute when it is alleged by one party and denied by the other, and by both with some show of reason. A mere naked allegation, without evidence, or against the evidence, cannot create a dispute within the meaning of the law.

'Dispute of fact' means that the disagreement is **a dispute about what the facts are**, not about how the law will interpret them or about their effect on any of the parties. It is about whether the roof leaks or doesn't leak, not about the legal obligations of landlord and tenant in this situation.

There is a dispute in law when…

A dispute of law can arise a.r.o an erroneous determination of the legal rules governing procedure, evidence or the matters at issue between parties. If a dispute is about the *essentialia or naturalia* of a contract of purchase and how the law will interpret them - the dispute is a dispute in law.

Example: A:'This radio is broken!' B: 'I know. I told you it was broken when I sold it to you!' A: 'No you did not! I will see you in court!'

This is a 'material dispute of fact **in law'** Fact: A and B agree the radio is broken, dispute: Did A know that the radio was broken when he bought it?

Scenario: Abel sells his farm to Jafta for R500 000. Jafta takes occupation of the farm and begins to farm. Despite a reminder, he refuses to make any payments towards the purchase price of the farm in terms of the contract of sale. Jafta alleges that the farmhouse is derelict and that the borehole is not as strong as he thought when he viewed the farm, which means that he will not be able to irrigate as much land as he planned to, and so the farm is useless to him.
Abel wants to cancel the sale because of the failure to pay the purchase price and to take possession of his farm again. **The question now is which form of proceedings Abel ought to use to achieve the desired relief.**

Carefully read the set of facts above and answer the following questions:

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

There was a **dispute in law** between the parties.

» 'Nature' refers to the type of dispute, i.e. a dispute in law or a factual dispute.

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(2) What is the reason for your answer?

Abel wants to cancel the contract owing to Jafta's behaviour.

The question **whether Abel has grounds** for cancellation is clearly a **question of law**.

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

No, the answers would not have differed.

In this case, **the dispute is in law**, despite the fact that the one party makes a number of factual allegations which would indicate that there had indeed been an agreement (e.g. that it had been agreed that R500K would be the price for the specific farm and that the parties had wanted to purchase and sell the farm), while the other party would deny some of these allegations.

Since the dispute is about the *essentialia* of a contract of purchase, the dispute is a dispute in law. The true state of affairs can be established by the court on hearing the oral evidence.

NB: However, if the dispute related to whether or not the seller made a **misrepresentation** to the purchaser which led to the conclusion of the contract (e.g. re- water capacity of the borehole), a real **dispute of fact** would have arisen. (In practice, damages will also be claimed, and, damages are claimed by way of the combined summons.)

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(4) With reference to the set of facts, which type of proceedings would be appropriate in the light of the above questions? Substantiate? **Application proceedings.** We are dealing with a legal dispute and not with a genuine dispute of fact. Consequently, the dispute may be decided simply on the basis of the documents before the court.

Scenario 1: Sandra has passed her attorney's admission examination and her contract as a candidate attorney expires soon. She would like to be admitted as an attorney and must approach the court with an application to be admitted. Sandra's principal advises her to draw up the application herself, and she must decide which type of application is the correct one.

Activity 2.1: SG pp 22/23

Carefully read through the scenario above and then answer the following questions:

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

To put it simply, they are determined by the questions you must ask yourself if you find yourself in this kind of situation.

Thus, the first question you must ask is

» are proceedings being instituted or is the application related to existing proceedings? (i.e. proceedings which have already been instituted)

Logically, the second question which follows is

» whose rights or interests are affected by this application?

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

» **An *ex parte* application**: the above questions should have indicated that (independent) proceedings will be instituted and that the interests and rights of no-one other than Sandra will be affected by the application.

» Therefore, she is not obliged to give notice of the application to anyone else.

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(3) What documents comprise this application?

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

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

Rule 6: Applications

(1) Save where proceedings by way of petition are prescribed by law, **every application shall be brought on notice of motion supported by an affidavit as to the facts** upon which the applicant relies for relief.

Scenario 2: On his divorce from his wife, Theresa, Paul was awarded custody of their minor child. As agreed, Theresa takes the child on holiday, but, at the end of the holiday, she refuses to return the child to Paul. Paul is very worried about the child's welfare and school attendance, and approaches the court for an order to have the child removed from Theresa's possession and care and to be returned to him. You are the candidate attorney with whom Paul is consulting. Paul wants to know what legal procedure can be used in these circumstances and also how soon he can expect the relief he seeks.

Activity 2.2: SG pp 26

Carefully read through the scenario above and then answer the following questions:

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

The **'ordinary' application** will be used, since Theresa must be given notice of the application in order to have the opportunity to put her side of the story.

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

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

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

(Heading)

NOTICE OF MOTION

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

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

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

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

(d) Further and/or alternative relief.

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

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

Activity 3.1: NO ACTIVITIES FOR SU 3

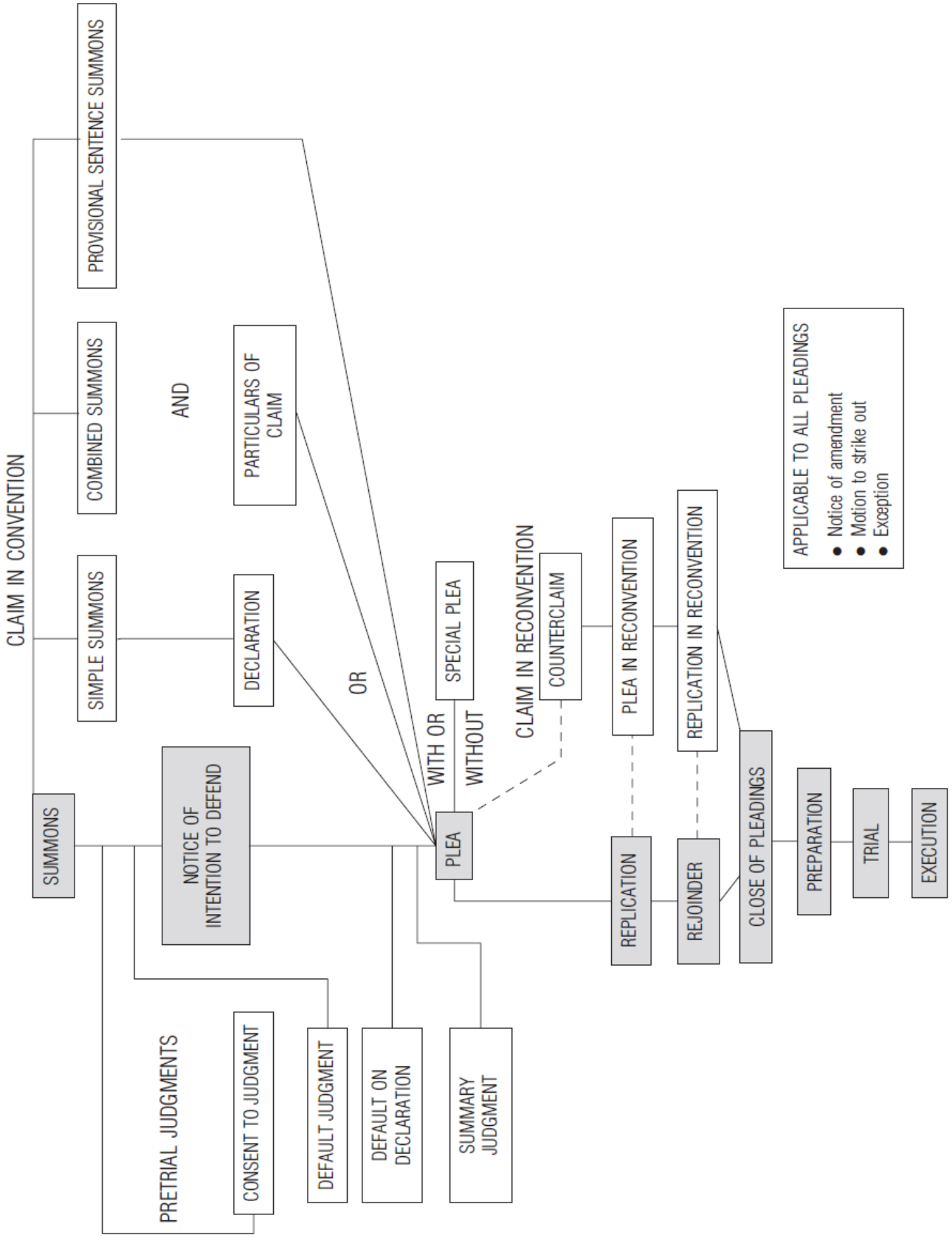

Figure 3.2: Schematic outline of the conducting of summons proceedings

Activity 4.1: SG pp 39 & 40

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

Carefully read through the scenario above and then answer the following questions:

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

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

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

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

Rule 12: Intervention of Persons as Plaintiffs or Defendants:
Any person entitled to join as a plaintiff or liable to be joined as a defendant in any action may, **on notice** to all parties, **at any stage** of the proceedings **apply for leave to intervene as a plaintiff or a defendant.** The court may on such application make such order, including any order as to **costs**, & give directions as to further procedure in the action as to it may seem to meet.

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(3) You are the attorney for the plaintiffs mentioned in (2) above. During the court proceedings, the attorney for Pegasus argues that you do not have a mandate to act for the plaintiffs. What should you do now? Answer the question yourself with the help of Rule 7(1).

Rule 7: Power of Attorney: KEN
(1) Subject to the provisions of sub-rules (2) and (3) a **power of attorney to act need not be filed**, but the authority of anyone acting on behalf of a party may, within **10 days** after it has come to the notice of a party that such person is so acting, or with the leave of the court on good cause shown at any time before judgment, **be disputed**, where-after such person may no longer act unless he satisfied the court that he is authorised so to act, and to enable him to do so the court may postpone the hearing of the action or application.

A dispute raised by the attorney for Pegasus would be satisfactorily answered by the submission to the Registrar of the Court of a "power of attorney" confirming my *locus standi*, in writing - duly authorised and signed by the person or person's thus issuing such 'power of attorney'.

Activity 5.1: SG pp 44

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

Carefully read through the scenario above and then answer the following questions:

(1) Simply identify the appropriate form of service?

Substituted service.

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

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

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

In the case of **substituted service**, the defendant is within the borders of the Republic, but his or her exact whereabouts are unknown.

In contrast to this, **edictal citation** is used where the defendant is outside the borders of the Republic, even if his or her whereabouts overseas are known.

