

Discussion class 2012: CIP 2601

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DISCUSSION CLASSES - 2012
CIP2601

OVERVIEW:

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- 2 COMMON MISTAKES IN ASSIGNMENTS AND EXAMS**
- 3 GENERAL PRINCIPLES IN ANSWERING PROBLEM QUESTIONS**
- 4 FRAMEWORK FOR DISCUSSION CLASSES**
 - 4.1 OVERVIEW OF JURISDICTION IN THE COURTS**
 - 4.2 JURISDICTION IN THE SUPERIOR COURTS**
 - 4.3 JURISDICTION IN THE LOWER COURTS
(APPLICATION OF TUTORIAL LETTER 103/3/2012)**
 - 4.4 IMPACT OF NATIONAL CREDIT ACT AND
CONSUMER PROTECTION ACT (TUTORIAL LETTER
103/3/2012)**
- 5 SAMPLE PROBLEM QUESTIONS**
- 6 ANY QUESTIONS?**

1 INTRODUCTORY REMARKS

- Aim: discussion class, not a lecture
- Past exam papers – lecturers cannot furnish you with past examination papers and memoranda
- Tutorial matter (study guide and all tutorial letters)
- **Assignments are important. See feedback and commentaries!**
- Brief discussion of important amendments (see Tutorial Letter 103/3/2012)
- **Study all units for the exams:** if a particular section is not covered, this doesn't mean that it will not be tested in the exams!
- **Go through activities and feedback**
- **All tutorial letters are available on myUnisa. PLEASE CONSULT MYUNISA FOR TUTORIAL MATERIAL AND IMPORTANT ANNOUNCEMENTS!**

2 COMMON MISTAKES IN ASSIGNMENTS AND EXAMINATIONS – GO THROUGH ASSIGNMENT QUESTIONS (Ass 01)

- Students don't know the difference between high court principles and sections in the lower courts namely,
 1. **High Courts:** Common law principles apply – see terminology in SU 10.
 2. **Lower Courts:** “Creatures of statutes” – sections of the Magistrates' Courts Act 32/1944 (MCA) apply; see SUs 20-24.
 3. Generally: students must state the relevant principle (High Courts) or state the relevant section of the Divorce Act or lower courts and apply to the given set of facts to obtain full marks.
 4. The principle/section must be stated in full!
 5. Students will be penalized if they use principles to answer questions in lower courts as sections apply to lower courts!
- Students don't read the questions properly
- Your answer must conform to the mark scheme
- Application of principles and sections to given set of facts (eg application of section 2(1)(a) or 2(1)(b) of the Divorce Act of 1979)
- Answers must be specific!
- Students are confused between study units 13, 14 and 15.
- Students are confused when using the following principles: attachment *ad fundandam jurisdictionem* and attachment *ad confirmandam jurisdictionem* (see SUs 14.1 and 14.2)
- **Note:** section 28 of the MCA applies to the defendant and not the plaintiff!

- Regarding section 28(1)(a): Incorrect to say “defendant is an *incola* therefore magistrate’s court has jurisdiction...)
- Regarding section 28(1)(d) :Students must state that the cause of action occurred “wholly”/cause of action occurred wholly or fully within the court’s jurisdiction. Just stating cause of action is incorrect.
-

3 GENERAL PRINCIPLES IN ANSWERING PROBLEM QUESTIONS

See Tutorial Letter 104/3/2012 (studying and preparing for examinations)

- **SUPERIOR COURT JURISDICTION**– State relevant principle or section and apply to the given set of facts.
- **JURISDICTION IN THE LOWER COURTS**– state relevant section and apply to the given set of facts.

4 FRAMEWORK FOR DISCUSSION CLASSES

IMPORTANT AMENDMENTS:

- Arrest *tamquam suspectus de fuga* now unconstitutional – see ***Tatiana Malachi v Cape Dance Academy case***
- Regional magistrates’ courts now have divorce jurisdiction: new section 28(1A), thus section 46(1) amended accordingly
- Financial jurisdictional limit of **regional magistrates’ courts** set at R300,000 (note exceptions sections 38, 39, 45 etc)
- Financial jurisdiction limit of **district magistrates’ courts** remain at R100,000 (note exceptions sections 38, 39, 45 etc)
- See Tutorial Letter 103/3/2012 for further information

KEY CONCEPTS AND AREAS:

- Differences between substantive law (rights and obligations of persons eg private law) and adjective law (procedure to enforce the rights and duties eg civil procedure) – see SU 1
- Differences between civil and criminal proceedings eg different parties (plaintiff and defendant vs state and accused), objectives, onus of proof – see SU 2
- Inherent jurisdiction of the High Courts

√ common-law based (jurisdiction reliant on common law and not from statute although in certain cases statute may limit or increase its jurisdiction)

√ entrenched in the Constitution – section 173 (SU 3.2)