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

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

Activities - Study unit 6: The simple summons and the combined summons SG pp 46

Background Information

A summons may be defined as a written instruction to the sheriff to notify a person (normally termed 'the defendant') against whom the plaintiff wishes to obtain relief (in the form of an order) to give notice within a specified time (the *dies induciae*) of his or her (the defendant's) intention to defend the action if the claim is disputed.

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

The **simple summons** is employed, and **may only be employed**, where the plaintiff's claim is for a debt or liquidated demand. [The simple summons itself is not a pleading.]

Definition 'debt or liquidated claim':

The Latin maxim *cum certum est an et quantum debeatur* applies, meaning - *it is certain that if and in so far as it is due.* Thus a 'debt or liquidated claim' is a debt, the amount of which has been determined by agreement between the parties or by legal proceedings, wherein a debt is liquidated when it is rendered certain what is due, and how much is due - wherein failure to pay such debt will give rise to a liquidated claim.

Declaration by plaintiff:

The application of the declaration is restricted to, & is compulsory in, those instances where

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

and

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

Rule 20(2) provides that the declaration must contain the following:

(1) the nature of the claim

(2) the legal conclusion which the plaintiff will be entitled to deduce from the facts therein

(3) a prayer for the desired relief

The combined summons and particulars of claim:

As in the case of the simple summons, the nature of the claim determines whether the combined summons should be used.

An unliquidated claim is a claim for which the amount and liability will not be precisely determined or that it cannot be determined without an evidentiary hearing.

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

Example: in the case of a car accident the pain suffered is a question to be determined by the court and hence any claim with respect to the pain suffered is an unliquidated claim.

Activity 6.1: SG pp 51

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

Carefully read through the scenario above and then answer the following questions:

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

The nature of the claim. (i.e. the type of claim).

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

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

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

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

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

When a <u>simple summons has been issued</u> and <u>a notice of intention to defend has been filed</u> by the defendant, the plaintiff's next step is to respond with a declaration.

Background information:

Read Rule 8 - & - Study Rule 8(1) & Rule 8(3) to (7)

Rule 8: Provisional Sentence

(1) Where by law any person may be **summoned to answer a claim made for provisional sentence**, **proceedings shall be instituted by way of a summons** as near as may be in accordance with **Form 3** of the First Schedule calling upon such person to **pay the amount** claimed or, failing such payment, to **appear personally or by counsel** or by an attorney who, under section 4 (2) of the Right of Appearance in Courts Act, 1995 (Act 62 of 1995), has the right of appearance in the Supreme Court upon a day named in such summons, **not being less than 10 days** after the service upon him or her of such summons, to admit or deny his or her liability.

(2) Such summons shall be **issued by the registrar** and the provisions of Sub-rules (3) and (4) of rule 17 shall *mutatis mutandis* apply.

(3) Copies of all documents upon which the claim is founded shall be **annexed to the summons and served with it.**

(4) The plaintiff shall set down the case for hearing before noon on the court day but one preceding the day upon which it is to be heard.

(5) Upon the day named in the summons the defendant may appear personally or by an advocate or by an attorney who, under section 4 (2) of the Right of Appearance in Courts Act, 1995 (Act 62 of 1995), has the right of appearance in the Supreme Court to admit or deny his liability and may, not later than noon of the court day but one preceding the day upon which he or she is called upon to appear in court, deliver an affidavit setting forth the grounds upon which he or she disputes liability in which event the plaintiff shall be afforded a reasonable opportunity of replying thereto. [Sub-rule (5) substituted by GN R1746 of 25 Oct 1996.]

(6) If at the hearing the defendant admits his liability or if he has previously filed with the registrar an **admission of liability** signed by himself and witnessed by an attorney acting for him and not acting for the opposite party, or, if not so witnessed, verified by affidavit, the **court may give final judgment against** him.

(7) The **court may hear oral evidence** as to the authenticity of the defendant's **signature,** or that of his agent, to the document upon which claim for provisional sentence is founded or as to the authority of the defendant's agent.

Owing to the fact that the provisional sentence summons is actually an enforcement procedure, the court will allow a provisional sentence summons only if…

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

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

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Activity 7.1: SG pp 58

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

Carefully read through the scenario above and then answer the following questions:

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

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

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

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

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

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

Scenario 7.2: Peter and Sandra get divorced. In terms of the deed of settlement, Peter has to pay R550 000 in cash to Sandra, and agrees to do this out of the proceeds of the sale of their beach house in Hermanus. However, Sandra insists that Peter sign an acknowledgement of debt for this sum. Peter accepts that he is obliged to pay this sum and does so. Interest on this amount is also set out in the acknowledgement of debt. **Peter fails to pay the principal debt.** Sandra needs this money to buy herself a place to stay. Naturally, she would like to receive payment as soon as possible.

Activity 8.1: SG pp 62

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

(1) The simple summons

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

(2) The combined summons

The combined summons is both a pleadings and process document.

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

(3) The declaration

The declaration is a pleading (since it contains a formal, concise, but more complete, version of the plaintiff's claim to which the defendant must answer).

Uniform Court Rules
Rule 20: Declaration

(1) In all actions in which the plaintiff's claim is for a debt or liquidated demand and the defendant has delivered notice of intention to defend, **the plaintiff shall**, except in the case of a combined summons, **within fifteen days after his receipt thereof, deliver a declaration.**
(2) The declaration shall set forth the **nature of the claim**, the **conclusions of law** which the plaintiff shall be entitled to deduce from the facts stated therein, and a **prayer for the relief** claimed.
(3) Where the plaintiff seeks relief in respect of several distinct claims founded upon separate and distinct facts, such claims and facts shall be **separately and distinctly stated.**

Activity 9.1: SG pp 70

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

Carefully read through the scenario above and then answer the following questions:

(1) Simply name the pleadings (in the correct order) which can be exchanged in convention between D and F upon service of the combined summons?

The plea on the merits:

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

The replication:

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

The rejoinder:

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

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

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

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(3) Briefly indicate when pleadings will be regarded as closed? **KEN**

Rule 29: lays down when pleadings are deemed to be closed. 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.

Activities - Study unit 10

Further pleadings & processes up to and including Close of Pleadings

Activity 10.1: SG pp 79

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

Carefully read through the scenario above and then answer the following questions:

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

An application to set aside the summons as - an irregular proceeding.

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

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

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

An **application to amend**.

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

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

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(5) M believes that N is in possession of a tape recording of the negotiations that M and N have had and which gave rise to the conclusion of the contract. Briefly explain in what circumstances M may request inspection hereof? Rule 35(14) applies

Rule 35: Discovery, Inspection and Production of Documents

(14) **After appearance to defend has been entered, any party to any action may, for purposes of pleading,** require any 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.

Inspection: After appearance to defend has been entered inspection can be requested, which is relevant to a reasonably anticipated issue in the action. It is important to note that any party can obtain inspection, but not merely in respect of any type of document or tape recording: **the document must be clearly specified**, and this procedure cannot be used for purposes of a 'fishing expedition' in search of possible documents. **The test is whether the document is essential**, and not merely useful, **for purposes of pleading.**

Activity 11.1: SG pp 85

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

Rule 34: Offer to Settle

(5) Notice of any offer or tender in terms of this rule shall be given to all parties to the action and shall state-

(a) whether the same is **unconditional or without prejudice** as an **offer of settlement**;

(b) whether it is accompanied by an **offer to pay** all or only part of **the costs** of the party to whom the offer or tender is made, and further **that it shall be subject to such conditions** as may be stated therein;

(c) whether the offer or tender is made by way of settlement of **both claim and costs or of the claim only**;

(d) whether **the defendant disclaims liability for the payment of costs** or for part thereof, in which case the **reasons for such disclaimer** shall be given, and the action may then be set down on the question of costs alone.

In terms of Rule 34, a defendant may, at any time – by notice to all parties to the action - unconditionally or without prejudice offer to settle a plaintiff's claim where:

(i) payment of a sum of money is claimed **- or -** (Rule 34(1))

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

- The offer should indicate that liability in respect of the claim is accepted unconditionally and the offer is made without prejudice (liability) to the party offering the settlement.
- It should also include which conditions (if any) the offer may be subject to.
- The offer must indicate whether the offer is made by way of settlement of both claim and costs or of the claim only - and i.r.o the issue of costs raised - be accompanied by an offer of full or part payment of the costs to the plaintiff or party to whom the offer is made.
- If the defendant disclaims liability for the payment of costs or for part thereof, the reasons for such disclaimer shall be given, and the action may then be set down on the question of costs alone.

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

Rule 34A: Interim Payments

(8) The fact that an order has been made under sub-rule (4) **shall not be pleaded and no disclosure of that fact shall be made** to the court at the trial or at the hearing of questions or issues as to the quantum of damages until such questions or issues have been determined.

It is important to note that the fact that an offer has been made or that an order for an interim payment has been made, may not be pleaded or disclosed in court at the trial or the hearing of questions or issues of quantum of damages until such questions or issues have been determined and before judgment has been given, and no reference to such offer may appear on any file in the office of the Registrar containing the papers of the case– any party acting contrary to this Rule will be liable to have costs given against him or her, even if he or she is successful in the action. (Rule 34(13)). (Rule 34(10)) Rule 34A(8).

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

Carefully read through the scenario above and then answer the following questions:

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

He should make an **application** for an **interim payment** in terms of Rule 34A.

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

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

Activity 12.1: SG pp 93

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

The grounds are clearly set out in Rule 32(1) and require no further explanation.

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.

You will immediately realize that **these types of claims fall within the definition of a 'debt or liquidated demand'**

(See SU 6.2: pp 37 of this rework… which deals with an ordinary/simple summons).

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

6.2.1 When is the simple summons employed? SG pp 47
The **simple summons** is employed, and **may only be employed**, where the plaintiff's claim is for a debt or liquidated demand.

Rule 32(1) furthermore refers to a defendant's notice of intention to defend, which indicates that an action has already been instituted. This application is thus made within the framework of existing proceedings. From what has already been said, it should be clear that **an application for summary judgment should follow ONLY FROM A simple summons.**

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

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

The procedure is clearly described in Rule 31(3) and 31(4). Summarize this procedure yourself Write it down as you would answer an examination question.

- **Failure to deliver a declaration**

Study Rule 31(3) together with Rule 31(4) as **regards the procedure for set-down**.

Rule 31: Judgment on Confession and by Default:
(3) Where a plaintiff has been barred from delivering a declaration the **defendant may set the action down** as provided in Sub-rule (4) and **apply for absolution from the instance** or, after adducing evidence, for judgment, and the court may make such order thereon as to it seems meet.
(4) The proceedings referred to in Sub-rules (2) and (3) shall be set down for hearing upon **not less than five days' notice to the party in default:** Provided that no notice of set down need be given to any party in default of delivery of notice of intention to defend.