- Lower courts as creatures of statutes: SU 3.3
- Sources of civil law – main statutes, who has competence to make, amend or repeal rules of court etc - see SU 4
- Civil Procedure in context: differences between Anglo-American civil procedure systems and Continental civil procedure systems; know principles of bilaterality, party prosecution and party presentation; understand the role of the court; critical appraisal of adversarial system, methods of reform (SU 5)

ALTERNATIVE DISPUTE RESOLUTION:

See SU 6

PRIMARY PROCESS: SU 6.2

- Traditional process
- 3 types: Negotiation, mediation and arbitration**
- Negotiation:**
- Resolution of differences by agreement
- Different stages viz, orientation, positioning, bargaining and close-out
- Mediation:**
- Resolution of dispute by intervention of third party (mediator)
- Basic stages viz, pre-mediation, opening, middle and closing
- Arbitration:**
- Role of arbitrator
- Why is arbitration regarded as a primary ADR process?
Allows a great deal of party control over the process

DERIVATIVE PROCESS: SU 6.3

- Created from primary process
- Derivatives of Mediation:**
- Conciliation
- Facilitation

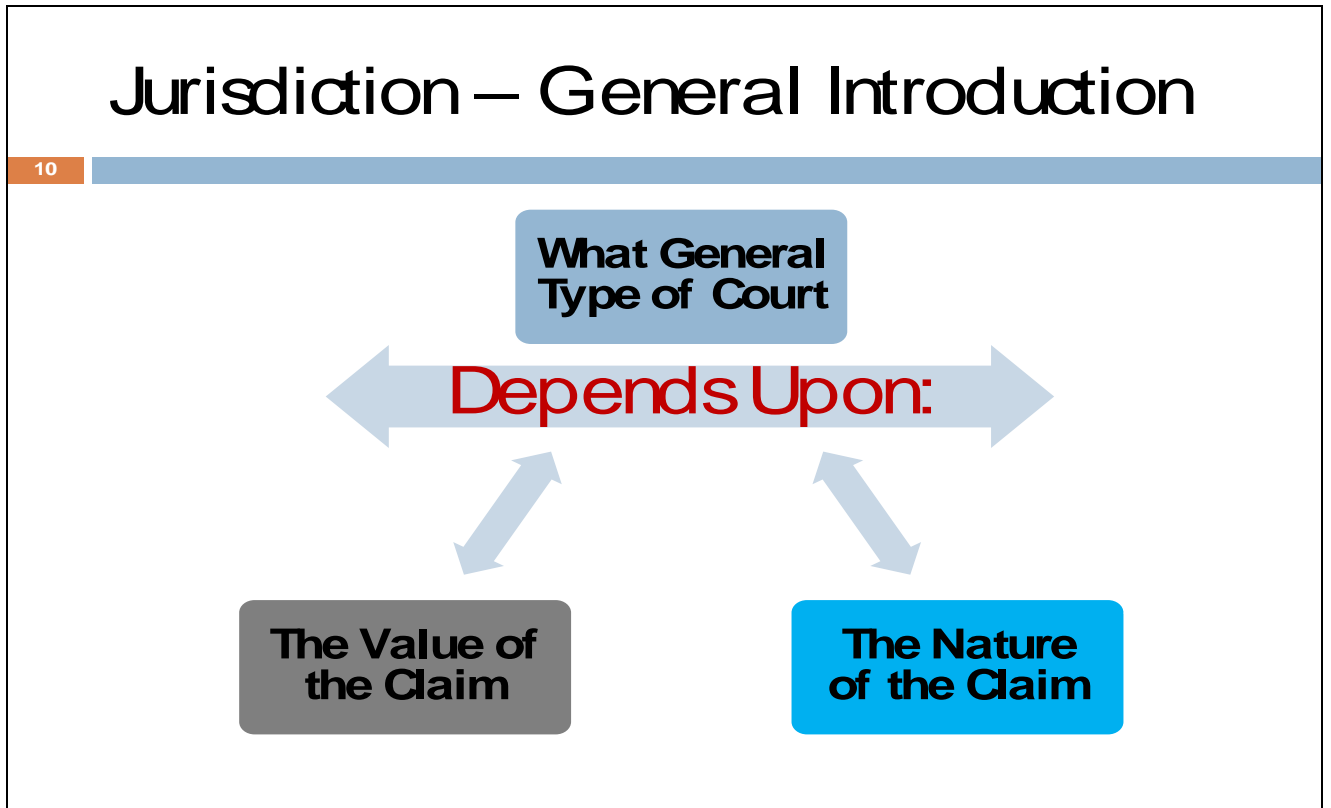
- Derivatives of Arbitration:**
- Expedited arbitration
- Documents-only arbitration
- Quality arbitration
- Final-offer arbitration

 HYBRID PROCESS: SU 6.4

- Combine elements of primary processes
- Mini-trial
- Med/Arb (use in labour disputes)
- Arb/Med (use in labour disputes)

- Also know positive characteristics and weaknesses of ADR –
SU 6.5.2-6.5.3

4.1 JURISDICTION OF THE COURTS:



SMALL CLAIMS COURTS:

Small Claims Courts – Basics : SGU 7

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Claims up to R12,000

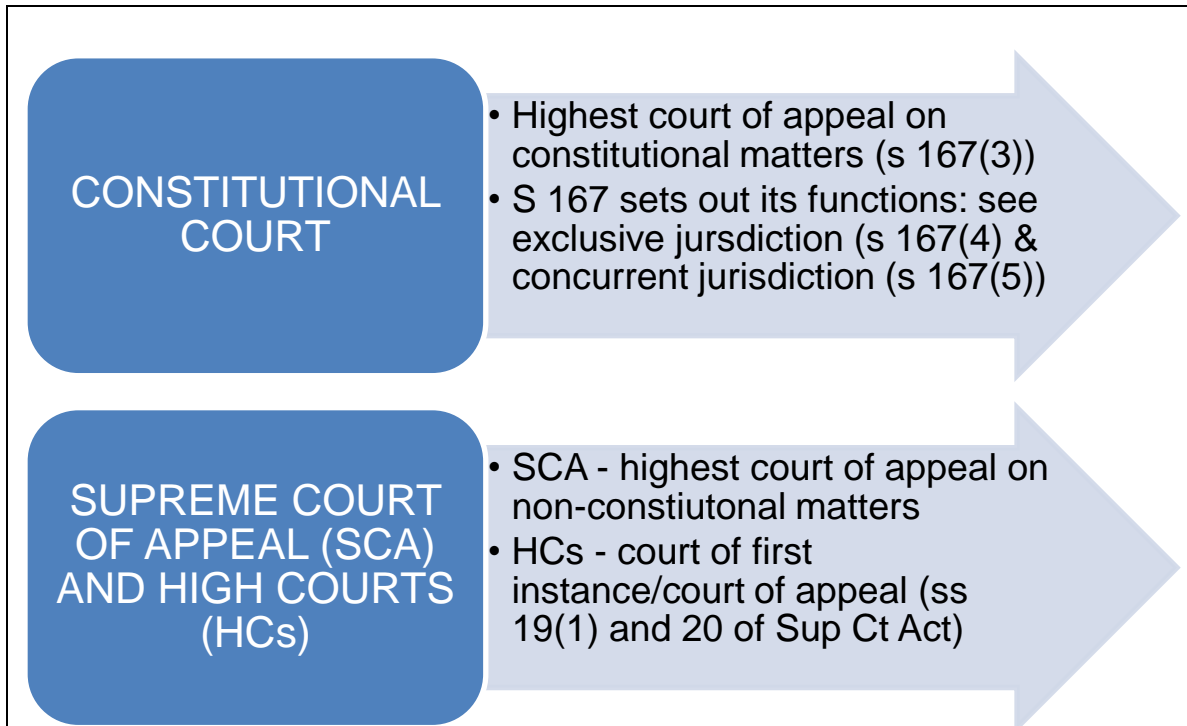
Plaintiffs only natural persons
+
No lawyers

Proceedings inquisitorially conducted

EXPLANATORY NOTES:

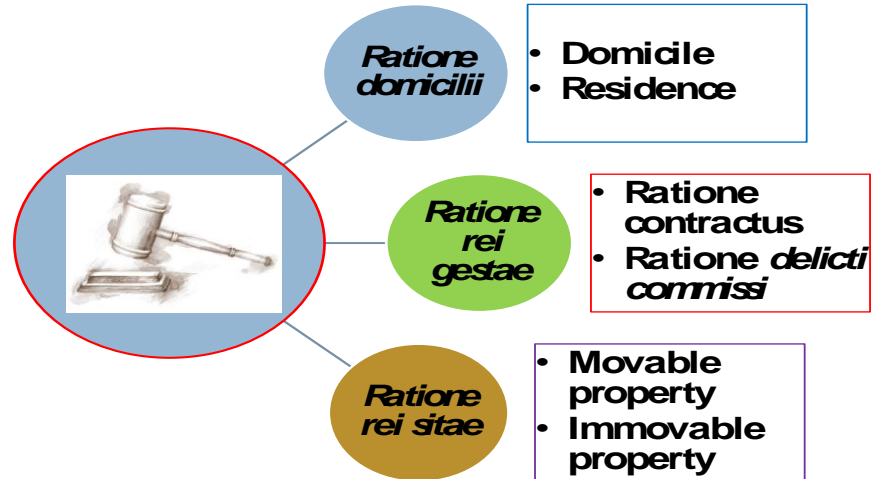
- See s15 of Small Claims Courts Act 61 of 1984 regarding quantitative jurisdictional limit of Small Claims Court (SCC)
- See s16 regarding claims beyond the jurisdiction of the SCC
- See s26(3) regarding the role of the commissioner