- Note that, **here, the plaintiff fails to deliver a pleading** and, because a pleading other than a replication or one of the ensuing pleadings is in issue, **a notice of bar must first be served** on the plaintiff.

- Should the plaintiff thereafter fail to deliver a pleading, he or she will be in default and will *ipso facto* be barred from doing so.
- Take note of **the orders which the defendant may request**, namely

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

  (2) after presenting evidence, 'judgment' (i.o.w the court will give a judgment as it thinks fit.)

Scenario 1: Homework CC sues Computer Mecca CC for damages for the provision of **defective hardware and installation**. Homework CC not only **lost data**, but also **clients**. Although Computer Mecca CC enters appearance, it fails to deliver the pleadings which should follow thereupon. Homework CC is dissatisfied with this since it delays finalizing the action. **The question is what action can be taken by the plaintiff?**

Carefully read through the scenario above and then answer the following questions:

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

- **Firstly**, the pleading which follows the notification of intention to defend is naturally the plea on the merits.
  - » Consequently, before the plaintiff may apply for judgment by default, it will first mean a notification of bar of the defendant.
  - » If the defendant still fails to deliver the plea, the plaintiff can go on to request a judgment by default.
- **Secondly**, the claim is one for compensation for damages.
  - » This means that the claim is unliquidated.
  - » Consequently, the plaintiff must approach the court in terms of Rule 31(2) and evidence in respect of the *quantum* of the claim must be led.

Rule 31: Judgment on Confession and by Default:

(2) (a) Whenever in an action the claim or, if there is more than one claim, any of the claims is **not for a debt or liquidated demand** and a **defendant is in default of delivery of notice of intention to defend or of a plea**, **the plaintiff may set the action down as provided** in Sub-rule (4) **for default judgment** and the **court may**, after hearing evidence, **grant judgment** against the defendant or make such order as to it seems meet.

(b) **A defendant may within 20 days after** he has knowledge of **such judgment apply to court** upon notice to the plaintiff **to set aside such judgment** and the **court may, upon good cause shown, set aside the default judgment on such terms as to it seems meet.**

Scenario 2: John, a handyman, buys a large number of items on credit at his local hardware shop. John has known the owner of the hardware shop for years. The things are delivered at John's house and a copy of the invoice is handed to him once he has signed the original. The total amount for the items is R420 000. Despite requests, John refuses and/or fails to pay his account. The owner of the shop suspects that John simply does not have the money to pay owing to the generally poor economic situation. **John is sued and he enters an appearance to defend. What should the plaintiff do now?**

Carefully read through the scenario above and then answer the following questions:

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

- An application for summary judgment.

---

(5) Explain in detail what action the defendant may take in reply to the summary judgment procedure mentioned in (4) above?

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

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

Rule 32: Summary Judgment:

(3) Upon the hearing of an application for summary judgment the defendant may-

(a) **give security to the plaintiff** to the satisfaction of the registrar for any judgment including costs which may be given, or

(b) **satisfy the court by affidavit** (which shall be delivered before noon on the court day but one preceding the day on which the application is to be heard) or with the leave of the court by oral evidence of himself or of any other person who can swear positively to the fact **that he has a bona fide defence to the action**; such affidavit or evidence shall disclose fully the **nature and grounds of the defence** and the **material facts relied upon therefor**.

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

Defendants who wish to defend themselves in terms of the NCA against an application for summary judgment should note the following (the objective of these remarks is not to provide you with a comprehensive discussion of a defendant's position under the NCA: you are referred to standard works on the NCA for this): **The Supreme Court of Appeal in** *Rossouw v FirstRand Bank Ltd* 2010 6 SA 439 (SCA) held that there is compliance with the provisions of section 129(1)(a) of the NCA if the credit provider dispatches the required notice to the consumer in the manner chosen by the latter (e.g. by sending it to the consumer's last-known address by registered mail) - actual receipt thereof is the consumer's responsibility.

In this regard, *Standard Bank of South Africa v Van Vuuren* 2009 5 SA 557 (T) is interesting. In this case, it was held that the attaching of the notice by the sheriff to the main gate of a property other than the mortgaged property provided no evidence that the notice in terms of section 129 reached the respondent, and that this accordingly was a *bona fide* defence.

Bald allegations by a consumer that there was 'reckless credit' or of 'over-indebtedness' do not constitute a *bona fide* defence - a reasonable amount of verificatory detail is required.

Consequently, a defendant should, *inter alia*, provide the following:

» a statement showing his or her assets and liabilities, and income and expenditure…
in a way sufficient to enable the court to determine whether the allegation of over-indebtedness is *bona fide*;

» particulars of the particular debt counsellor and the date on which such person was approached;

» the assessment by the debt counsellor, etc

SA Taxi Securitisation (Pty)Ltd v Mbatha and two similar cases 2011 1 SA 310 (GSJ).

Activity 13.1: SG pp 102

Scenario: S and T are involved in a car accident. S suffers some serious injuries to his back and has had to have several operations. It is also expected that he will have to have future operations to his back. S sues T and claims damages. **The pleadings are closed and both parties begin to prepare for the trial.** On the one hand…

Both parties must be informed of:

- the steps which may be taken to prevent them from being caught unprepared by the opposing party at the trial.
- they must also be informed about the steps they must take to shorten the trial as required by the Rules
- parties must also be informed about how they may present their evidence to the court.

(1) With reference to the set of facts above, simply name the different steps that the plaintiff will have to take in preparation for his case?

The plaintiff will have to:

- give notice of his intention to call expert witnesses;
- make summaries of their evidence available to the opposing party;
- give notice of any plans, photographs, etc. to be used. (Remember, this was a collision and, in all likelihood, there will be a police plan and possibly even photographs of the scene of the accident;)
- request further details for trial purposes;
- disclose documents;
- request inspection of the defendant's discovery; and -
- demand that the defendant specify documents that he is going to use in the trial.

(Note that the steps will depend on the facts of the particular case and that not all the steps will necessarily be taken in every case.)

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

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

---

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

Rule 37(4) i.r.o the pre-trial conference requires the list to indicate

- the admissions required
- the enquiries that will be directed,
- which are not included in a request for particulars for trial, and
- other matters regarding preparation for trial, to be raised at the conference.

Rule 37: Pre-trial conference:

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

(a) the admissions which he requires;
(b) the enquiries which he will direct and which are not included in a request for particulars for trial; and
(c) other matters regarding preparation for trial which he will raise for discussion

---

(4) With reference to the given facts above, set out which of the matters mentioned in Rule 37(6) must appear in a hypothetical set of minutes of a pre-trial conference?

The wording of Rule 37(6) makes it clear that the minutes must deal with all the matters set out in the Rule. Study this Rule, and be prepared to list at least five matters in a possible examination question.

Rule 37: Pre-trial conference:

(6) The minutes of the pre-trial conference shall be prepared and signed by or on behalf of every party and the following shall appear therefrom:

(a) The place, date and duration of the conference and the names of the persons present;
(b) if a party feels that he is prejudiced because another party has not complied with the rules of court, the nature of such non-compliance and prejudice;
(c) that every party claiming relief has requested his opponent to make a settlement proposal and that such opponent has reacted thereto;
(d) **whether any issue has been referred by the parties for mediation, arbitration or decision by a third party** and on what basis it has been so referred;
(e) whether the case should be transferred to another court;
(f) which issues should be decided separately in terms of rule 33 (4);
(g) **the admissions made by each party;**
(h) any dispute regarding the duty to begin or the onus of proof;
(i) any agreement regarding the production of proof by way of an affidavit in terms of rule 38 (2);
(j) which party will be responsible for the copying and other preparation of documents;
(k) which documents or copies of documents will, without further proof, serve as evidence of what they purport to be, which extracts may be proved without proving the whole document or any other agreement regarding the proof of documents

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Activity 14.1: SG pp 108

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

Attorney-and-client costs:

» arise out of the contractual relationship between client and attorney

» the costs are not at all related to possible litigation.

» the costs comprise remuneration for all professional services and expenses flowing from the attorney's mandate

» these costs are not statutorily fixed – and

» are a form of punitive measure for improper behaviour

Party-and-party costs:

» are those costs which a party incurs on taking legal steps and

» which are payable by an opposing party in terms of a court order

» these costs are:

- only estimated costs and expenses
- taxed by the Taxing Master in accordance with a fixed, prescribed scale, thus ensuring that only such charges and costs actually incurred in the course of litigation are allowed.

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

(2) Re-read the set of facts above. Identify the type of order as to costs applicable in these circumstances. Explain briefly?

Attorney-and-client costs.

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

Activity 15.1: SG pp 113

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

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

- Orders *ad pecuniam solvendam* are orders in terms of which the debtor is ordered to pay a sum of money, while orders *ad factum praestandum* are orders in terms of which a person is ordered to perform, or not to perform, a certain action.
- Orders *ad pecuniam solvendam* in respect of the defendant's property are enforced by means of a writ for execution, whereas orders *ad factum praestandum* in respect of the person of the debtor are enforced by means of contempt of court.

Background information:

Judgments of court can either be of immediate effect or of such a nature that they demand compliance.

Example: An example of a judgment with immediate effect is a decree of divorce… whereas Example of a judgment which demands compliance is an order to pay a certain amount of money, or orders to pay maintenance of a certain amount per month.

Such judgments are subdivided into:

» judgments *ad pecuniam solvendam* (i.e. judgments in which the debtor is ordered to pay a sum of money)

Note that judgments ***ad pecuniam solvendam*** are enforced **against the property** of the judgment debtor

and

» judgments *ad factum praestandum* (i.e. judgments in which a person is ordered to perform, or to refrain from performing, some act).

Note that judgments ***ad factum praestandum*** are enforced **against his person**.

Activity 16.1: SG pp 119

Simply name the procedures applicable in the given situations:

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

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

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

(2) Read the set of facts above. Now act for your client?

Prohibitory interdict.

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(3) A and B have been neighbours for 15 years. In the third year in which they were neighbours, A was unsuccessful in an action against B, and, since then, has instituted six actions against B. Although all the actions appear different at first glance, the facts are only slightly different and the actions are essentially the same. Now act for B?

An order which prohibits vexatious proceedings.

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

Restitutory interdict.

Activity 17.1: SG pp 126

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

Carefully read through the scenario above and then answer the following questions:

(1) Write concise notes on *ex parte* applications in magistrates' courts procedure?