4.2 JURISDICTION OF THE SUPERIOR COURTS: SUs 9 & 18



High Courts : Basic Grounds for Jurisdiction : SGU 10.1

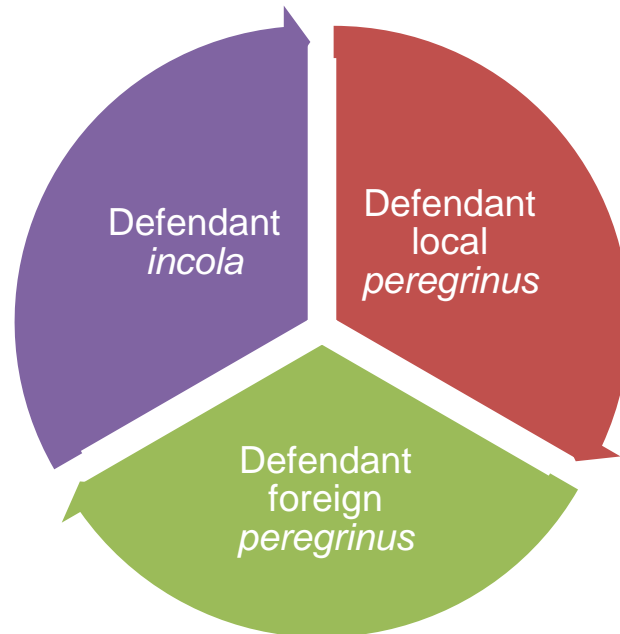
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EXPLANATORY NOTES:

- Ratione domicilii* – the court where the defendant is either domiciled or resident
- Know definitions of domicile and residence
- Ratione rei gestae* - monetary claims
- Ratione rei sitae* – property claims
- Know definitions of *incola* and *peregrinus*
- Know distinction between local *peregrinus* and foreign *peregrinus* (SU 10)

CLAIMS SOUNDING IN MONEY: SUS 12-14



EXPLANATORY NOTES:

- If defendant is an *incola* of the court: *ratione domicilii* applies (the court where the defendant is either domiciled or resident)
- If defendant is a local *peregrinus* of the court: *ratione rei gestae* applies (the court where the cause of action arose: delict/contract)
- If defendant is a foreign *peregrinus* (court has no jurisdiction unless defendant's property is attached to found or confirm jurisdiction)
- Effect of section 28(1) of Supreme Court Act 59/1959: no attachment of property of local *peregrinus*
- Know effect of *Bid Industrial Holdings* case: arrest to found or confirm jurisdiction is unconstitutional

ATTACHMENT AD FUNDANDAM JURISDICTIONEM : SU 14.1**EXPLANATORY NOTES:**

- It is not necessary for cause of action to occur within the court's area of jurisdiction

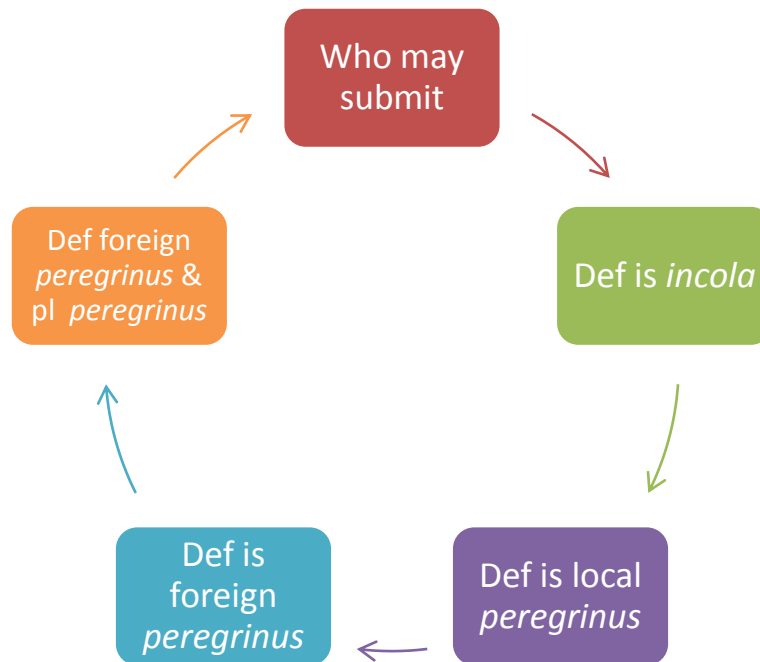
ATTACHMENT AD CONFIRMANDAM JURISDICTIONEM:
SU 14.2



EXPLANATORY NOTES:

- Relevant in money claims (debt /damages)
- It is not necessary whether plaintiff is an *incola* or *peregrinus* of the court
- Know the effect of s 19(1)(c): attachment to found or confirm may take place anywhere in RSA
- Know the distinction between s 19(1)(c) and s 28(1) of the Supreme Court Act 59/1959

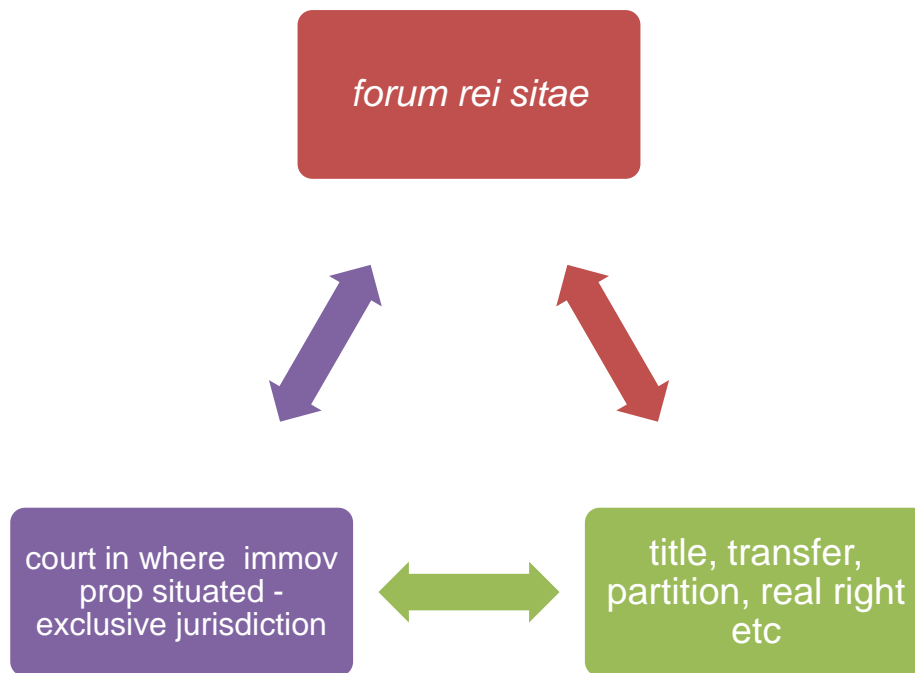
SUBMISSION TO JURISDICTION: SU 15



EXPLANATORY NOTES:

- Def is *incola*: no submission
- Def local *peregrinus*: where cause of action arose or where def *incola*
- Def foreign *peregrinus* and plaintiff is *incola* of court: cause of action within court's area – *Briscoe v Marais* (*Veneta* case obiter re *incolae* plaintiffs)
- Def foreign *peregrinus* and plaintiff local or foreign *peregrinus*: cause of action within area + attachment to confirm jurisdiction

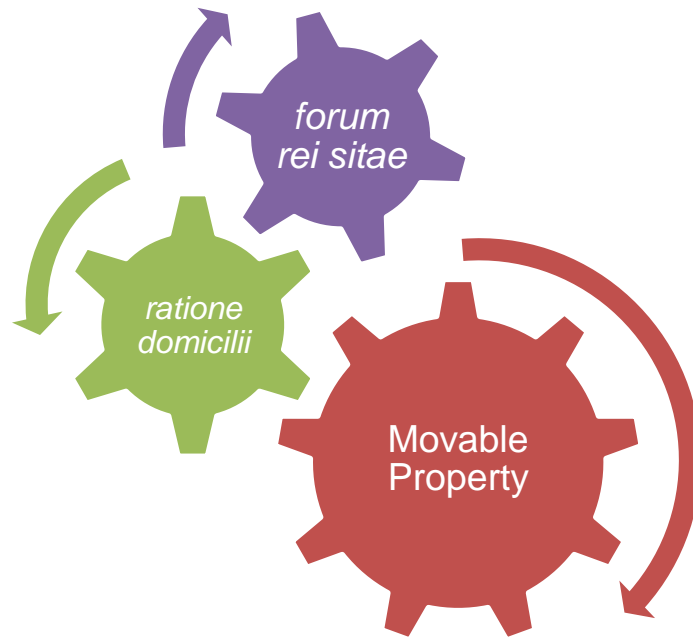
CLAIMS RELATING TO IMMOVABLE PROPERTY: SU 16.2



EXPLANATORY NOTES:

- It is irrelevant whether the defendant is an *incola* or *peregrinus*

CLAIMS RELATING TO MOVABLE PROPERTY: SU 16.3

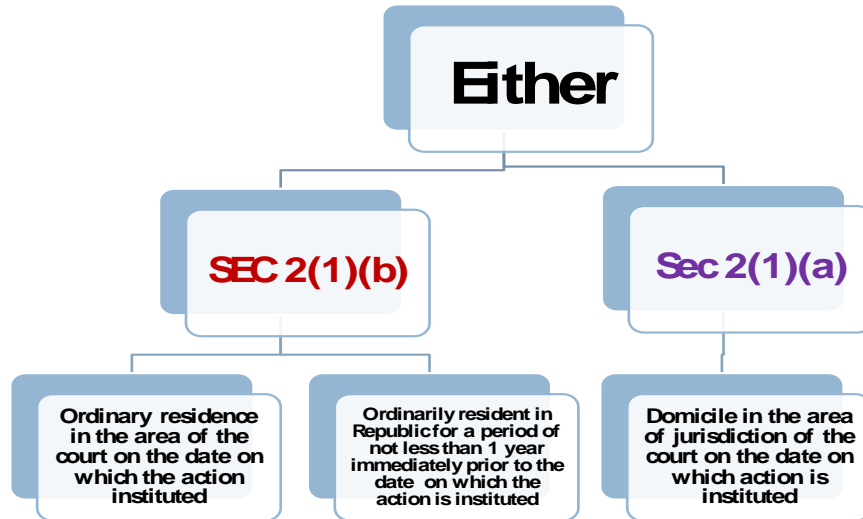


EXPLANATORY NOTES:

- It is debatable whether *forum rei sitae* is exclusive
- No clarity on *forum domicilii* – would apply however

Matrimonial Claims : **SGU 17**

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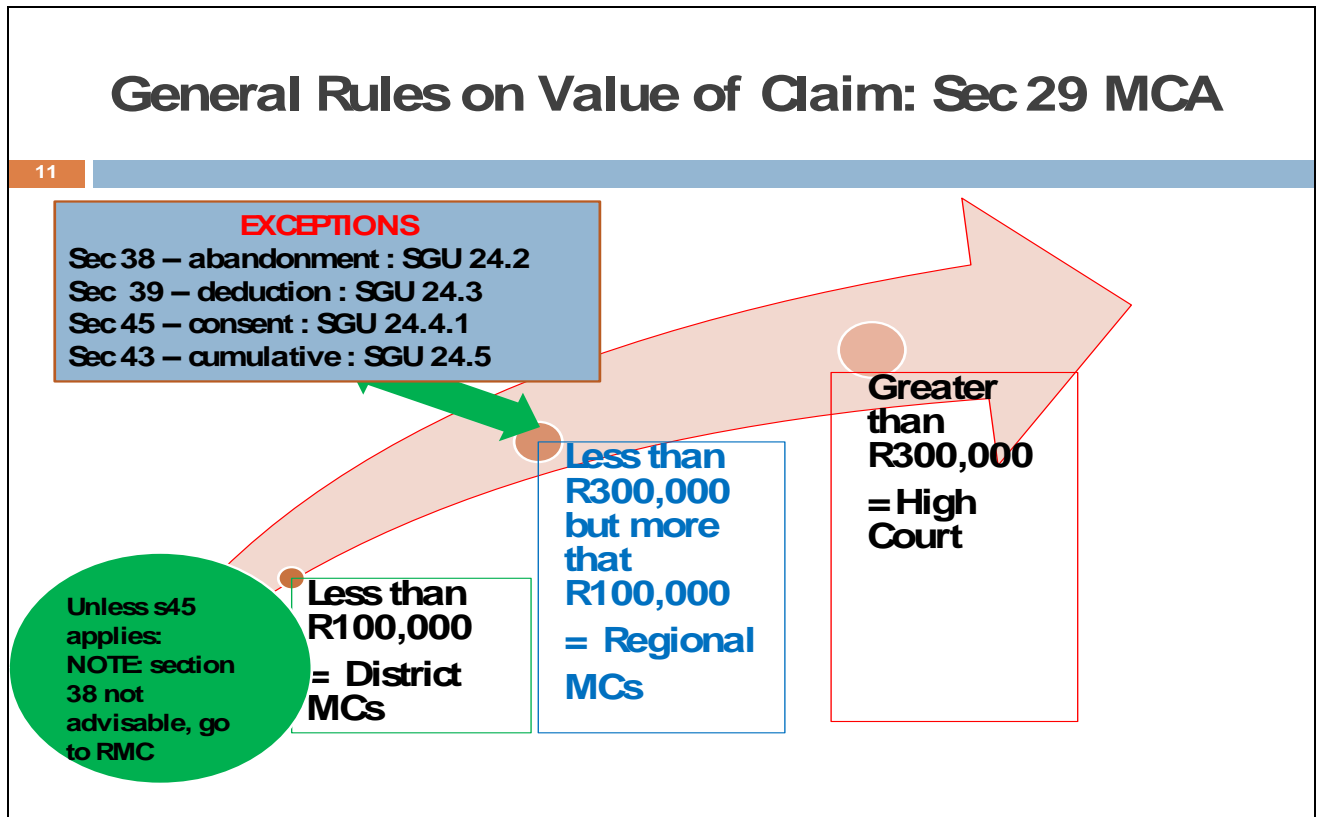


EXPLANATORY NOTES:

- Know common-law position
- Effect of Domicile Act 3/1992 – independent domicile
- Divorce Act 70/1979: independent domicile/residence of both/either parties – these are separate, independent and alternative grounds!
- Know definitions of domicile & residence (SU 10)
- Note section 2(1)(b): two requirements regarding ordinary residence!
- Jurisdiction regarding nullity and annulment: how it applies

4.3 JURISDICTION OF THE LOWER COURTS: SUS 19-24

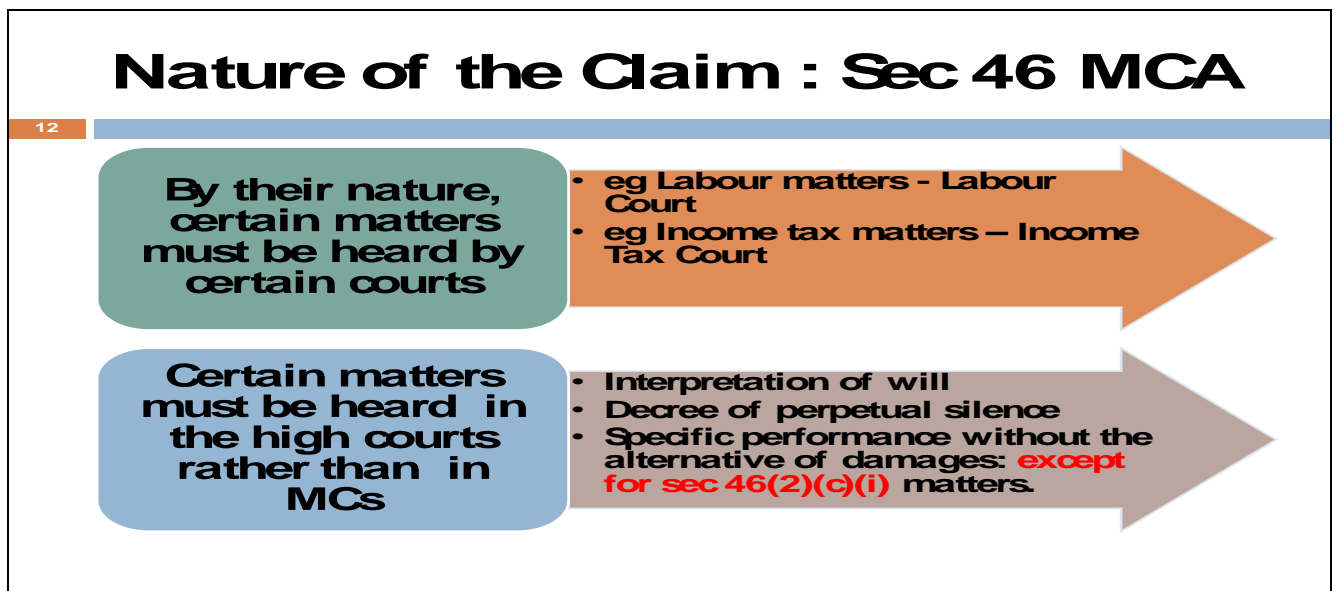
- Refer to Tutorial Letter 103/3/2012



EXPLANATORY NOTES:

- Section 29(1B)(a) of the new Act now provides that a RMC shall **have jurisdiction** to determine actions relating to the nullity of a marriage and divorce as well as related matters.
- RMC may also hear any matter provided for in terms of the Recognition of Customary Marriages Act 120 of 1998.

- Section 29(1B)(b) provides that a RMC hearing any of these matters shall have the same jurisdiction as any high court regarding such matter.
- Section 1 of the Divorce Act 70 of 1979 has also been amended to extend the definition of “court” to include a reference to a RMC.
- Re exceptions: section 43 - Parties must be same and causes of action must be different
- Section 40 - splitting of claims (SU 24.6). No splitting where different causes of action
- Section 47: counterclaims exceeding jurisdiction (SU 24.7)
- NB: exceptions also apply to RMC!



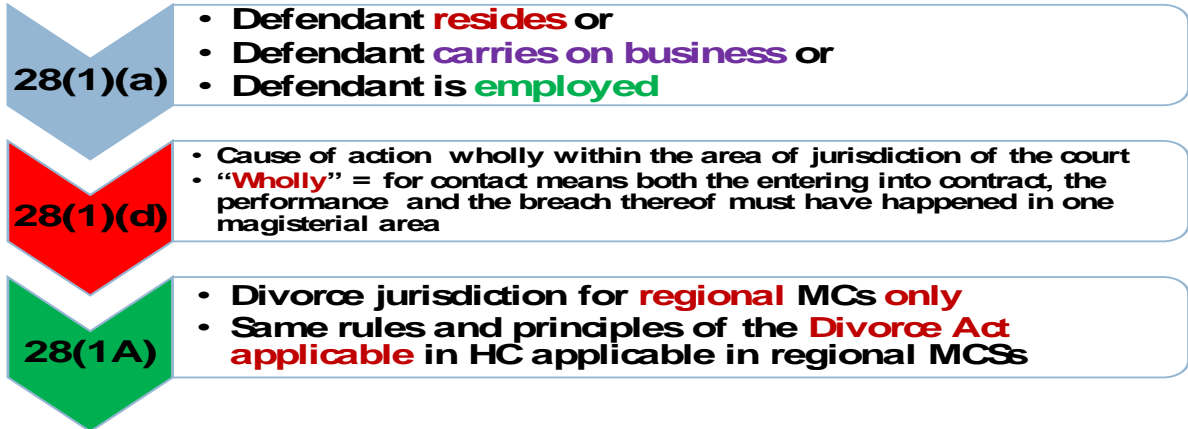
EXPLANATORY NOTES:

- Section 46: matters beyond the jurisdiction of the DMC
- Section 46(1) has been repealed: see Tutorial Letter 103/3/2012

- Claim for payment of money ≠ specific performance
- Exceptions: see sections 46(2)(c)(i)-(iii)

Which Particular Court : Sec 28 MCA

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EXPLANATORY NOTES:

- Section 28 applies to the defendant and not the plaintiff!
- Refer to Tutorial Letter 103/3/2012 re amendments to MCA

Miscellaneous Provisions

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- **Section 30 = Interdicts as exceptions to section 46(2)(c): SGU 23.2**
- **Section 31 = automatic rent interdict: SGU 23.3.2**
- **Section 32 = attachment of property in security of rent: SGU 23.3.3**
- **Section 50 = removal of the matter to the high court**

EXPLANATORY NOTES:

- ***Mandamenten van spolie*** : does not contravene section 46(2)(c) – SGU 23.2.3
- Delete SU 23.2.4 – Refer to Tutorial Letter 103/3/2012

4.4 IMPACT OF NATIONAL CREDIT ACT, 2005, AND THE CONSUMER PROTECTION ACT, 2008

- Aim: facilitate consumer-related issues
- See section 90(2)(k) of the NCA – when consent to jurisdiction of HC excluded
- See sections 69 (use of remedies in CPA) & 115 (civil actions and jurisdiction) of the CPA
- See Tutorial Letter 103/3/2012 for clarity

5 SAMPLE OF PROBLEM QUESTIONS

JURISDICTION OF THE SUPERIOR COURTS

QUESTION 1

X has a claim against Z in the amount of R350 000 on the grounds of breach of contract. The cause of action arose in Cape Town where Z also owns a holiday home. X is an *incola* of Cape Town and Z is an *incola* of Pretoria. On the basis of these facts, answer the following questions giving full reasons for each answer.

- (i) Can X institute proceedings against Z in the Western Cape High Court, Cape Town?(1)
- (ii) If it is possible to institute proceedings against Z in the Western Cape High Court, Cape Town, would it be necessary to attach Z's property? (2)
- (iii) Can X institute proceedings against Z in the North Gauteng High Court, Pretoria? (1)
- (iv) Would your answer to (i) differ if Z was a *peregrinus* of the whole Republic? (6)
- (v) Would your answer to (iv) differ if Z is not present in Cape Town and now has attachable property and the property is situated in Durban? (3)
- (vi) Would your answer to (i) differ if the claim related to the registration of fixed property and the property is situated in Durban? (2)
- (vii) Would your answer to (vi) differ if the claim related to movable property situated in Durban? (1)

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QUESTION 2

J and T are married to each other and are domiciled in Lesotho. After having been married to each other for a period of 8 years, J wishes to divorce his wife, T. At the time of the institution of divorce proceedings, J had been living in Pretoria for ten months.

With these facts in mind, answer the following questions. Give full reasons for your answers.

- (a) Will the North Gauteng High Court, Pretoria, have jurisdiction to hear the action for divorce? (3)

JURISDICTION OF THE LOWER COURTS

QUESTION 3

X lives and works in Pretoria. Y lives in Randburg. X and Y enter into a contract of sale in Pretoria, to the value of R100 000 in terms of which X has to deliver goods to Y's business premises in Johannesburg. X fails to deliver the goods. Y wishes to institute proceedings against X in a district magistrate's court in the amount of R100 000 for breach of contract. In relation to these given facts, answer the following questions and give brief reasons for your answers:

- (a) Could Y institute proceedings against X in the magistrate's court for the **district** of Pretoria? (2)
- (b) Could Y institute proceedings against X in the magistrate's court for the **district** of Johannesburg? (4)
- (c) Would any **district magistrate's court** have jurisdiction to hear the action if the amount of the claim was R110 000 and Y owed X an admitted debt of R30 000?(5)
- (d) On the given facts, would a **regional magistrate's court** have jurisdiction if, in the same summons, Y claimed R200 000, R260 000 and R300 000 and each claim for breach of contract was based on a separate account for goods sold and delivered? (3)

[14]