- *Ex parte* applications may be brought only in those instances where the applicant cannot request an order against a person. Rule 56 provides an exception in that applications for interdicts, attachments to secure claims, and *mandamenten van spolie* may be made by means of *ex parte* applications.
- The reason is that a speedy remedy, where relief is urgently required, will be frustrated if the other party is notified of the intended application in advance.
- The court grants a temporary order (*rule nisi*) and determines a return day on which the person against whom the order is made must give reasons why the order should not be made final.
- The court may also require the applicant to provide security for any losses suffered and may require any additional evidence where relevant.
- Any party affected by the *ex parte* order may, after 24 hours' prior notice, anticipate the return date.
- The order is *ipso facto* discharged upon security being provided by the respondent for the amount to which the order relates.

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(2) Name the form of proceeding that Peter should use to approach the court for relief?

Motion or application procedure.

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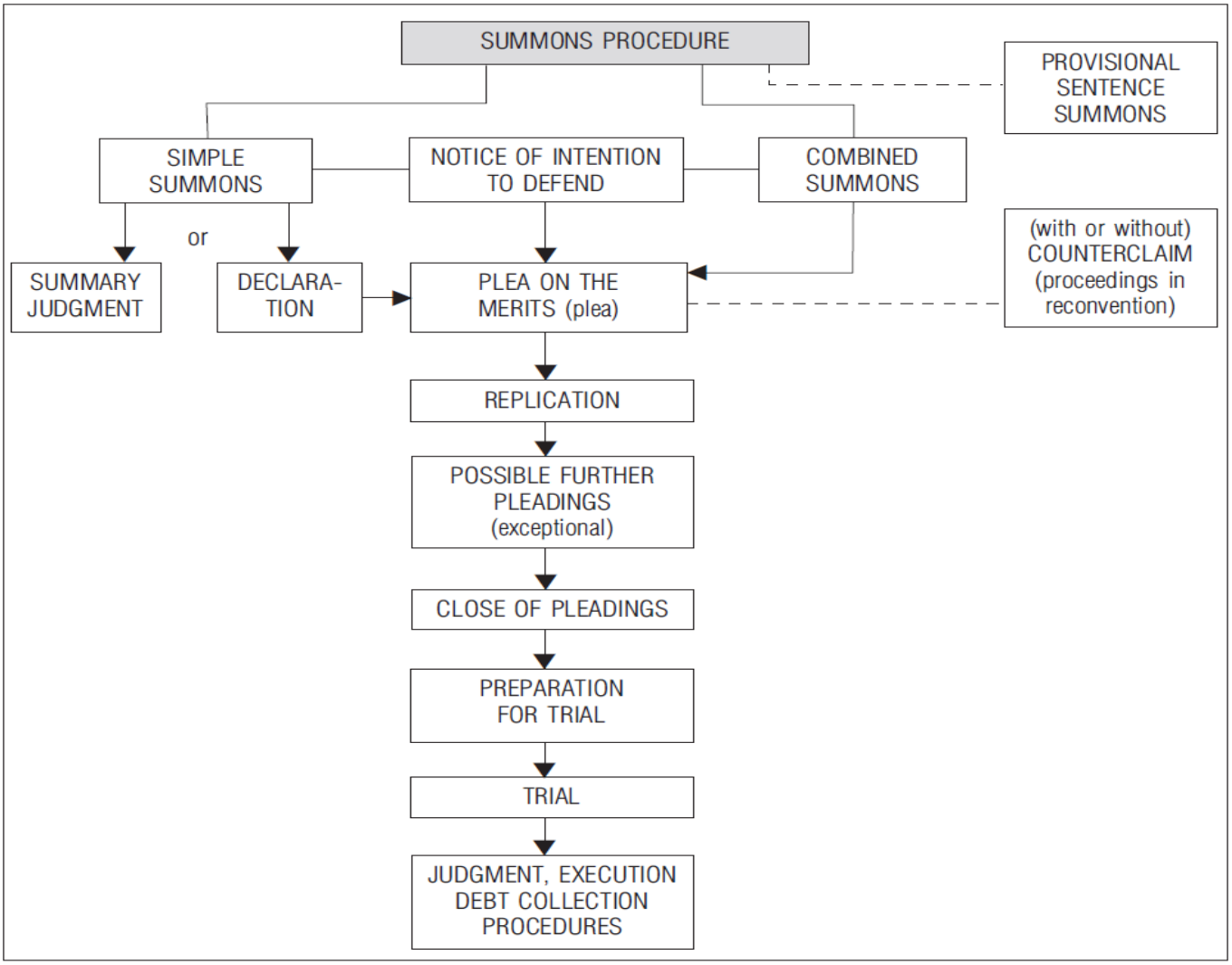
(3) Briefly describe the documents which may be exchanged between Peter and Solly in the opposed application proceedings in the magistrates' court?

- **The applicant, Peter,** will initiate the proceedings by drawing up a notice of motion which conforms with Form 1A of the Magistrates' Courts Rules.
- Attached to this notice of motion is a supporting affidavit. Such affidavit sets out Peter's and other interested persons' evidence in support of the order applied for.
- **The respondent, Solly,** replies to Peter's allegations as contained in the supporting affidavit, in the responding affidavit.
- **Peter has an opportunity to reply** to Solly's responding affidavit by way of a replying affidavit. The purpose of such reply is to adduce new facts which serve as a reply to the respondent's defence.
- **The court** has a discretion to allow the filing of further affidavits.

Schematic outline of magistrates' court proceedings: Study the schematic outline:



Activity 18.1: SG pp 134

Scenario: John and Peter are involved in a motor collision in Johannesburg. Peter contends that the collision was due solely to the negligence of John. Peter suffers damages in the amount of R80 000. Peter wishes to institute proceedings in a magistrates' court in the amount of R80 000. John intends to defend the action.

Carefully read through the scenario above and then answer the following questions:

(1) In what circumstances will it be necessary for Peter's attorney to file a power of attorney?

A power of attorney does not have to be filed, since rule 52(2) provides that it is not necessary for anyone to file a power of attorney to act in a magistrates' court unless the attorney's authority to act is challenged.

Magistrates' Courts Rules
Rule 52: Representation of parties... power of attorney….
(2) **It shall not be necessary for any person to file a power of attorney to act**, but the authority of any person acting for a party may be challenged by the other party within 10 days after he or she has noticed that such person is so acting or with the leave of the court for good cause shown at any time before judgment and thereupon such person may not, without the leave of the court, so act further until he or she has satisfied the court that he or she has authority so to act and the court may adjourn the hearing of the action or application to enable him or her to do so:
Provided that no power of attorney shall be required to be filed by the State Attorney, any deputy state attorney or any professional assistant to the State Attorney or to a deputy state attorney or any attorney instructed in writing by or on behalf of the State Attorney or a deputy state attorney in any matter in which the State Attorney or a deputy state attorney is acting in his or her capacity as such.

(2) Who is responsible for issuing the summons?

The registrar or clerk of the civil court.

---

(3) The plaintiff does not have to specifically allege that the court has jurisdiction. Discuss this statement critically? **NB:**

This statement is not correct.

Normally, the plaintiff need not allege that a specific court has jurisdiction, but rule 5(6) provides **that it is compulsory for a plaintiff who relies on** the jurisdiction of a court in terms of section 28(1)(d) [work, business, residential home] and 28(1)(g) [ownership of immovable property] respectively, to state that the cause of action arose wholly within the particular district or region as well as the particulars in support thereof, or that the property is situated within the court's jurisdictional area.

---

(4) What procedure must Peter follow if he decides to amend the summons after service?

Peter may amend the summons after service by following the procedure set out in rule 55(A).

Rule 55A: Amendment of pleadings:

(1) **Any party desiring to amend a pleading or document other than an affidavit**, filed in connection with any proceedings, shall notify all other parties of his or her intention to amend and shall furnish the particulars of the amendment. Etc…

---

(5) What particulars will Peter's summons contain? **NB:**

See par 18.4 in the SG. **You should be able to list approximately six to eight of these in a possible examination question.**

18.4 Form and content of the summons:

Rules 5 and 6 contain the most important provisions regarding the content of a summons.

The following particulars must be included in the summons:

(1) the surname and first names or initials of the **defendant** by which the defendant is known to the plaintiff; the defendant's residence or place of business and, where known, the defendant's occupation and employment address and, if the defendant is sued in any representative capacity, such capacity

(2) the full names, gender (if the **plaintiff** is a natural person) and occupation and the residence or place of business of the plaintiff, and if the plaintiff sues in a representative capacity, such capacity

(3) a form of consent to judgment

(4) a form of appearance to defend

(5) a notice drawing the defendant's attention to the provisions of section 109 of the Act

(6) **a notice in which the defendant's attention is directed to the provisions of the Act in cases where the action is based on a debt referred to in section 55 of the Act**

Section 55 - Definition - **'debt'** means any liquidated sum of money due.

Section 58 - Consent to judgment or to judgment and an order for payment of judgment debt in instalments

Section 65A - Notice to judgment debtor if judgment remains unsatisfied

Section 65D - Determination of judgment debtor's financial position

(7) where the defendant is cited under the jurisdiction conferred upon the court by section 28(1)(d) of the Act, [resides, carries on business or is employed] an averment that the whole cause of action arose within the district or region, and the particulars in support of such averment

(8) where the defendant is cited under the jurisdiction conferred upon the court by section 28(1)(g) of the Act, [owns immovable property within the district or regional division] an averment that the property concerned is situated within the district or region

(9) any abandonment of part of the claim under section 38 of the Act and any set-off under section 39 of the Act [plaintiff may abandonment of part claim] SG pp 132

(10) where the plaintiff issues a simple summons in respect of a claim regulated by legislation, the summons may contain a bare allegation of compliance with the legislation, but thedeclaration, if any, must allege full particulars of such compliance (provided that, where the original cause of action is a credit agreement under the National Credit Act (NCA), the plaintiff seeking to obtain judgment in terms of section 58 of the Act shall in the summons deal with each of the relevant provisions of sections 129 and 130 of the NCA, and allege that each one has been complied with)

(11) where the plaintiff sues as cessionary, the plaintiff shall indicate the name, address and description of the cedent at the date of cession as well as the date of the cession

(12) a summons in which an order is sought to declare executable, immovable property which is the home of the defendant shall contain a notice in the following form:

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

Please note that rule 5(11) provides that, if a party fails to comply with any of the provisions of this rule, such summons will be deemed to be an irregular step and the opposite party will be entitled to act in accordance with rule 60A. These matters are not discussed in detail.

However, please note the following:

18.4.1 Dies induciae

This refers to the **stipulated period** mentioned in the summons **within which the defendant** is called upon **to enter** an appearance to defend after service of the summons. Rule 13(1) provides that **appearance to defend** the action must be entered w**ithin ten days** after service of the summons.

18.4.2 Address for service of pleadings

Rule 5(3)(a) provides for **the attorney's and plaintiff's facsimile or electronic mail address to be included in the summons**, apart from the physical address which should be within 15 kilometres of the courthouse. Rule 5(3)(b) to (d) provides for service by facsimile or electronic mail under certain conditions.

18.4.3 Declaration/particulars of claim

Rule 5(7) provides that **a party relying on an agreement governed by legislation** shall state the nature and extent of his or her compliance with the provisions of the legislation. In any action based on the NCA, the summons must allege compliance with s 129 & 130 of the NCA.

Rule 5(7) further provides that **a simple summons in respect of a claim regulated by legislation** may contain a bare allegation of compliance with the legislation, **but** a **declaration** (**and** a **combined summons's** particulars of claim) must allege full particulars of such compliance. SG pp 133

Rule 5(10) contains a reference to section 26 of the Constitution, which accords a **right to access adequate housing to everyone**.

Rule 5(10) provides that, in actions where an order is sought to declare immovable property which is the home of a defendant, executable (and also probably in actions where an eviction of a lessee is sought), **the defendant's attention must be drawn to section 26 of the Constitution**, which accords everyone the right to access adequate housing.

Note that, in practice, it is trite [repetitive] law that a plaintiff has a choice whether to use a **simple** or a **combined summons**. This position is correctly set out in rule 5(2)(b) by the insertion of the word **'may'**, as opposed to 'shall'. Rule 5(2)(b) sets out that, in every case where the claim **is based** on a debt or liquidated demand, a simple summons may be used.

However, where a claim is **not based** on a debt or liquidated demand, rule 5(2)(a) provides that a combined summons must be used.

It should be noted that **a summons for rent** under section 31 of the Act shall be in the form prescribed in Annexure 1, Form 3 (rule 5(8)).

Rule 5(11) provides that failure to comply with any of the provisions of rule 5 may be addressed in terms of rule 60A (irregular proceedings). Therefore, rule 60A must be used where there is no compliance with rule 5. If a party fails to comply with any of the provisions of this rule, such summons shall be deemed to be an irregular step and the opposite party shall be entitled to act in accordance with rule 60A (rule 5(11)).

18.4.4 The plaintiff as cessionary

Where the plaintiff sues as cessionary, the name, address and description of the cedent, and the date of the cession, must be mentioned in the summons (rule 5(9)).

18.4.5 Averments of jurisdiction

Rule 5(6)(a) states that it is compulsory for a plaintiff who relies on the jurisdiction conferred upon the court in terms of section 28(1)(d) of the Magistrates' Courts Act 32 of 1944 to aver that the whole cause of action arose within the district or region, and to set out the particulars in support of such averment. A mere averment that the whole cause of action arose within the magistrates' court or district is thus insufficient.

Magistrates' Courts Act
Section 28: Jurisdiction in respect of persons
(d) any person, whether or not he or she **resides, carries on business or is employed** within the district or regional division, if the cause of action arose wholly within the district or regional division;

Where a plaintiff relies on section 28(1)(g) of the Act for jurisdiction, the summons must contain an averment that the property concerned is situated within the court's area of jurisdiction (rule 5(6)(b)). Likewise, a summons must show any abandonment of part of the claim under section 38 and any set-off under section 39 of the Act.

Magistrates' Courts Act
Section 28: Jurisdiction in respect of persons
(g) any person **who owns immovable property within the district or regional division** in actions in respect of such property or in respect of mortgage bonds thereon.

Activity 19.1: SG pp 138

Scenario: Jonas, the owner of a spaza shop, purchases goods to the value of R60 000 from Quicksell CC, a retailer. The goods are delivered at Jonas's shop, and Jonas issues a cheque in payment. When Quicksell CC presented the cheque at its bank for payment, **the cheque was returned unpaid and marked ''Refer to drawer''.** Quicksell CC does not tolerate bad debts, and instructs its attorneys to issue summons against Jonas.

Carefully read through the scenario above and then answer the following questions:

(1) Jonas pays the amount of R60 000 to Quicksell CC by cheque and the cheque is dishonoured by the bank. What type of summons may Quicksell CC now use?

Quicksell CC may now use a **provisional sentence summons**.

[a cheque is grounds for- and proof of a debt or liquidated demand… requirement for provisional sentence summons]

(2) What is a defence against provisional sentence based on?

A defence against a provisional sentence summons is based on the authenticity of the signature on the document or the authority of the person signing, and the merits of the claim itself.

(3) What do you understand by the term ''security *de restituendo*''?

The term refers to the security which the plaintiff must give for the restitution of money he or she has received from the defendant in terms of a judgment in the event of the defendant defending and succeeding in the main case.

Activity 20.1: SG pp 143

Scenario: Mr Plaintiff wishes to issue summons against Defendant (Pty) Ltd for damages sustained. You act on behalf of Mr Plaintiff and issue a combined summons at the offices of the clerk of the court.

(1) Explain briefly how service ensures compliance with the *audi alteram partem* principle?

- In terms of this principle, any person is entitled to be heard before an order or judgment is given against him or her.
- Service causes legal processes (which include court documents and notices) to be brought to the attention of the opposite party to enable him or her to take notice of any legal steps taken against him or her which affect his or her rights and/or interests, as well as of the steps that he or she may take in response.
- Such a party is then in a position to defend himself or herself against such legal steps, and is able to put his or her side before court.

---

(2) Briefly explain what factors must be considered before you have the summons served by a particular method on behalf of Mr Plaintiff in the scenario above?

This question simply aims to stimulate your thoughts on a basic and practical level: it is not a typical examination-type question, and tests common sense.

- Firstly, you should confirm (by company-office search) that the defendant is not a foreign company, and you should establish its registered address and main place of business.
- If satisfied that neither substituted service nor edictal citation is applicable, you will then peruse the contents of rule 9 to ensure proper service.

---

(3) Defendant (Pty) Ltd is a slippery customer and avoids service of the summons. Advise the messenger which method of service will constitute sufficient service herein?

- Rule 9(5) provides that, in these circumstances, it will be sufficient for the sheriff to affix a copy of the summons to the outside door, the door of the main entrance or to the security door of the defendant's place of business.
- The sheriff may also place the copy in the post box of the business.

---

(4) State the allegations that the applicant must set out in the *application for substituted service*, as required by rule 10(2)(a)?

The application must set out, in precise terms:

» the nature and extent of the claim;
» the grounds upon which the claim is based and
» upon which the court has jurisdiction to hear the matter;
» as well as the method of service for which leave is sought.

If the method is not personal service, the plaintiff must also set out the last-known address of the defendant and the enquiries made to establish his or her current address.

Litigation proceedings up to and including 'close of pleadings'

SG pp 144

Activity 21.1: SG pp 149

Scenario: John and Peter are involved in a motor-vehicle collision in Johannesburg. Peter contends that the collision was due solely to the negligence of John. Peter suffers damages in the amount of R80 000. Peter wishes to institute proceedings against John in the magistrates' court. Peter issues summons in the amount of R80 000 against John. John may take various steps after being served with the summons.

Carefully read through the scenario above and then answer the following questions:

(1) What pleading must John file in order to disclose his defence?

John must file his **plea on the merits**.

---

(2) When must the pleading referred to in (1) above be filed?

Rule 17(1) sets out the instances when the defendant may deliver his or her plea, namely within 20 days after service upon him or her of a declaration (in respect of a simple summons), or within 20 days after delivery of the notice of intention to defend (in respect of a combined summons).

Magistrates' Courts Rules
Rule 17m: Plea
(1) **Where a defendant has delivered notice of intention to defend,** the defendant shall within **20 days** after the service upon him or her of a declaration or within 20 days after delivery of such notice in respect of a combined summons, **deliver a plea with or without a claim in reconvention**, **or an exception with or without application to strike out.**

---

(3) John alleges that Peter was also negligent. He wishes to institute proceedings against Peter. What pleading must John file?

John must file his **counterclaim.**

---

(4) When must the pleading referred to in (4) above be filed?

The particular pleading may be **filed within the time period laid down for the delivery of a plea.** See rule 20(1)(a) in this respect.

Magistrates' Courts Rules
Rule 20: Claims in reconvention
(1) (a) **A defendant who counterclaims shall,** together with such defendant's plea, deliver a claim in reconvention setting out the material facts thereof in accordance with rules 6 and 15 unless the plaintiff agrees, or if plaintiff refuses, the court allows it to be delivered at a later stage.

Activity 22.1: SG pp 155

Scenario: John, a spaza shop owner, purchases goods to the value of R80 000 from Peter, the owner of a retail merchandise store. The goods are delivered at John's shop. John receives a copy of the invoice after having signed the original. Despite repeated requests, John refuses and/or fails to pay for the goods delivered. Peter issues summons against John in the amount of R80 000 for goods sold and delivered. John enters an appearance to defend.

Carefully read through the scenario above and then answer the following questions:

(1) What procedure may Peter use when applying for summary judgment?

The plaintiff, Peter, proceeds by way of **application procedure**.

This procedure involves an application for which a special form is prescribed, namely summary judgment, and must be distinguished from an application by means of notice of motion with or without supporting affidavits.

---

(2) What are the three requirements for the supporting affidavit which must be filed by the plaintiff together with the notice for summary judgment?

The three requirements are as follows:

(a) It must be signed by the plaintiff personally and he or she must state that he or she has personal knowledge of the facts; or,

in the case of a legal person, it must be signed by someone who alleges that he or she is duly authorised to make the affidavit; in addition, he or she must state his or her capacity in respect of the plaintiff and that he or she has personal knowledge of the facts.

(b) The plaintiff must verify or confirm the amount or cause of action.

(c) The deponent must state that, in his or her belief, there is no *bona fide* defence to the claim and that appearance has been entered solely for the purpose of delaying the action (rule 14(2)).

Magistrates' Courts Rules
Rule 14m: Summary judgment

(2) The plaintiff shall within 15 days after the date of delivery of notice of intention to defend, deliver notice of application for summary judgment, together with an affidavit made by plaintiff or by any other person who can swear positively to the facts verifying the cause of action and the amount, if any, claimed and stating that in his or her opinion there is no *bona fide* defence to the action and that notice of intention to defend was delivered solely for the purpose of delay.
If the claim is founded on a liquid document a copy of the document shall be annexed to such affidavit and the notice of application for summary judgment shall state that the application will be set down for hearing on a stated day not being less than 10 days from the date of the delivery thereof.

---

(3) What steps may the defendant John take to ward off the summary judgment application?

The defendant, John, may take the following steps:

(a) The defendant may give security that he will satisfy whatever judgment may be given against him in the action.

(b) The defendant may give evidence that he or she has a *bona fide* defence or counterclaim against the plaintiff (rule 14(3)).

Magistrates' Courts Rules
Rule 14m: Summary judgment
(3) Upon the hearing of an application for summary judgment the defendant may-
(a) **give security to the plaintiff** to the satisfaction of the registrar or clerk of the court for any judgment **including costs** which may be given; **or**
(b) **satisfy the court by affidavit** (which shall be delivered before noon on the court day but one preceding the day on which the application is to be heard) or with the leave of the court by oral evidence of himself or herself or of any other person who can swear positively to the fact that defendant has a *bona fide* defence to the action, and such affidavit or evidence shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor.

(4) What allegations must be contained in John's opposing affidavit?

John's opposing affidavit must contain the following:

(a) the allegation that he has a *bona fide* defence (thus also a denial that the appearance to defend has been entered solely for the purpose of delaying the plaintiff's action)

(b) a disclosure of the nature and grounds of the defence or counterclaim

(5) What orders may the court make at the hearing of the summary judgment application?

The court may grant the following orders:

(a) The court may: give leave to defend to a defendant **so entitled** OR
give judgment against a defendant **not so entitled.**

(b) The court may: give leave to defend to a defendant as to such part of the claim OR
give judgment against the defendant as to the balance of the claim unless the defendant has paid such balance into court.

(c) It may **make both** such orders (rule 14(6)).

Magistrates' Courts Rules
Rule 14m: Summary judgment
(6) If on the hearing of an application made under this rule it appears-
(a) that any defendant is entitled to defend and any other defendant is not so entitled; or
(b) that the defendant is entitled to defend as to part of the claim, **the court shall…**
(i) give leave to defend to a defendant so entitled thereto and give judgment against the delinquent party
(ii) give leave to defend to the defendant as to part of the claim and enter judgment against him or her as to the balance of the claim, unless such balance has been paid to the plaintiff; - or
(iii) make both orders provided for in subparagraphs (i) and (ii).

Activity 23.1: SG pp 162

Scenario: Ms Momentum and Mr Dozie are involved in a motor collision in a busy intersection. Ms Momentum estimates the damage to her new German SUV to be R120 000 and issues a summons in this amount against Mr Dozie. **Mr Dozie denies** causing the collision and also denies the estimated damages, because the chrome bull bar of his double-cab bakkie does not have as much as a scratch, and, according to him, the alleged damage amounted to no more than a scratch and a dent that could be fixed manually. **He therefore intends defending the action.** The streets forming the intersection have recently undergone name changes, and the parties and their attorneys all spell these names in documents differently from the official version.

Carefully read through the scenario above and then answer the following questions:

(1) Ms Momentum describes Mr Dozie in the particulars of claim as a ''churl in a lumber-box who drives as if he owns the road''. Mr Dozie is offended by this statement, because not only is he of slender build, but he is also well known in local arts and culture circles and considers himself to be a cultured person. Moreover, he considers his vehicle to be stylish. As his attorney, explain what step can be taken to address his objection?

Mr Dozie may bring an **application for striking out**, because the particulars of claim contain scandalous, vexatious or irrelevant averments. (Only the offending part is removed and the rest of the pleading stands.)

---

(2) Mr Dozie serves his plea on the merits and denies that Ms Momentum's vehicle sustained damages, alternatively, if it did, it did not amount to R120 000. He does not specifically deny being responsible for the damages, nor does he aver that the collision occurred due to Ms Momentum's negligence. What remedy is available to Ms Momentum?

She can raise an exception on the ground that the **plea does not disclose a defence**

---

(3) If Ms Momentum spells one of the street names incorrectly in the particulars of claim, may Mr Dozie take any steps to address this defect?

No, there is no formal remedy available to him – a party may amend only his or her own pleading.

---

(4) If Ms Momentum wishes to correct this spelling error, which procedure may she follow?

She may bring an **application for an amendment.**

---

(5) On what grounds may the procedure referred to in (4) be refused?

No amendments will be made by which any party other than the party applying for such amendment may be prejudiced in the conduct of his or her action or defence. section 111(1).

---

(6) Who is responsible for the costs of amending a pleading?

The party giving notice of such amendment (unless the court directs otherwise) (rule 55A(9)).

Activity 24.1: SG pp 167

Scenario:
None

(1) State the requirements for the content of an offer to settle?

The offer to settle must indicate:

- whether the offer is unconditional or without prejudice
- whether it is accompanied by an offer to pay **all** or only **part** of the **costs**
- whether the offer is made by way of settlement of both claim and costs, or of the claim only, and
- whether the defendant disclaims liability for the payment of costs, or part thereof, in which case the reasons for such disclaimer shall be given

---

(2) Explain the consequences of disclosing to the court that an offer or tender was delivered before judgment is given?

Such a party will be liable for a costs order against him or her, despite being successful in the action (rule 18(13)).

---

(3) Explain under what circumstances a court will order an interim payment?

If the court is satisfied that

- the defendant admitted liability for the plaintiff's damages in writing
- the plaintiff obtained judgment against the defendant for damages to be determined
- the defendant is insured in respect of plaintiff's claim, or has the means at his or her disposal to make payment

---

(4) Explain what the consequences are for a party who fails to give security within a reasonable period of time if so requested?

The court may **dismiss any proceedings instituted** or **strike out any pleadings filed** by the defaulting party, or make such other order as it deems fit (rule 62(4)).

Activity 25.1: SG pp 173

Scenario: Peter issues summons against John in the amount of R80 000 for damages sustained in a motor-vehicle collision. Peter alleges that the collision was due solely to the negligence of John. John defends the action. Pleadings have been closed between the parties. **The parties now begin to prepare for trial.** The parties need to disclose to each other certain aspects of the evidence which they hope to adduce at the trial.

(1) What is the reason for discovery?

- Discovery of documents is important so that parties may prepare for trial and not be taken by surprise.
- This will prevent unnecessary postponements, delays and costs.

---

(2) When does discovery take place?

- Discovery takes place **when pleadings have been closed**.

---

(3) What is the procedure involved?

Rule 23 describes the procedure involved.

- After the close of pleadings, but not later than 15 days before the date of trial, either party may deliver a notice to the other party calling on him or her to deliver a schedule specifying the documents in his or her possession or under his or her control relating to the action and which he or she intends to use in the action or which tends to prove or disprove either party's case.
- Such schedule, verified by affidavit, shall be delivered by the party required to do so within ten days after the delivery of the notice.
- If privilege is claimed for any of the documents scheduled, such documents shall be separately listed in the schedule and the ground on which privilege is claimed in respect of each shall be set out.

---

(4) What are the consequences of failure to disclose?

- In terms of rule 23(2), a document not disclosed may not be used for any purpose in the trial of the action by the party in whose possession or under whose control it is without the court's leave on such terms as to adjournment and costs as may be just.
- The other party may call for and use such document in the cross-examination of a witness.

---

(5) When is it necessary to submit to a medical examination in terms of rule 24?

- Rule 24(1) determines that 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 a medical examination by one or more duly registered medical practitioners.

(6) 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 representatives to appear before it in chambers for a pre-trial conference.
- **The following issues/matters are addressed at a pretrial conference**:
  (a) the simplification of the issues
  (b) the necessity or desirability of amendments to the pleadings
  (c) the possibility of obtaining admissions of fact and of documents with a view to avoiding unnecessary proof
  (d) the limitation of the number of expert witnesses
  (e) such other matters as may aid in the disposal of the action in the most expeditious and least costly manner (s 54(1)).

---

(7) Explain what the consequences are for a party who fails to comply with a request for further particulars for purposes of preparing for trial?

A party which fails to deliver such particulars timeously or sufficiently, runs the risk of the opposing party applying to court for:

- an order for their delivery
- or for the dismissal of the action
- or the striking out of the defence, as the case may be.

The court may make such order as it deems fit (rule 16(4)).

Activity 26.1: SG pp 177

Scenario: Peter issues summons against John in the amount of R80 000 for damages sustained in a motor-vehicle collision. Peter contends that the collision was due solely to the negligence of John. John defends the action. The pleadings are closed. The parties have discovered relevant documentary evidence which they hope to adduce at the trial. **The parties go to trial.**

Carefully read through the scenario above and then answer the following questions:

(1) Which party bears the onus of proof?

- **Peter** – having raised and set down the matter for trial is the dominus litis and therefore bears the onus of proof upon the averments he has made.

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

- Usually, it is the plaintiff (Peter, in this instance) who has to lead evidence first as he raised and set down the matter for trial is the *dominus litis* and therefore bears the onus of proof upon the averments he has made.
- Peter has to establish the facts giving rise to the cause of action.
- Peter must prove on a balance of probabilities that John was negligent, and is therefore responsible for the damages.

(3) What happens if the parties disagree regarding the question of who bears the onus of proof?

- The court will direct which party must first adduce evidence (rule 29(10)).

Activity 27.1: SG pp 180

Scenario: Peter issues summons against John in the amount of R80 000 for damages sustained in a motor-vehicle collision. Peter contends that the collision was due solely to the negligence of John. John defends the action. The pleadings are closed. The parties have discovered relevant discovery evidence which they hope to adduce at the trial. The parties go to trial. Peter's attorney adduces his evidence first. He closes his case after presenting all the evidence which he wishes to lead before the court.

Carefully read through the scenario above and then answer the following questions:

(1) Suppose Peter [the plaintiff] has failed to discharge his onus on a balance of probabilities. What step may John take at the end of Peter's case?

John's attorney may apply for **absolution from the instance**.

This order may be applied for when there is insufficient evidence on which the court may reasonably find for the plaintiff. [Peter, in this instance].

---

(2) What is the effect of such an order?

The parties are left in the same position **as if** the case had never been brought.

---

(3) Discuss whether the above order can be applied for if the onus rested on John [the defendant] and he failed to discharge his onus on a balance of probabilities?

- **No.** The court can never grant absolution from the instance when the onus rests on the defendant.
- The court will grant judgment in favour of the plaintiff (Peter) when John (defendant) fails to discharge his onus on a balance of probabilities.

---

(4) What judgments may the court grant after the plaintiff and the defendant have closed their cases and presented argument?

The court may grant the following judgments:

(a) judgment for the plaintiff in respect of his claim in so far as he or she has proved the same

(b) judgment for the defendant in respect of his or her defence in so far as he or she has proved the same

(c) absolution from the instance, if it appears to the court that the evidence does not justify the court in giving judgment for either party

(d) such judgment as to costs (including costs as between attorney and client) as may be just

(e) an order, subject to such conditions as the court thinks fit, against the party in whose favour judgment has been given suspending, wholly or in part, the taking of further proceedings upon the judgment for a specified period pending arrangements by the other party for satisfaction of the judgment

(f) an order against a party for the payment of an amount of money for which judgment has been granted in instalments or otherwise, incl an order contemplated by s'65Jor73 (s48)

Activity 28.1: SG pp 183

(1) What do you understand by the following terms?

(a) attorney-and-client costs: The amount due for services rendered and expenses incurred for which the client is liable to his or her attorney is known as attorney-and-client costs.

(b) party-and-party costs: The court usually makes an order at the end of a case to the effect that one of the parties (e.g. the defendant) is to pay the legal costs incurred by the other party (the plaintiff).

- This is known as party-and-party costs and must be paid by one party (the defendant) to the other party (the plaintiff) and not to the plaintiff's attorney.
- The defendant therefore reimburses the plaintiff for costs that he or she (the plaintiff) must pay to his or her attorney.
- Also note that party-and-party costs are determined by a tariff rather than a contract between attorney and client as is the case with attorney-and-client costs.

(c) costs *de bonis propriis*

- Costs *de bonis propriis* are costs of suit which the court directs are to be paid by the unsuccessful party out of his or her own pocket where he or she instituted proceedings or defended the matter in a representative capacity.
- This applies where the litigation in question has been *mala fide*, negligent or unreasonable.

---

(2) The attorney-and-client costs between attorney John Smith and his client Abel Dixon amount to R5 000. According to the cost order granted by the court, the defendant Joshua Simelane is obliged to reimburse Abel for his costs on the party-and-party scale. The party-and-party costs are taxed at R3 800. Will Joshua be liable for R5 000 or R3 800? Give reasons for your answer?

- Party-and-party costs are calculated according to a fixed tariff.
- These party-and-party costs are less than the attorney-and-client costs because only certain cost items may be recovered on the party-and-party scale, and even those costs which are recoverable can be recovered only at the given tariff.
- Joshua therefore pays only part of Abel's costs, namely R3 800 (not the entire R5 000), to John Smith.
- Abel [John's client] remains liable for payment of the balance of the amount: R1 200.

---

(3) Why is an order for costs granted?

The reason for granting an order for costs is that the successful party (e.g. the plaintiff) must be compensated for the costs that he or she is obliged to pay his or her attorney for conducting the case on his or her behalf.

Activity 29.1: SG pp 188

Scenario: Peter sues John for damages sustained in a motor-vehicle collision. Peter succeeds in his action, and the court orders John to pay Peter damages in the amount of R80 000. Despite reminders, John refuses and/or fails to comply with the court judgment. **Peter wishes to know if there are any legal steps that he can take against John to enforce the judgment.**

(1) What kind of movables may be attached?

The following **movables** may be attached:

- corporeal things
- incorporeal things
- bills of exchange, cheques, promissory notes, bonds - and
- securities for money belonging to the execution debtor (s 68).

---

(2) List the items that are **exempt from execution**?

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

(a) the necessary beds, bedding and wearing apparel of the execution debtor and of his or her family

(b) the necessary furniture (other than beds) and household utensils in so far as they do not exceed in value the sum of R2 000

(c) stocks, tools and agricultural implements of a farmer in so far as they do not exceed in value the sum of R2 000

(d) the supply of food and drink in the house sufficient for the needs of such debtor and of his or her family during one month

(e) tools and implements of trade, in so far as they do not exceed in value the sum of R2 000

(f) professional books, documents or instruments necessarily used by such debtor in his profession, in so far as they do not exceed in value the sum of R2 000

(g) such arms and ammunition as such debtor is required by law, regulation or disciplinary order to have in his or her possession as part of his or her equipment:

Provided that the court shall have a discretion in exceptional circumstances and on such conditions as it may determine to increase the sums referred to in paragraphs (b), (c), (e) and (f)

---

(3) When may a warrant be issued against immovable property?

If the debtor….

does not possess sufficient movable goods to satisfy the judgment, the court may, on good cause shown, order such attachment (s 66).

---

(4) When do you issue a warrant of execution?

When **compliance with a judgment** is sought.

---

(5) May a creditor at will elect to issue a warrant of execution against movable property or immovable property?

No, this may not be done.

Sections 66(1) and 66(2) are relevant here.

Section 66(1): provides that execution may:

- first be levelled against the movable property of the judgment debtor
- and then against his or her immovable property…

provided that there is not sufficient movable property to satisfy the judgment or order, or if the court, on good cause shown, orders that execution be levied against the debtor's immovable property.

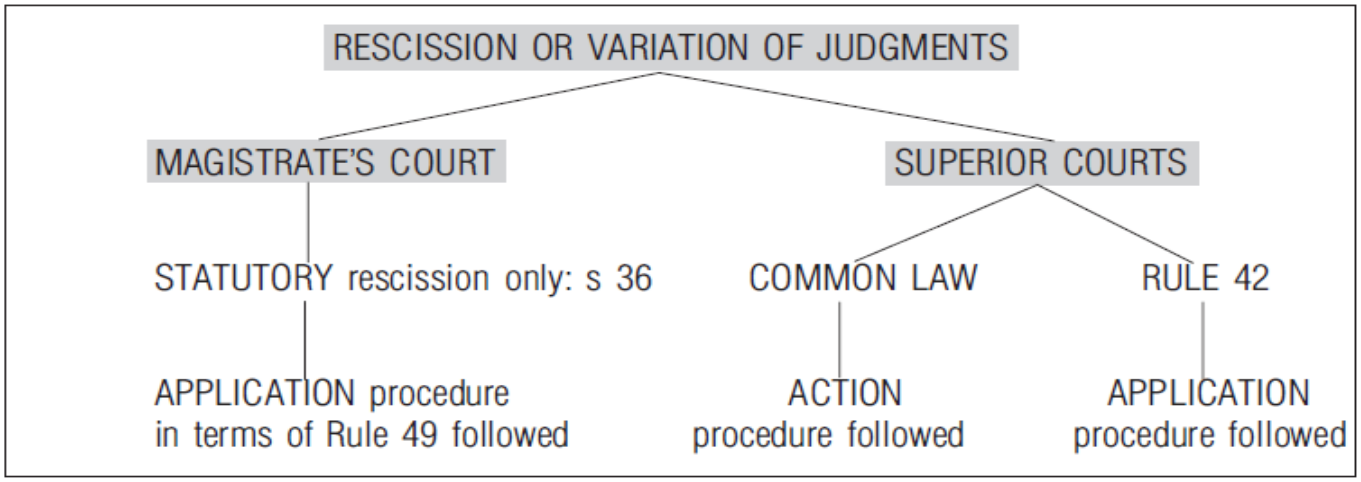
Section 66(2): refers to

- execution against immovable property which is subject to a preferent claim.

Refer to section 66(2) above regarding the instances when such execution will be allowed.

SG pp 192

Schematic representation of the procedure i.r.o the rescission or variation of judgments:



Activity 30.1: SG pp 197

Scenario: Thomas purchases goods to the value of R90 000 from Sibeko. Thomas takes delivery of the goods, but, despite demand, refuses to pay the purchase price. Thomas alleges that the goods are defective. Sibeko institutes proceedings against Thomas in the magistrates' court to obtain payment of the purchase price. Thomas fails to respond timeously to the summons, and default judgment is granted against him. **Thomas is now displeased because the judgment was granted in his absence and he has a valid defence to the action.**

Carefully read through the scenario above and then answer the following questions:

(1) What procedure must Thomas follow to set aside the judgment?

Thomas must apply to court for **rescission of the judgment** in terms of rule 49.

Rule 49m: Rescission and variation of judgments

(1) **A party to proceedings in which a default judgment has been given, or any person affected by such judgment**, may **within 20 days** after obtaining knowledge of the judgment serve and file an application to court, on notice to all parties to the proceedings, for a rescission or variation of the judgment **and the court may,** upon good cause shown, or if it is satisfied that there is good reason to do so, **rescind or vary the default judgment** on such terms as it deems fit: Provided that the 20 days' period shall not be applicable to a request for rescission or variation of judgment brought in terms of sub-rule (5). [consent]…. ETC

---

(2) What information must be contained in the supporting affidavit?

The supporting affidavit must contain:

» reasons for the defendant's absence or default and

» the grounds of the defendant's defence to the claim (rule 49(3)).

Magistrates' Courts Rules

Rule 49m: Rescission and variation of judgments

(3) **Where an application** for rescission of a default judgment **is made by a defendant against whom the judgment was granted**, **who wishes** to defend the proceedings, the application must be supported by an affidavit setting out the reasons for the defendant's absence or default and the grounds of the defendant's defence to the claim.

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(3) What judgments may be rescinded by a court in terms of section 36(1) of the Magistrates' Courts Act 32 of 1944?

In terms of section 36(1), the magistrates' court may

(a) *rescind or vary any judgment* granted by it *in the absence of the person* against whom that judgment was granted

(b) *rescind or vary any judgment* granted by it:

» which was void *ab origine* or

» was *obtained by fraud or by mistake* common to the parties

(c) to *correct patent errors* in any judgment *in respect of which no appeal is pending*

(d) to rescind or vary any judgment *in respect of which no appeal lies*

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(4) What judgments may be varied or rescinded by the High Court in terms of Rule 42(1)?

The High Court may, in addition to any powers it may have *mero motu* [of own accord] or upon the application of any party affected, rescind or vary

(a) *an order or judgment erroneously sought or* erroneously *granted* in the absence of any party affected thereby

(b) an order or judgment *in which there is an ambiguity*, or a *patent error or omission*, but only to the extent of such ambiguity, error or omission

(c) an order or judgment *granted as the result of a mistake common to the parties* (Rule 42(1))

Uniform Rules of Court:
Rule 42u: Variation and Rescission of Orders
(1) The court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary:
(a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;
(b) an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;
(c) an order or judgment granted as the result of a mistake common to the parties.

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(5) Name the procedure to be followed when variation of judgment in terms of Uniform Rule 42 is sought?

The **application procedure** must be followed.

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(6) Name the procedure to be followed when variation of judgment in terms of the common law is sought?

The **action procedure** must be followed.

Superior Courts Act, 2013
Section 22(1) ScA: Grounds for review of proceedings of Magistrates' Court
(1) **The grounds upon which the proceedings of any Magistrates' Court may be brought under review before a court of a Division are—**
(a) absence of jurisdiction on the part of the court;
(b) interest in the cause, bias, malice or corruption on the part of the presiding judicial officer;
(c) gross irregularity in the proceedings; and
(d) the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.
(2) This section does not affect the provisions of any other law relating to the review of proceedings in Magistrates' Courts.

Activity 31.1: SG pp 205

Scenario: Peter Rendell, a disc jockey, is sued in the magistrates' court by Tony Mokaba, a supplier of stereo sound equipment, for the **nonpayment of his account**. Peter contends that the equipment that he purchased was defective. The magistrate, in passing judgment in favour of Tony Mokaba, states,*inter alia*, that: **''only a lying, thieving, degenerate and drunken DJ would neglect to pay his debts like all other law-abiding citizens''**.

Carefully read through the scenario above and then answer the following questions:

(1) Should Peter appeal against the judgment or take it on review in terms of the requirements of section 22 of the Superior Courts Act, 2013? Explain?

In determining which procedure is appropriate, one should begin by enquiring what one's grounds of complaint are.

- Generally, if one complains about the reasoning employed by the court in coming to a decision, one will proceed by way of appeal.
- But if one complains about the process which led to the decision of the magistrate, one will proceed by way of review.

From the facts, it seems that Peter should take the judgment on review in terms of section 22(1)(b) of the Superior Courts Act, 2012.

- Section 22(1)(b) provides that a court will interfere with the judgment where there is interest in the cause, bias, malice or corruption on the part of the presiding judicial officer.
- Peter should use the above review procedure, because the magistrate's comments display bias and/or malice.

It should be noted that a court may also interfere in other instances such as the following (not applicable to this answer, though):

(a) in the absence of jurisdiction on the part of the court (s 22(1)(a))
(b) in the case of a gross irregularity in the proceedings (s 22(1)(c))
(c) where a magistrate has admitted inadmissible or incompetent evidence, or rejected admissible or competent evidence (s 22(1)(d))

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(2) Depending on your answer to (1) above, state the procedure that must be used?

Motion proceedings must be used, because review of a decision of a magistrates' court is being sought.

(3) Name two distinctions between appeal and review?

31.1.2 Distinction between appeal and review

SG pp 201

Traditionally, appeal and review may be distinguished as follows:

(1) An appeal is aimed at the result of the trial, whereas a review is aimed at the method by which the result is obtained.

- This does not appear to be a very satisfactory distinction because the ultimate aim of both forms of proceedings is to reverse the judgment of the court *a quo*.
- However, the distinction lies rather in the methods employed to achieve this end.
- In an appeal, the appellant accepts that the record correctly reflects the proceedings in the lower court, and that the proceedings were conducted properly… (if he or she does not, and still wishes to appeal, he or she must have the record amended).
- He or she alleges, however, that the presiding officer made false deductions and findings of fact on the evidence (although acting perfectly properly), or that his or her legal conclusions were incorrect.

The very object of a review is to show that the proceedings were improperly conducted, and it seeks to have the judgment set aside on these grounds without being concerned with the merits of the case.

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(2) The second distinction (which is simply another facet of the first) is that:

- in the case of an appeal, the parties are restricted to the record of the proceedings and may not go beyond it… whereas…
- in the case of a review, the parties may, by the nature of review, go beyond the record.

The converse (i.e. that in review one can never argue the matter without going beyond the record) is not true, as we shall see.

A sound starting point is the proposition that, in the case of an appeal, one cannot go beyond the record. If one wishes to go beyond the record, one must resort to review proceedings; appeal proceedings may never be used for this purpose.

As Innes CJ expressed it in *R v Bates and Reidy* 1902 TS 199:

The difference between appeal and review is that an appeal is based upon the matters contained in the record, while in review the appellant may travel beyond the record in order to rely on certain grounds, such as gross irregularity and the admission of incompetent evidence. If the appellant desires to appeal, but is not satisfied with the record as it stands, he may proceed to apply for leave to amend it.

(3) The third distinction is that **the rules governing civil appeals** usually provide that:

- an appeal must be noted within a stipulated number of days, and that the steps to prosecute it must be taken within a further limited period.
- In regard to reviews, however, there is generally no fixed period within which the proceedings must be brought, but this must be done within a 'reasonable time'. What is 'reasonable' will depend upon the facts of each case.

The reason for there being no fixed period is that an irregularity might come to light months or even years after the case has been tried.

(4) The final (and most obvious) distinction is that the procedure differs.

- An appeal must be noted and prosecuted according to statutory provisions, supplemented by the rules of court.
- Reviews, on the other hand, are brought on notice of motion.

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(4) Name two instances when a court will interfere with a decision taken by a quasi-judicial body?

The court will interfere in the following instances:

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

(b) If a public body, although confining itself within the scope of its powers, acts *mala fide* or dishonestly, or for ulterior reasons which ought not to influence its judgment.

Activity 32.1: SG pp 214

Scenario 1: Jane Smith institutes proceedings in a magistrates' court against John Richards for damages arising out of breach of contract. The magistrate grants judgment against John. John is dissatisfied, and takes the matter on appeal

Carefully read through the scenario above and then answer the following questions:

(1) Must John apply for leave to appeal to a High Court?

No, John is allowed one appeal as of right in terms of s83 of the Magistrates' Courts Act '44.

The appeal lies to the appropriate division of the High Court from judgments of magistrates' courts.

Magistrates' Courts Act of 1944
Section 83 McA- Appeal from magistrate's court
Subject to the provisions of section 82, **a party to any civil suit or proceeding in a court may appeal to the** provincial or local division of the **Supreme Court having jurisdiction** to hear the appeal, against-
(a) any judgment of the nature described in section 48; [above]
(b) any rule or order made in such suit or proceeding and having the effect of a final judgment, including any order under Chapter IX and any order as to costs;
(c) any decision overruling an exception, when the parties concerned consent to such an appeal before proceeding further in an action or when it is appealed from in conjunction with the principal case, or when it includes an order as to costs.

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(2) How many judges will hear the appeal?

An appeal from an inferior court is **heard by two judges**.

See section 14(3) of the Superior Courts Act, 2013.

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(3) Describe how John must note his appeal to a High Court?

See 32.2.6 to answer this question.

This matter is regulated by rule 51(3).

Magistrates' Courts Rules
Rule 51(3) - Appeals in civil cases
(3) **An appeal may be noted within 20 days after the date of a judgment** appealed against **or** within 20 days after the registrar or clerk of the court has supplied a copy of the judgment in writing to the party applying therefor, whichever period shall be the longer.

John must note the appeal within 20 days of the date of judgment appealed against, **or** within 20 days of the clerk of the court providing a copy of the written judgment, whichever period is the longer.

John notes the appeal by delivering a notice and, unless the court of appeal directs otherwise, by furnishing security for the respondent's costs of appeal to an amount as determined of R1 000.

A notice of appeal must state the following:

- whether the judgment as a whole, or only part of the judgment or order, is being appealed against, and if only part, then what part
- the grounds of appeal, specifying the findings of fact or rulings of law appealed against

The grounds of appeal must be clearly specified in order for the notice to pass muster

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(4) Explain the implications for John if Jane abandons part of the judgment granted in her favour?

Jane was the plaintiff in the original application. If a plaintiff abandons any part of a judgment granted in his or her favour, judgment in respect of the part abandoned is entered for the defendant (John) with costs in terms of section 86(2) of the Magistrates' Courts Act 32 of 1944. See section 86(2).

Magistrates' Courts Act of 1944
Rule 86(2) McA- Respondent may abandon judgment
(2) Where the party so abandoning was **the plaintiff**, or applicant, judgment in respect of the part abandoned shall be entered for the defendant or respondent with costs.

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(5) How does the noting of the appeal affect the execution of the judgment given in the magistrates' court?

The noting of an appeal automatically suspends execution of the judgment, pending the outcome of the appeal.

Upon application, however, the court may order that the judgment be put into effect. The court's discretion will be made on such terms as the court may determine about security for the due performance of any judgment which may be given upon the appeal or application. See section 78 of the Magistrates' Courts Act.

Magistrates' Courts Act of 1944 - Section 78 McA- Execution or suspension in case of appeal
Where an **appeal has been noted or** an **application to rescind, correct or vary a judgment** has been made, the court may direct either-
» that the judgment shall be carried into execution or
» that execution thereof shall be suspended pending the decision upon the appeal or application.
The direction shall be made upon such terms, if any, as the court may determine as to security for the due performance of any judgment which may be given upon the appeal or application.

Activity 32.2: SG pp 219

Scenario 2: Fanie Botha institutes an action for damages against Solly Sibeko in the High Court. Both the court *a quo* and, on appeal, the full bench of the provisional division, reject his claim. Fanie now wishes to appeal either to the Supreme Court of Appeal, or to the Constitutional Court

Carefully read through the scenario above and then answer the following questions:

(1) What procedure must Fanie follow to apply to appeal to the Supreme Court of Appeal?

An application for leave to appeal must be lodged in triplicate with the Registrar of the Supreme Court of Appeal within the time limits prescribed by the law.

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(2) If leave to appeal is granted, what is the next step that Fanie must take?

A notice of appeal must be lodged with the Registrar of the Supreme Court of Appeal and with the Registrar of the court *a quo* within one month after the date of the granting of leave to appeal.

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(3) What essential information must be included in a notice of appeal?

The notice of appeal must state:

- what part of the judgment or order is appealed against and
- state the particular respect in which the variation of the judgment or order is sought.

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(4) What is meant by the term 'heads of argument'?

The 'heads of arguments' comprise:

- the main points to be made in counsel's address to court as well as
- a list of the authorities to be quoted in support of each point.
- The heads of argument will also define the form of order sought from the Court.

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(5) Suppose that Fanie is unsuccessful in his appeal. Can he now apply to the Constitutional Court?

Only if the matter raises an arguable point of law of general public importance which ought to be considered by the Constitutional Court, *and* if the Constitutional Court grants leave to appeal (see section 167(3) of the Constitution, 1996).

Purely on the given facts the answer is probably "no".

The Constitution of South Africa 1996
Section 167: Constitutional Court
(3) The Constitutional Court-
(a) is the highest court in all constitutional matters;
(b) may decide only constitutional matters, and issues connected with decisions on constitutional matters; and
(c) makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter.