

CIP101-D

October/November 2002

UNISA

CIVIL PROCEDURE 101

Duration : 2 Hours

100 Marks

EXAMINERS :

FIRST :

PROF E HURTER

MS F CASSIM

PROF RA KELBRICK

SECOND :

PROF JA FARIS

EXTERNAL :

THE HON MR JUSTICE WJ VAN DER MERWE

This paper consists of 3 pages.

PLEASE COMPLY WITH THE FOLLOWING INSTRUCTIONS WHEN ANSWERING THE EXAMINATION PAPER

Answer all **SIX** questions.

- (a) Ensure that you give reasons for each answer when instructed to do so. A mere YES/NO will earn NO marks if instructed to discuss or provide reasons for your answer.
- (b) Please ensure that the time that you devote to each question is in proportion to the marks allotted.

GENERAL PRINCIPLES

QUESTION 1

- (a) Complete the following sentences by writing the appropriate word in your answer book(not on this examination script):

In criminal proceedings, the state prosecutes the

(i) at the instance of the

(ii)

(2)

In civil trial proceedings, a

(iii) issues summons against a

(iv)

(2)

In civil appeals, a

(v) commences proceedings against a

(vi)

(2)

(6)

[TURN OVER]

UNISA

JURISDICTION OF THE LOWER COURTS

QUESTION 5

Nazir, who lives in Johannesburg, buys a cattle truck for R90 000 from Tsepo, who lives in Bloemfontein. Nazir pays Tsepo R60 000 of the purchase price and undertakes to pay the remaining R30 000 a month later. Tsepo delivers the truck to Nazir's home but, despite demand, Nazir fails to pay this outstanding amount. Answer the questions that follow, in each instance giving brief reasons for your answers.

- (a) Will any magistrate's court have jurisdiction to hear an action instituted by Tsepo against Nazir in which he claims return of the motor vehicle? *Sec 29 Sec 29* *Sp. 46 21 121* (4) *pg 117*
- (b) Will the magistrate's court situated in Pretoria have jurisdiction to hear the action instituted by Tsepo against Nazir in which he claims payment of the outstanding amount? (3) *pg 131*
- (c) John, another of Nazir's creditors, removes the truck from Nazir's premises because Nazir owes him money. What can Nazir do to force John to return the truck? *Sp. 102 pg 142* (3)
- (d) If Tsepo does not wish to have his action against Nazir heard by a magistrate's court, describe what he must do to have it heard by a High Court. (6) *Sec 50 pg 145* [16]

QUESTION 6

Answer the following questions.

- (a) Name any three matters which a small claims court may not hear in terms of the provisions of section 16 of the Small Claims Court Act of 1984. (6) ✓
- (b) Explain the provisions of section 47 of the Magistrates' Courts Act of 1944 that deals with counterclaims that exceed the court's jurisdiction. *pg 21* (8) [14]

TOTAL: [100]

QUESTION 2

- (a) This question is based indirectly on activity question 3 at the end of unit 6. You were required merely to name each stage of the process of negotiation; no explanation was required. What was obvious is that many candidates muddled the negotiation of stages with those for mediation.
- (b) The answer to this question is clearly set out in the feedback to activity question 10 at the end of unit 6. Therefore no further commentary is necessary. Briefly the following to explain the allocation of marks: one mark was awarded for correctly naming each derivative of the process of arbitration. Two marks per derivative process were awarded if you explained the nature of each. No marks were awarded if a student gave a general explanation which lacked substance.

QUESTION 3

- (a) Section 2 (1) of the Divorce Act provides that domicile or residence of either spouse within the area of a particular High Court is sufficient to confer jurisdiction in that court. Section 2(1)(a) provides that a court may exercise divorce jurisdiction if both or either parties are/is domiciled in its area of jurisdiction on the date on which the action is instituted. The fact that Peter has moved permanently to Bloemfontein indicates that he has the intention to stay there indefinitely. Section 2(1)(a) also provides that such court will be competent to exercise jurisdiction irrespective of the period of domicile. Thus, a spouse's domicile of one month or one day within the court's area will be sufficient to confer jurisdiction. Therefore, Peter is domiciled in Bloemfontein. Thus, both Thandi and Peter may institute a divorce action in the Bloemfontein High Court in terms of section 2(1) of the Divorce Act. Alternatively, the parties may institute a divorce action in the Bloemfontein High Court on the basis of Peter being ordinarily resident in Bloemfontein for more than a year (in terms of s 2(1)(b) of the Divorce Act). See further unit 17.3. Please note that a reference to the common law principle was not required for purposes of this answer.
- (b) The common-law position was that a woman upon entering into marriage, automatically adopted and followed the husband's domicile, retaining it throughout the subsistence of the marriage. Therefore, she lost the domicile which she had acquired prior to her marriage, and also forfeited her competence to acquire a domicile of choice during the subsistence of the marriage. However, the wife's domicile of dependence was abolished by the provisions of the Domicile Act 3 of 1992. An independent domicile for married women is now conferred in terms of section 1(1) of the Domicile Act, which provides that every person over or under the age of 18 years who has the status of a major by law, shall be competent to acquire a domicile of choice, regardless of such person's sex or marital status. The Domicile Act amended the Divorce Act 70 of 1979 by establishing both domicile and residence as separate grounds for the exercise of divorce jurisdiction. The present position is that the domicile or ordinary residence of either spouse within the area of a particular High Court is sufficient to confer jurisdiction on that court. The effect of the amendment is that the word "domicile" when used in the context of divorce jurisdiction must be interpreted according to the definition contained in section 1(1) of the Domicile Act and not according to the common-law position. See further unit 17.2.

- (d) Until the end of 1999, the implication of the common law principle (namely that a person or the property of a foreign peregrine had to be either arrested or attached, as the case may be, to provide the necessary *nexus* between the court, the litigants or the cause of action), was that the person or the property of the person had to be situated within the area of jurisdiction of the court where the plaintiff wished to institute action. This principle was confirmed in the *Ewing McDonald* case. The application of this principle led to the fact that *incola* plaintiffs often could not litigate effectively against foreign *peregrine* defendants simply because there was no property (or person) situated within the court's area of jurisdiction. Section 19(1)(c) now specifically provides that arrest or attachment (to found or to confirm jurisdiction), of a foreign *peregrinus* or his/her property, can be effected anywhere in South Africa. See unit 14.3.

Again note the amount of detail contained in this answer. If you treat the question superficially, you cannot expect a reasonable mark. It is with good reason that we instruct you to pay attention to the mark allocation of each question.

JURISDICTION OF THE LOWER COURTS

QUESTION 5

- (a) This question asks whether a magistrate's court (in contradistinction to a High Court) may hear the action. It is clearly stated in the study guide that such a question requires a consideration of section 46 and possibly also section 29 of the Magistrates' Courts Act 32 of 1944 (unit 20.2 and 20.3). The correct answer to this question was that a magistrate's court may hear the matter because it is an exception to the general rule that a magistrate's court may not order specific performance without an alternative claim for damages (s 46(2)(c)(ii) unit 21.2.4.2 p 127). However, some credit was given to students who recognised the claim as possibly one for specific performance - also to those students who dealt with the provisions of section 29(1)(a) and 29(1)(e) (~~unit 22.2.3 and 22.2.7~~).
- (b) This magistrate's court may not hear the matter because the cause of action did not arise in the area neither is the defendant resident, employed or carrying on business in the area (~~unit 28.2.1 and 28.2.4~~).
- (c) Nazir must apply for a *mandamenten van spolie*. To obtain a spoliation order, he need merely show that he was in peaceful possession and was unlawfully dispossessed (~~unit 24.2.3~~).
- (d) The names of the parties were given incorrectly. The question obviously related to section 50 - removal to the High Court at the option of the defendant. However, because the question asked what Tsepo, the plaintiff, could do, credit was given both for a discussion of section 50 (unit 24.5) and for the statement that Tsepo, as plaintiff and *dominus litis*, could institute action in either a magistrate's court or a High Court.

GENERAL PRINCIPLES

EXAM

OCT
2001

QUESTION 1

- (a) **Distinguish** between civil and criminal proceedings in respect of the following:
- (i) the objectives (6)
 - (ii) the onus of proof. (6)
- (b) **Briefly describe any three** recognised methods for reforming civil procedure. (6)
- [12]

ALTERNATIVE MODELS OF DISPUTE RESOLUTION

QUESTION 2

- (a) Briefly describe **three** positive characteristics of the system of Alternative Dispute Resolution. (6)
- (b) **Discuss** the mini-trial. (10)
- [16]

JURISDICTION OF THE SUPERIOR COURTS

QUESTION 3

John is a diamond dealer who lives in Bloemfontein. John sells a valuable diamond to Peter, a jeweller, for a purchase price of R300 000. Peter lives in Pretoria but conducts his business from an office in Cape Town. The contract is signed in Johannesburg but the diamond must be personally delivered to Peter's Cape Town office and the purchase price will be paid on delivery. After taking delivery of the diamond, Peter refuses to pay the purchase price.

Answer the following questions, in each instance giving brief reasons for your answer.

- (a) John wishes to sue Peter for an amount of R300 000, being the purchase price of the diamond. **Explain** whether the Johannesburg High Court and the Cape Town High Court will be competent to exercise jurisdiction. (4)
- (b) **Explain** whether or not summons may be issued out of either of the High Courts identified in (a) above during a period when Peter is in Durban for business purposes. (3)
- (c) The original facts remain the same, except that Peter, the purchaser, is a *peregrinus* of the Republic and his only asset in South Africa is his business in Cape Town. **Explain** whether the Johannesburg High Court and the

(d) If Agatha, the defendant, is a company and the amount of Phil's claim is R3 000, may Phil institute action in a small claims court? (2)

Yes. Sec 7(1) jurisdiction

[12]

QUESTION 6

Answer the following questions.

(a) Name any three matters which a magistrate's court may not hear in terms of the provisions of section 46 of the Magistrates' Courts Act of 1944. (6)

(b) Explain cumulative jurisdiction in terms of section 43 of the Magistrates' Courts Act of 1944. (6)

(c) Explain the inquisitorial role of the commissioner in the small claims courts. (6)

[18]

TOTAL: [100]

QUESTION 2

- (a) On the basis of any three of the characteristics stated in the study guide, students were expected to give a technical answer. Answers that were based on a certain amount of "padding", especially in regard to stock answers relating to saving of costs and other such generalities, did not earn good marks. No marks were awarded for a discussion of the three primary processes of negotiation, mediation and arbitration.

See further study guide unit 7.5.2.

- (b) Many students were unable to answer this question. These students discussed the procedure in the small claims courts, or the mediation/arbitration process or created their own version of the mini-trial process. No marks were awarded even if these answers reflected elements of the mini-trial process since the basic premises were incorrect.

See study guide unit 7.4.2 for the correct information that had to be included in an answer.

QUESTION 3

- (a) Both the Johannesburg High Court and the Cape Town High Court may hear the matter on the basis that they are vested with jurisdiction *ratione contractu*. Students did not receive any credit for arguing that Peter's business in Cape Town gave that court jurisdiction. See study guide unit 14.2.
- (b) Summons may be issued by any court vested with jurisdiction and the defendant's whereabouts are irrelevant in this regard. His whereabouts are relevant for purposes of service but as section 26(1) provides that process runs throughout the country, service may be effected on the defendant anywhere in the country. See study guide unit 15.3.
- (c) As Peter is a foreign peregrine, arrest of his person or attachment of his property will always be necessary before a court may exercise jurisdiction. Section 19(1)(c) provides that arrest or attachment may take place anywhere in South Africa, so his assets in Cape Town may be attached to found or confirm jurisdiction. The Bloemfontein High Court may exercise jurisdiction provided arrest or attachment *ad fundandam jurisdictionem* is possible because John the plaintiff is an *incola* of that court. The Johannesburg High Court may exercise jurisdiction provided arrest or attachment *ad confirmandam jurisdictionem* takes place, as this will strengthen the partial jurisdiction it has because the cause of action arose in its jurisdiction. See study guide units 15.1 and 15.2.
- (d) This is now an action concerning property, not a claim sounding in money. The place where the property is situated always has jurisdiction *ratione rei sitae*. So the Cape Town High Court has jurisdiction because the diamond is stored in a bank vault there. As the property is movable, this jurisdiction is not necessarily exclusive and the place where the defendant is domiciled may also be able to exercise jurisdiction. It is for this reason that the Pretoria High Court may possibly also

- (b) The answer is "no". Section 28(1)(g) extends jurisdiction to persons who own immovable property within the court's jurisdiction. The mere fact that immovable property (the warehouse) is situated in Port Elizabeth does not confer jurisdiction upon Port Elizabeth's magistrate's court. The action must be in respect of that particular property or it must be in respect of a mortgage bond registered over such property, which is not the case here. Also, section 28(1)(g) does not refer to movable property and so the fact that the equipment which is the subject of the litigation is situated in Port Elizabeth does not confer jurisdiction on this court. See study guide unit 23.2.7.
- (c) The answer is "no". The quantitative restriction on all claims in the small claims court is R 3000. Section 22 of the Small Claims Court Act provides that the small claims courts have no jurisdiction to hear a matter, which otherwise exceeds their jurisdiction by virtue of the consent of the parties. Therefore, section 22 forbids Phil and Agatha to consent to the jurisdiction of the small claims court to hear the matter. See study guide unit 8.5.
- (d) The answer is "yes". Section 7(1) of the Small Claims Court Act provides that a juristic person such as a company may become a party to an action as a defendant. The quantitative jurisdictional limit on claims in a small claims court is R 3 000. So Phil may institute action in a small claims court if Agatha is a company and the amount of his claim is R 3 000. See study guide unit 8.4.

QUESTION 6

- (a) Students had to name any **three** of the following matters that a magistrate's court may not hear:
- (i) A magistrate's court cannot grant a divorce. The reason is that divorce affects the status of the parties and matters of status must be decided by the High Court (s 46(1)).
 - (ii) Magistrates' courts do not have jurisdiction to hear disputes regarding the validity of wills or interpretation of wills (s 46(2)(a)).
 - (iii) A magistrate's court is not empowered to declare a person insane, or to declare a person incapable of managing his or her own affairs (s 46(2)(b)).
 - (iv) Magistrates' courts are incompetent to make orders of specific performance unless a claim for damages is included as an alternative (s 46(2)(c)).
 - (v) Magistrates' courts may not grant a decree of perpetual silence (s 46(2)(d)).

See further study guide unit 21.2.

- (b) Students could not answer this question adequately without having looked at the wording of the section. Section 43 provides that claims must be based on different causes of action before they can be included in one summons. (If based on the same cause of action, inclusion in one summons would amount to a splitting of claims.) The exception in section 43(2) provides that an interim interdict or arrest

ANNEXURE A: SAMPLE EXAMINATION PAPER

2002

CIVIL PROCEDURE**CIP101-D****MODULE 1**

Duration: 1 hour

Marks: 50

GENERAL PRINCIPLES**QUESTION 1**

Discuss litigation as a method of dispute resolution.

(8)
[8]**ALTERNATIVE MODELS OF DISPUTE RESOLUTION****QUESTION 2**

Briefly discuss any two (2) positive characteristics of alternative dispute resolution.

(4)
[4]**JURISDICTION OF THE SUPERIOR COURTS****QUESTION 3**

X has a claim against Z in the amount of R200 000 on the grounds of breach of contract. The cause of action arose in Cape Town. X is an *incola* of Cape Town and Z is an *incola* of Pretoria. On the basis of these facts, answer the following questions.

- (a) Can X institute proceedings against Z in the Cape Town High Court? (1)
- (b) If it is possible to institute proceedings against Z in the Cape Town High Court, would it be necessary to arrest Z or attach his property? (2)
- (c) Can X institute proceedings against Z in the Pretoria High Court? (1)
- (d) Would your answer to (a) differ if Z was a *peregrinus* of the whole Republic? (6)
- (e) Would your answer to (d) differ if Z is not present in Cape Town and has attachable property and the property is situated in Durban? (3)
- (f) Would your answer to (a) differ if the claim related to the registration of fixed property and the property is situated in Durban? (2)
- (g) Would your answer to (f) differ if the claim now related to movable property situated in Durban? (1)

Give full reasons for each answer.

[16]

ANNEXURE B: COMMENTARY

GENERAL PRINCIPLES

Question 1

It has a broad social purpose, namely to compensate, to adjust behaviour and to regulate public policy and may be described as a state-sponsored method of resolving civil disputes through the court system (thus being a public process). The formal and technical characteristics of the process protects the procedural rights of litigants as opposed to interests in informal processes. Litigation is controlled by external rules, such as the rules of court and statutory provisions. Lastly, it is also a command process: a decision in the form of a judgment is imposed on the litigants by a judicial officer and is enforced by execution proceedings. See study unit 6.2 for a full discussion of this topic.

ALTERNATIVE MODELS OF DISPUTE RESOLUTION

Question 2

The answer to this question is found in study unit 7.5.2 of the study guide. You will note that a number of characteristics are discussed.

SUPERIOR COURT JURISDICTION

Question 3(a)

Yes: the cause of action arose here (*ratione rei gestae*). See study unit 14.2.

Question 3(b)

No: Z is an *incola* of the Republic and section 28 of the Supreme Court Act specifically prohibits the arrest (or attachment of property) of an *incola* of the Republic. See study unit 14.2.

Question 3(c)

Yes: based on the principle *actor sequitur forum rei*. If you simply answered that Z lives or is domiciled there, your answer is worth half a mark. The reason for the court having jurisdiction is seated in this principle. See study unit 14.1.

Question 3(d)

No, the Cape Town court will still have jurisdiction, but on different grounds. Arrest or attachment must now take place. There are two types of arrest or attachment, namely *ad confirmandam iurisdictionem* and *ad fundandam iurisdictionem*. In the first instance the requirements are arrest or attachment plus cause of action, and in the latter instance, apart from arrest or attachment, it is required that the plaintiff be an *incola* of the particular court. *In casu* only **arrest** is possible, since there is no mention of attachable property. Furthermore, because both the requirements relating to cause of action and the plaintiff-*incola* are met, both forms or types of arrest can take place. This is a fairly cryptic answer, but contains the

Question 5(a)

Johannesburg. See study unit 10.2.1 for the answer.

Question 5(b)

Eight judges. See study unit 10.2.1 for the answer.

Question 6(a)

Section 28(1)(a) provides that a magistrate's court may exercise jurisdiction over any person who either "resides", "carries on business" or is "employed" in the district. On the given facts, X lives and works in Pretoria. X therefore resides and is employed in the district of the magistrate's court for Pretoria in terms of the provisions of section 28(1)(a). Y could therefore institute proceedings against X in the magistrate's court for the district of Pretoria. See study unit 23.2.1.

Question 6(b)

The Pretoria magistrate's court will not have jurisdiction in terms of section 28(1)(d), since this section requires that the "whole cause of action" arises within a particular court's jurisdiction. "Whole cause of action" means that not only must the conclusion of the contract take place within a particular court's area, but also the breach. Here conclusion of contract occurs in Pretoria, but the breach thereof occurs in Johannesburg. (Delivery had to take place in Johannesburg and failure to do so = breach of contract.) Neither of these courts will have jurisdiction, because the whole cause of action did not arise in either court's jurisdiction. See study unit 23.2.4.

Question 6(c)

In terms of section 29(1), the monetary jurisdiction of a magistrate's court is limited to an amount of R100 000. In the present instance, the claim of R110 000 exceeds the quantitative limit of a magistrate's court. Therefore, it would appear that no magistrate's court will have jurisdiction and that the claim can be brought in the High Court. However, it is possible to bring the claim of R110 000 within the jurisdiction of a magistrate's court by deduction of an admitted debt (s 39). From the facts, it is apparent that Y owes X an amount of R30 000. This would enable Y to deduct this amount as an admitted debt from the amount of R110 000 so claimed in terms of section 39 of the Magistrates' Courts Act of 1944. The effect of section 39 is to bring the claim within the quantitative jurisdiction of a magistrate's court (R110 000 - R30 000 = R80 000). However, the plaintiff will always be awarded the amount proved in court, less the amount admitted as being due to the defendant. See study units 22.2.10 and 25.3.

Question 6(d)

Yes, in terms of section 43 of the Magistrates' Courts Act, a magistrate's court has cumulative jurisdiction. This is so provided the parties are the same, and provided the claims are based on different causes of action. In the present instance, this is the case. See study unit 25.5.

QUESTION 4

Mary, a South African woman, visits Botswana for a holiday. While there, she marries John, a mineworker, who is a citizen of Botswana. At Mary's request the couple move to Johannesburg where John accepts employment with a mining company. After six months John decides to go to Kimberley because he would rather work in a diamond mine. Mary refuses to accompany John to Kimberley since she holds a job with good prospects in Johannesburg. After spending about eight months in Kimberley, John decides to return to Botswana. Shortly after his return to Botswana, John decides to institute divorce proceedings against Mary.

- (a) Briefly discuss whether John, who is domiciled and resident in Botswana, would be able to institute divorce proceedings against Mary in the Johannesburg High Court. (3)
- (b) Briefly indicate whether or not your answer would differ had Mary instituted proceedings for divorce when John decided to leave for Kimberley. (3)
[6]

QUESTION 5

Briefly describe three functions of the Constitutional Court.

(6)
[6]
[24]

JURISDICTION OF THE MAGISTRATE'S COURT

QUESTION 6

X lives and works in Pretoria. Y wishes to institute proceedings against X in a magistrate's court in the amount of R100 000 for goods sold and delivered by Y to X in Pretoria. 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) Would your answer to (a) above differ if X were a partnership? (3)
- (c) Will any 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 magistrate's court have jurisdiction if, in the same summons, Y claimed R 50 000, R 60 000 and R 70 000 and each claim was based on a separate account for goods sold and delivered to X? (4)

[14]
[50]

gestae. See the study guide, units 13 and 14 on pages 89-93.

20.

Question 3(c)

The defendant is now a foreign *peregrinus* and, for any court to have jurisdiction, arrest or attachment of Y's person or property must take place. If this can be done, the Johannesburg High Court will still have jurisdiction but on a different jurisdictional ground to (b) above. The arrest or attachment will be *ad confirmandam jurisdictionem* because the cause of action (signature of the contract) arose within the court's area of jurisdiction. Where a court exercises jurisdiction based on arrest or attachment *ad confirmandam jurisdictionem*, the nature of the proceedings is irrelevant, provided that money is claimed (such as a claim for damages which is the case here). It is also irrelevant whether the plaintiff is an *incola* or *peregrinus* of the court concerned, and the cause of action need not arise wholly within the court's jurisdiction for that court to be vested with jurisdiction. Section 19(1)(c) of the Supreme Court Act 59 of 1959 also provides that **arrest or attachment, both to found and confirm jurisdiction may take place anywhere in the Republic**. From the above, it is apparent that X can institute action in the Johannesburg High Court if he can arrest Y or attach his yacht anywhere in South Africa.

Alternatively, X can institute action in the Pretoria High Court if he can arrest Y or attach his yacht. This is because X, the plaintiff, is an *incola* of Pretoria, as he is ordinarily resident and domiciled in Pretoria. The court's jurisdiction in this instance, will be based on arrest or attachment *ad fundandam jurisdictionem*. Please note that the order for arrest or attachment founds jurisdiction, and it is not necessary for the cause of action to have arisen within the court's area of jurisdiction. Thus, one can institute action against a foreign *peregrinus* in the court where the plaintiff is an *incola*. See the study guide, unit 15 on pages 95 - 98.

Question 4(a)

This question deals with divorce jurisdiction. The jurisdictional status of both parties to the marriage must be determined to decide whether the Johannesburg High Court has jurisdiction to hear the divorce proceedings - in other words, we must decide where both John and Mary are domiciled and also whether either might comply with the residence requirements. John is domiciled and resident in Botswana, while his wife Mary, is resident in Johannesburg at the time divorce proceedings are to be instituted. Mary also appears to have been ordinarily resident in the Republic for a period of one year immediately before that date. Although John cannot institute action in the Johannesburg High Court on the basis of his own domicile or residence, he may do so because the defendant, Mary, is resident in that court's area of jurisdiction and has been ordinarily resident in the Republic for a year preceding this date. (You have not been given enough information to decide if Mary is domiciled in Johannesburg, but if you want to base jurisdiction on this factor, you must remember to give a definition of domicile - it is not enough to merely say that she is domiciled in a certain place.) See the study guide unit 18 on pages 106 -111.

Question 4(b)

As it does not appear that John ever became domiciled in South Africa, the fact that he had not yet returned to Botswana at this stage will not affect his domicile. We do not know where Mary is domiciled. At this stage John is still resident in the Johannesburg court's area of jurisdiction, but has not been resident in the Republic for one year. Mary is resident in the

GENERAL PRINCIPLES

QUESTION 1

Discuss the passive role of the court in Anglo-American jurisdictions. (10)
[10]

ALTERNATIVE MODELS OF DISPUTE RESOLUTION

QUESTION 2

- (a) Briefly discuss the common factors shared by all Alternative Dispute Resolution processes. (10)
- (b) Explain the manner in which final-offer arbitration functions. (6)
- (c) Name four objectives of the Small Claims Courts Act of 1984. (4)
[20]

JURISDICTION OF THE SUPERIOR COURTS

QUESTION 3

- (a) X, a Frenchman, is the owner of a yacht. The yacht is damaged at sea, rescued and brought to dry dock in Cape Town. X instructs Z, who lives permanently in Durban, to do the necessary repairs to the yacht. Z performs the repairs in Cape Town at a total cost of R200 000. Despite demand, X fails to pay Z for the cost of the repairs and sails from Cape Town to Durban.

With these facts in mind, answer the following questions, giving reasons for each answer.

- (i) Could Z successfully bring an application for the attachment of X's yacht to enable the Cape Town High Court to exercise jurisdiction? (5)
- (ii) Could Z successfully bring an application for the attachment of X's yacht to enable the Durban High Court to exercise jurisdiction? (4)
- (iii) Would the Cape Town High Court have jurisdiction if X was domiciled in Pretoria? (3)
[12]
- (b) R and S are married to each other and are domiciled in Lesotho. During their five-year marriage R, the husband, lives and works in Bloemfontein while his wife, S, lives in Lesotho where she maintains the family home. R frequently visits his wife and family in Lesotho. R meets another woman and wishes to divorce S. With these facts in mind, answer the following questions, giving full reasons for your answers.
- (i) Can R institute divorce proceedings in the Bloemfontein High Court? (4)

QUESTION 6

Answer the following questions.

- (a) **Name five matters that fall beyond the jurisdiction of a magistrate's court in terms of section 46 of the Magistrates' Courts Act of 1944.** (5)
- (b) **Discuss the case of *Mohamed & Son v Mohamed* 1959 2 SA 688 (T) in regard to the splitting of claims in terms of section 40 of the Magistrates' Courts Act of 1944.** (9)

[14]

TOTAL: [100]

B 2 General comments

Please note that what follows is not a full memorandum of the October 2003 examination paper. It does not consist of model answers – it is merely a reference guide to assist you should you decide to work through last year's examination paper in preparation for your examinations this year. The answers are not always complete – you will sometimes find merely a reference to the relevant study unit.

The most constructive way of using this commentary is for you to answer the questions in simulated examination conditions and then to refer to the memorandum to mark your answers. Do bear in mind that, while working through old examination papers will help you to assess your understanding of the work and your ability to answer questions based on the study material, it will not help you acquire sufficient information to answer this semester's paper. That can only be done by studying your prescribed material.

Important note: This commentary is sent to you for another good reason. When comparing your answers to our commentary, please take note of the extent of the answers provided. You will note that we require you to display a detailed knowledge of the study material, and therefore superficial answers will obviously yield poor marks. The questions are formulated in a very specific manner because we require very specific answers. It is also only logical that if, for instance, a question counts six or eight marks, you cannot give the same amount of detail as you would for one that counts only two marks: far more is required. We constantly find that students make this mistake and are then disappointed by the poor marks they obtain. Remember, we can award marks only for what is written, and if your answers are incomplete, there is simply very little for which marks can be awarded. You should view an examination paper as an invitation to display your knowledge.

If you are a candidate attorney, a word of caution: because you regularly come across certain documents and procedures in practice and know what they look like (and may even have used them), it does not necessarily mean that you know all you need to know or know everything there is to know about them. From experience we know that many students in practice perform certain actions because they simply "follow a recipe" and do not necessarily know exactly why a particular step is being taken or why a particular document is being filed: they simply know it is so because that is what they have been taught. Please do not be lulled into a false sense of confidence in these circumstances, thinking that you actually know the content of the study material – you still have to study the work to learn what the **theoretical**

Note: One mark was awarded for each main factor and half a mark for the clarification where appropriate.

- (b) The arbitrator's competence to decide the matter is modified. The arbitrator may make an award only on the basis of the most reasonable of the last offers made by each disputant. The arbitrator may not choose a middle path but must choose only one of the offers. To illustrate this, a professional soccer player claims an annual fee of R500 000 but the club is willing to pay R200 000. The reasonable fee is set at R300 000. The arbitrator will award the most reasonable fee which is R200 000, and reject R500 000 as being excessive. The purpose of final-offer arbitration is to discourage excessive demands on the part of both parties. The disadvantage is that an arbitrator might be compelled to choose one of two offers, no matter how absurd or irrational each one is.

Commentary:

Students were required to furnish an explanation of how final-offer arbitration works with reference to examples or illustrations to obtain full marks. See further unit 6.3.3. This question was generally well answered.

- (c) One may name any four of the following objectives:
- (1) to make the administration of justice more accessible to all South Africans
 - (2) to provide a forum for the settling of minor civil disputes
 - (3) to remove time-consuming, formalistic and expensive procedures
 - (4) to introduce informal and simplified procedures in order to reduce the cost of litigation and provide for the speedy determination of small claims
 - (5) to further reduce the cost of litigation by prohibiting legal representatives from appearing in a small claims court
 - (6) to establish a consumer-orientated court.

Commentary:

The answer to this question is clearly set out in Unit 7.1. This question was generally well answered.

QUESTION 3

- (a) (i) X is a peregrinus of the Republic and therefore arrest or attachment of the person or property has to take place for a South African court to have jurisdiction over him. There are two types of arrest or attachment, namely
- *ad confirmandam iurisdictionem* which requires arrest or attachment plus cause of action and
 - *ad fundandam iurisdictionem* which requires arrest or attachment plus that the plaintiff is an *incola* of the particular court.

In casu cause of action arose in Cape Town and therefore attachment *ad confirmandam iurisdictionem* is applicable.

Commentary:

Many students confused this term with the term *ratione rei gestae*. The term *ratione rei gestae* is an example of a link which exists in respect of monetary claims. See further unit 10.1.

(b) MOVABLE PROPERTY:

Where the object of relief is movable property, the court in whose territorial area the movable property is situated has jurisdiction in any of the following actions

- (1) to determine the title to such property
- (2) for delivery of the movable property
- (3) where a real right in respect of such property is at issue

It is debatable whether the jurisdiction of the *forum rei sitae* is exclusive regarding movable property. Unlike immovable property, movables can be removed from the jurisdictional area of a court, while remaining under the control of the owner or possessor. Therefore, it would appear that the *forum domicilii* of the person would be able to exercise jurisdiction. However, the current position is that, while the *forum rei sitae* will always have jurisdiction, it is unclear whether the *forum domicilii* of the defendant will also be able to exercise jurisdiction. Where the *forum rei sitae* is approached for relief, it is irrelevant whether the defendant is a *peregrinus* or an *incola*.

Commentary:

Some students were confused about immovable property. They could not distinguish between movable and immovable property. Otherwise, this question was reasonably well answered. See further Unit 16.3.

(c) JURISDICTION OF CONSTITUTIONAL COURT (CC):

It only hears constitutional matters. However, it has the final say on whether or not a matter is a constitutional one, and so will itself determine what matters it is prepared to hear. The CC has exclusive jurisdiction regarding constitutional matters. Regarding other matters, it exercises concurrent jurisdiction with the High Courts (HC) and either court may hear the matter depending on the circumstances. It has exclusive jurisdiction regarding the following matters: hear disputes between organs of state at national or provincial level concerning their status, powers or function; the constitutionality of parliamentary or provincial bills; whether or not Parliament or the President has failed to comply with a constitutional duty and the certification of provincial constitutions. See s167(4). The CC exercises concurrent jurisdiction with the High Courts in respect of all other constitutional matters. The procedure is to approach the relevant HC for a decision. The decision may then be taken on appeal, when the CC is the court of final instance. No further appeal is possible. The CC no longer has the exclusive jurisdiction to determine whether an Act of parliament is invalid. A HC or the Supreme Court of Appeal may also make such a finding. However, it remains necessary for the CC to confirm such a finding made by any other court before the order has any force. This limits the concurrent jurisdiction of the other courts. In exceptional case, it is possible to approach the CC direct or to appeal to this court direct, despite the fact that the matter falls within the concurrent jurisdiction of the CC, and should first be heard by a HC or the Supreme

- (g) Yes: section 29(1)fA) specifically empowers the magistrates' court to hear an application for the liquidation of a Close Corporation. Normally liquidations and sequestrations are heard by the High Court (unit 21.2.9).

QUESTION 6

- (a) The answer to this question is found in unit 20.2 of the study guide.
- (b) *Mohamed & Son v Mohamed* involved a plea based on s40 of the Magistrates' Courts Act of 1944 by the defendant in defence of a suit brought by the plaintiff. The pertinent facts are that the plaintiff, a dealer, periodically sold goods to the defendant on credit. The credit sale was an arrangement of several years standing. Upon failure of the defendant to pay for the goods sold, the plaintiff instituted separate actions to recover the purchase price of the delivered goods in respect of the separate sales.

The defendant's plea was that the separate actions by the plaintiff amounted to a splitting of claims contrary to s40 in order to circumvent the limitations on the financial jurisdiction of the court. Section 40 prohibits the splitting of a "substantive claim" exceeding the jurisdiction of the court in order to recover the claim if the parties would be the same and the point at issue in all the split actions would be the same. The court a quo ruled in favour of the defendant.

On appeal, the court ruled in favour of the plaintiff. According to the court, the plaintiff's (applicant) claim was based on separate causes of action and therefore did not fall within the terms of s40. Each sale was entered into on different occasions, sometimes months apart, and the points at issue in each sale were different. The defendant (respondent) failed to provide the court with evidence that there was splitting of claims and that the plaintiff's intention with the different actions was merely to recover the sum due to him in more than one action. See study unit 24.6.

Commentary:

The question was generally not well answered. Generally, students appeared more confident in stating the facts of the case. Most did not answer the question asked: discussing the splitting of claims with specific reference to the case of *Mohamed*. Some students only mentioned the provisions of s40 without further ado. Surely, that is not enough to begin to answer the question. Considering the answers given, the impression created was that few students studied the *Mohamed* case. Few students appeared to have studied *Mohamed*, but they were confused about the decision of the court with regard to the splitting of claims in terms of s40 and in whose favour the case was finally decided. Here we mean the appeal decision.

Note that the appeal was decided in favour of the plaintiff (appellant). And for the sake of clarity, the following points from decision in *Mohamed* needs to be emphasised: (1) there is no splitting of claims where the claims are based on different causes of action; (2) claims which are not distinct and separate, and which arise out of one and the same case of action, must be sued for as one claim in one action and not be split; (3) in order to succeed with a defence based on s40, the defendant had to prove, apart from splitting of claims, that the objective of the plaintiff was to recover an amount owing to him in more than one action.

ALTERNATIVE MODELS OF DISPUTE RESOLUTION**QUESTION 2**

- (a) **Name** the four stages of the process of negotiation. (4)
- (b) **Name three** derivatives of the process of arbitration and **describe** each one briefly. (6)
[10]

JURISDICTION OF THE SUPERIOR COURTS**QUESTION 3**

- (a) X has a claim against Z in the amount of R200 000 on the grounds of breach of contract. The cause of action arose in Cape Town. X is an *incola* of Cape Town and Z is an *incola* of Pretoria. With these facts in mind, answer the following questions giving full reason for each answer.
- (i) Can X institute proceedings against Z in the Cape Town High Court? (2)
- (ii) Can X institute proceedings against Z in the Pretoria High Court? (2)
- (iii) If Z is temporarily resident in Durban, can X issue summons out of the Cape Town High Court and have the summons served in Durban? (2)
- (iv) Would your answer to (i) differ if Z was a *peregrinus* of the whole Republic? (3)
- (v) Would your answer to (i) differ if Z was a *peregrinus* of the whole Republic and the cause of action arose in Durban? (3)
- (vi) Could the Cape Town High Court assume jurisdiction if X was domiciled in Cape Town, Z was a *peregrinus* of the whole Republic, the cause of action arose in Cape Town and Z submits to the jurisdiction of the said court **before** an order for arrest or attachment is granted to X? (2)
- (vii) Could the Cape Town High Court assume jurisdiction if X was domiciled in Cape Town, Z was a *peregrinus* of the whole Republic, the cause of action arose in Cape Town and Z submits to the jurisdiction of the said court **after** an order for arrest or attachment is granted to X? (2)
- (viii) Would your answer to (i) differ if the claim related to the registration of fixed property and the property is situated in Johannesburg? (3)
[19]

[TURN OVER]

- (iii) Does the magistrate's court for the district of Johannesburg have jurisdiction? (2)
 - (iv) Does the magistrate's court for the district of Soweto have jurisdiction? (2)
 - (v) Do the magistrates' courts for the district of Roodepoort and Alexandra have jurisdiction? (3)
 - (vi) Would it be possible for any of the above courts to exercise jurisdiction if C's claim for damages was in the amount of R150 000 but C owes D an amount of R60 000? (3)
 - (vii) What may C do if D is preparing to leave South Africa in order to avoid judgment? (2)
 - (viii) If D prefers to have the action heard by a High Court rather than a magistrate's court, is there anything D can do as defendant? (4)
- [20]**

(b) Answer the following questions:

- (i) Explain the meaning of the word "wholly" as it is applied in terms of the provisions of section 28(1)(d) of the Magistrates' Courts Act 32 of 1944. (4)
 - (ii) Discuss briefly the scope of the provisions of section 110 of the Magistrates' Courts Act of 1944 in regard to the constitutional jurisdiction of a magistrate's court. (5)
 - (iii) Explain the inquisitorial role of the commissioner in the small claims courts. (6)
- [15]**

Total: [100]

JURISDICTION OF THE SUPERIOR COURTS

QUESTION 3

X has a claim against Z in the amount of R200 000 on the grounds of breach of contract. The cause of action arose in Cape Town. X is an *incola* of Cape Town and Z is an *incola* of Pretoria. On the basis of these facts, answer the following questions.

- (a) Can X institute proceedings against Z in the Cape Town High Court? (1)
- (b) If it is possible to institute proceedings against Z in the Cape Town High Court, would it be necessary to arrest Z or attach his property? (2)
- (c) Can X institute proceedings against Z in the Pretoria High Court? (1)
- (d) Would your answer to (a) differ if Z was a *peregrinus* of the whole Republic? (6)
- (e) Would your answer to (d) differ if Z is not present in Cape Town and has attachable property and the property is situated in Durban? (3)
- (f) Would your answer to (a) differ if the claim related to the registration of fixed property and the property is situated in Durban? (2)
- (g) Would your answer to (f) differ if the claim now related to movable property situated in Durban? (1)

Give full reasons for each answer. [16]

QUESTION 4

Mary, a South African woman, visits Botswana for a holiday. While there, she marries John, a mineworker, who is a citizen of Botswana. At Mary's request the couple move to Johannesburg where John accepts employment with a mining company. After six months John decides to go to Kimberley because he would rather work in a diamond mine. Mary refuses to accompany John to Kimberley since she holds a job with good prospects in Johannesburg. After spending about eight months in Kimberley, John decides to return to Botswana. Shortly after his return to Botswana, John decides to institute divorce proceedings against Mary.

- (a) Briefly discuss whether John, who is domiciled and resident in Botswana, would be able to institute divorce proceedings against Mary in the Johannesburg High Court. (3)
 - (b) Briefly indicate whether or not your answer would differ had Mary instituted proceedings for divorce when John decided to leave for Kimberley. (3)
- [6]

ANNEXURE B: COMMENTARY

GENERAL PRINCIPLES

Question 1

It has a broad social purpose, namely to compensate, to adjust behaviour and to regulate public policy and may be described as a state-sponsored method of resolving civil disputes through the court system (thus being a public process). The formal and technical characteristics of the process protects the procedural rights of litigants as opposed to interests in informal processes. Litigation is controlled by external rules, such as the rules of court and statutory provisions. Lastly, it is also a command process: a decision in the form of a judgment is imposed on the litigants by a judicial officer and is enforced by execution proceedings. See study unit 6.2 for a full discussion of this topic.

ALTERNATIVE MODELS OF DISPUTE RESOLUTION

Question 2

The answer to this question is found in study unit 7.5.2 of the study guide. You will note that a number of characteristics are discussed.

SUPERIOR COURT JURISDICTION

Question 3(a)

Yes: the cause of action arose here (*ratione rei gestae*). See study unit 14.2.

Question 3(b)

No: Z is an *incola* of the Republic and section 28 of the Supreme Court Act specifically prohibits the arrest (or attachment of property) of an *incola* of the Republic. See study unit 14.2.

Question 3(c)

Yes: based on the principle *actor sequitur forum rei*. If you simply answered that Z lives or is domiciled there, your answer is worth half a mark. The reason for the court having jurisdiction is seated in this principle. See study unit 14.1.

Question 3(d)

No, the Cape Town court will still have jurisdiction, but on different grounds. Arrest or attachment must now take place. There are two types of arrest or attachment, namely *ad confirmandam iurisdictionem* and *ad fundandam iurisdictionem*. In the first instance the requirements are arrest or attachment plus cause of action, and in the latter instance, apart from arrest or attachment, it is required that the plaintiff be an *incola* of the particular court. *In casu* only **arrest** is possible, since there is no mention of attachable property. Furthermore, because both the requirements relating to cause of action and the plaintiff-*incola* are met, both forms or types of arrest can take place. This is a fairly cryptic answer, but contains the essence of the answer. For a full discussion of these principles, see study units 15.1 and 15.2.

Question 5(b)

Eight judges. See study unit 10.2.1 for the answer.

Question 6(a)

Section 28(1)(a) provides that a magistrate's court may exercise jurisdiction over any person who either "resides", "carries on business" or is "employed" in the district. On the given facts, X lives and works in Pretoria. X therefore resides and is employed in the district of the magistrate's court for Pretoria in terms of the provisions of section 28(1)(a). Y could therefore institute proceedings against X in the magistrate's court for the district of Pretoria. See study unit 23.2.1.

Question 6(b)

The Pretoria magistrate's court will not have jurisdiction in terms of section 28(1)(d), since this section requires that the "whole cause of action" arises within a particular court's jurisdiction. "Whole cause of action" means that not only must the conclusion of the contract take place within a particular court's area, but also the breach. Here conclusion of contract occurs in Pretoria, but the breach thereof occurs in Johannesburg. (Delivery had to take place in Johannesburg and failure to do so = breach of contract.) Neither of these courts will have jurisdiction, because the whole cause of action did not arise in either court's jurisdiction. See study unit 23.2.4.

Question 6(c)

In terms of section 29(1), the monetary jurisdiction of a magistrate's court is limited to an amount of R100 000. In the present instance, the claim of R110 000 exceeds the quantitative limit of a magistrate's court. Therefore, it would appear that no magistrate's court will have jurisdiction and that the claim can be brought in the High Court. However, it is possible to bring the claim of R110 000 within the jurisdiction of a magistrate's court by deduction of an admitted debt (s 39). From the facts, it is apparent that Y owes X an amount of R30 000. This would enable Y to deduct this amount as an admitted debt from the amount of R110 000 so claimed in terms of section 39 of the Magistrates' Courts Act of 1944. The effect of section 39 is to bring the claim within the quantitative jurisdiction of a magistrate's court ($R110\ 000 - R30\ 000 = R80\ 000$). However, the plaintiff will always be awarded the amount proved in court, less the amount admitted as being due to the defendant. See study units 22.2.10 and 25.3.

Question 6(d)

Yes, in terms of section 43 of the Magistrates' Courts Act, a magistrate's court has cumulative jurisdiction. This is so provided the parties are the same, and provided the claims are based on different causes of action. In the present instance, this is the case. See study unit 25.5.

QUESTION 2

Indicate the most accurate statement.

- (1) The court exists for the rules and not the rules for the court.
- (2) The Rules Board is competent to make, amend and repeal rules for the Constitutional Court, High Courts and magistrates' courts.
- (3) Subject to ministerial approval, the Rules Board may make different rules in respect of the different High Courts.
- (4) The minister must appoint at least three lecturers in law at a South African university as members of the Rules Board.

QUESTION 3

Indicate the most accurate statement.

- (1) In Continental civil procedure, the judicial officer is only actively involved during the trial stage of the proceedings.
- (2) In Anglo-American civil procedure, the judge is never active during the pretrial stage of the proceedings.
- (3) Orality is a dominant characteristic of Anglo-American civil procedure.
- (4) The principle of bilaterality means in theory and in practice that both litigants have a fair and balanced opportunity to present their respective claims or defences.

QUESTION 4

Indicate the most accurate statement.

- (1) ADR processes are consensual because the disputants are not compelled to enter into the process.
- (2) Negotiation is not a bilateral process when multiparty negotiations are involved.
- (3) A mediator must always be neutral.
- (4) Unlike the process of litigation, the process of arbitration does not bind third parties but only the disputants that have taken the matter to arbitration.

QUESTION 8

Indicate the most accurate statement.

A High Court may exercise jurisdiction on the basis of an order for attachment *ad confirmandam jurisdictionem* if

- (1) the defendant is a peregrine of the Republic, the plaintiff is an *incola* of the court concerned and attachment has taken place;
- (2) both plaintiff and defendant are *peregrini* of the court concerned and attachment has taken place;
- (3) both plaintiff and defendant are *peregrini* of the Republic, the cause of action occurred within the area of jurisdiction of the court concerned and the attachment of the defendant's property has been effected in the area of jurisdiction of some other High Court;
- (4) the cause of action occurred within the area of jurisdiction of the court concerned and the attachment of the defendant's property has been effected in the area of jurisdiction of some other High Court and the defendant is an *peregrinus* of the court concerned but an *incola* of the Republic.

QUESTION 9

Indicate the most accurate statement.

In terms of the provisions of section 2(1) of the Divorce Act of 1979 read with section 1(1) of the Domicile Act of 1992, a court may exercise divorce jurisdiction on the following grounds:

- (1) Only if the wife is resident in the same High Court where her husband is resident;
- (2) Only if the wife is domiciled and resident in the area of jurisdiction of a High Court at the time of the institution of the action;
- (3) Only if both or either of the spouses are domiciled in the area of jurisdiction of a High Court on the date on which the action is instituted;
- (4) Only if both or either of the spouses are ordinarily resident in the area of jurisdiction of a High Court on the date on which the action is instituted and have or has been ordinarily resident in the Republic for less than one year immediately prior to the date of the marriage.

(Nov 2005)

Question 1

Correct answer: (3)

Option (3) accurately reflects the application of the onus of proof in civil proceedings, which is on the balance of probabilities. This means that a court will grant judgment in favour of a plaintiff/applicant if it is satisfied that the version put by the plaintiff/applicant is more probable than the version put by the defendant/respondent. The statement in (3) correctly reflects the situation where the plaintiff has not satisfied the onus of proof on the balance of probabilities. (See study unit 2.7.)

Option 1 is incorrect since, in civil proceedings, the plaintiff must prove the **liability** of the defendant; in criminal proceedings the objective is to establish the **guilt** of the accused. (See study unit 2.1.)

Similarly, terms have been muddled in option (2), which is incorrect. The person against whom the crime is committed is known as the **complainant**. The **plaintiff** is the person who commences proceedings when a civil claim is involved. (See study unit 2.4.)

Option (4) is incorrect. It is essential that lawyers distinguish between the words "judgement" and "judgment". The word "judgement" is used in a non-legal context and would, for instance, mean a personal or moral "judgement". In law, "judgment" is always spelt without the "e" when, for instance, referring to a judgment of a court. (See study unit 2.6.)

Question 2

Correct answer: (3). (See Rules Board for Courts of Law Act of 1985, s 6(b) (ii). The Act is contained in *Student handbook to Civil Procedure* (2002), p 43.)

Option 1 is incorrect. Rules exist for the court and not the court for the rules. The very purpose of the rules is to facilitate inexpensive and efficient litigation in the courts. (See SGU 4.3.2.)

Option 2 is incorrect. The rules relating to the manner in which the Constitutional Court may be engaged and for all the matters relating to the proceedings of and before the Court are **made by the Constitutional Court itself in consultation with the Chief Justice** of South Africa. They may not be made, amended or repealed by the Rules Board. (See SGU 4.3.10.)

Option 4 is incorrect. According to s 3(1) (f) of the Rules Board for Courts of Law Act of 1985, the Minister shall appoint "a lecturer in law at a university in the Republic" to the Rules Board.

Option 4 is incorrect. ADR processes are **generally private, not always private**. The "private" characteristic of ADR processes can be dispensed with, for instance, in the case of court-ordered or court-annexed mediation or arbitration. (See SGU 6.5.2 & 6.2.3.)

Question 6

Correct answer: (3) (See SGU 7.6.)

Option 1 is incorrect. In terms of s 22 of the Small Claims Courts Act of 1984, a small claims court have **shall not** have jurisdiction to hear any action **by virtue of consent** of the parties. (See SGU 7.6. Note that the Act is contained in *The student handbook for Civil Procedure* (2002), p. 211 -215.)

Option 2 is incorrect. In terms of s 7(1) of the Small Claims Court Act, **all juristic persons**, for example a company, shall not institute/commence an action in a small claims court. The participation of a juristic person can only be as a defendant. (See SGU 7.4.)

Option 4 is incorrect. In terms of s 16(g) of the Small Claims Courts Act, a small claims court shall **have no jurisdiction** in matters in which an **interdict** is sought.

Question 7

Correct answer. (1) (See SGU 10.1.)

Option 2 is incorrect. A *peregrinus* is a person who is neither domiciled nor resident within the court's area of jurisdiction. The issue of "citizenship" is irrelevant in this regard. (See SGU 10.1.)

Option 3 is incorrect. In terms of the doctrine of effectiveness a court will not be able to exercise jurisdiction unless compliance with its judgment can be expected. (See SGU 10.2.)

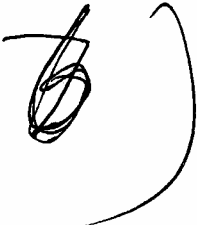
Option 4 is incorrect. If the defendant is an *incola* of the court, such **defendant need not be physically present** in the court's area of jurisdiction at the time when action is instituted. (See SGU 13.1.)

Question 8

Correct answer: (1)

Option 1 is correct, save for the fact that the statement does not mention that the cause of action arose within the area of jurisdiction of the court. (See SGU 14.2.)

Option 2 is incorrect. One of the important requirements under the rules of *ad confirmandam jurisdictionem* is that the **defendant is a peregrinus** of the whole Republic, and the **cause of action arose** within the area of jurisdiction of the court. It makes no difference whether the plaintiff is an *incola* or *peregrinus* of the court concerned. (See SGU 14.2.)

(2008) 

2071

ANNEXURE A: SAMPLE EXAMINATION PAPER

CIP201-G

Duration: 1 hour

Marks: 50

MAKE SURE THAT YOU COMPLY WITH THE FOLLOWING INSTRUCTIONS WHEN ANSWERING THE EXAMINATION PAPER.

Answer all FOUR questions:

- (1) Ensure that you give reasons for each answer when instructed to do so. A mere YES/NO will earn NO marks if you are instructed to discuss or provide reasons for your answer.
- (2) Please ensure that the time you devote to each question is proportionate to the marks allotted.

GENERAL PRINCIPLES

QUESTION 1

State any four aspects of process and procedure in terms of which the Rules Board is competent to make rules or amend or repeal them in terms of section 6 of the Rules Board for Courts of Law Act 107 of 1985.

(4)

[4]

ALTERNATIVE MODELS OF DISPUTE RESOLUTION

QUESTION 2

Discuss litigation as a method of dispute resolution.

(8)

[8]

JURISDICTION OF THE SUPERIOR COURTS

QUESTION 3

(a) X has a claim against Z in the amount of R200 000 on the grounds of breach of contract. The cause of action arose in Cape Town. 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 Cape Town High Court? (1)

(ii) If it is possible to institute proceedings against Z in the Cape Town High Court, would it be necessary to arrest Z or attach his property? (2)

(iii) Can X institute proceedings against Z in the Pretoria High Court? (1)

- (c) Would any 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 magistrate's court have jurisdiction if, in the same summons, Y claimed R50 000, R60 000 and R70 000 and each claim was based on a separate account for goods sold and delivered to X? (3)

[14]
[50]

ANNEXURE B: COMMENTARY

GENERAL PRINCIPLES

Question 1

The answer to this question is to be found in section 6(1) of the Rules Board for Courts of Law Act 107 of 1985. You may select any four areas of competence of the Rules Board in this regard.

ALTERNATIVE MODELS OF DISPUTE RESOLUTION

Question 2

It has a broad social purpose, namely to compensate, to adjust behaviour and to regulate public policy and may be described as a state-sponsored method of resolving civil disputes through the court system (thus being a public process). The formal and technical characteristics of the process protect the procedural rights of litigants as opposed to interests in informal processes. Litigation is controlled by external rules, such as the rules of court and statutory provisions. Lastly, it is also a command process: a decision in the form of a judgment is imposed on the litigants by a judicial officer and is enforced by execution proceedings. See study unit 6.1.2 for a full discussion of this topic.

SUPERIOR COURT JURISDICTION

Question 3(a)(i)

Yes: the cause of action arose here (*ratione rei gestae*). See study unit 13.2.

Question 3(a)(ii)

No: Z is an *incola* of Pretoria and the Republic, and section 28(1) of the Supreme Court Act specifically prohibits the arrest (or attachment of property) of an *incola* or local *peregrinus* of the Republic. See study unit 13.2.

have been ordinarily resident in the Republic for a period of one year immediately before that date. Although John cannot institute action in the Johannesburg High Court on the basis of his own domicile or residence, he may do so because the defendant, Mary, is resident in that court's area of jurisdiction and has been ordinarily resident in the Republic for a year preceding this date in terms of s 2(1)(b) of the Divorce Act 70 of 1979. (You have not been given enough information to decide if Mary is domiciled in Johannesburg, but if you want to base jurisdiction on this factor, you must remember to give a definition of domicile – it is not enough to merely say that she is domiciled in a certain place.) See s 2(1)(b) of the Divorce Act and study unit 17.3.

Question 3(b)(ii)

As it does not appear that John ever became domiciled in South Africa, the fact that he had not yet returned to Botswana at this stage will not affect his domicile. We do not know where Mary is domiciled. At this stage John is still resident in the Johannesburg court's area of jurisdiction, but has not been resident in the Republic for one year. Mary is resident in the court's area of jurisdiction, but it is not clear whether her residence was interrupted by her stay in Botswana. Unless Mary can show that she is a domiciliary of the Johannesburg court's area of jurisdiction, she may not institute divorce proceedings in South Africa. See study unit 17.3.

Question 3(c)

This statement is false. The Supreme Court of Appeal may hear appeals in respect of both constitutional and nonconstitutional matters but it is the final court of appeal in respect of non-constitutional matters and its decision is final. Regarding appeals on constitutional matters, a further appeal may be made to the Constitutional Court. See study units 9.2.2 and 9.3.2.

Question 4(a)

Section 28(1)(a) provides that a magistrate's court may exercise jurisdiction over any person who either "resides", "carries on business" or is "employed" in the district. On the given facts, X lives and works in Pretoria. X therefore resides and is employed in the district of the magistrate's court for Pretoria in terms of the provisions of section 28(1)(a). Y could therefore institute proceedings against X in the magistrate's court for the district of Pretoria. See study unit 22.2.1.

Question 4(b)

The Pretoria magistrate's court will not have jurisdiction in terms of section 28(1)(d), since this section requires that the "whole cause of action" arises within a particular court's jurisdiction. "Whole cause of action" means that not only must the conclusion of the contract take place within a particular court's area, but also the breach. Here conclusion of contract occurs in Pretoria, but the breach thereof occurs in Johannesburg. (Delivery had to take place in Johannesburg, and failure to do so = breach of contract.) Neither of these courts will have jurisdiction, because the whole cause of action did not arise in either court's jurisdiction. See study unit 22.2.4.

UNIVERSITY EXAMINATIONS

(2007)

UNIVERSITEITSEKSAMENS



**CIP201-G
CIP101-D**

May/June 2007

CIVIL PROCEDURE 201

Duration : 2 Hours

100 Marks

EXAMINERS :

FIRST :

PROF E HURTER

PROF OS SIBANDA

PROF F CASSIM

ADV TL MABUSELA

SECOND :

PROF JA FARIS

EXTERNAL :

THE HON MR JUSTICE WJ VAN DER MERWE

This paper consists of *four* pages.

PLEASE COMPLY WITH THE FOLLOWING INSTRUCTIONS WHEN ANSWERING THIS EXAMINATION PAPER:

- (a) Answer all **FOUR** questions.
- (b) Ensure that you give full reasons for each answer. A mere YES/NO will earn no marks.
- (c) Ensure that the time you devote to each question is proportionate to the marks allotted for the question.

GENERAL PRINCIPLES

QUESTION 1

- (a) Distinguish between civil and criminal proceedings in respect of the following:
 - (i) the subject matter; (2)
 - (ii) objectives. (2)

[4]

 - (b) Briefly describe any three areas of South African civil procedure that you believe are in need of reform. (6)
- [10]

[TURN OVER]

- (b) Adam and Maggie, who are both domiciled in Namibia, have been married for four years. Adam obtains employment as a miner in Johannesburg and only returns to Namibia when he is on vacation. Adam has been working in Johannesburg for about two years. Maggie subsequently discovers that Adam has been unfaithful to her. She is adamant that she wants a divorce. Answer the following questions on the basis of these facts, giving brief reasons for each answer:
- (i) State the provisions of section 1(1) of the Domicile Act 3 of 1999, which describes the acquisition of a domicile of choice. (2)
 - (ii) May Maggie institute a divorce action in the Johannesburg High Court although she has never been to Johannesburg? (5)
 - (iii) After working in Johannesburg for two years, Adam's employers transfer him to Kimberley in the Northern Cape, for a period of 10 months. May Adam institute a divorce action in the Kimberley High Court during this period? (3)
- [10]
- (c) Answer the following questions:
- (i) Does the *forum domicilii* have jurisdiction relating to claims regarding movable property? Discuss briefly. (3)
 - (ii) Distinguish between the terms "*incola*", "*peregrinus*" and "citizenship" in regard to the exercise of jurisdiction. (6)
 - (iii) Describe what is meant by the expression "*rationes jurisdictionis*". (3)
 - (iv) Explain the four (4) functions of the Constitutional Court. (8)
- [20]
[50]

JURISDICTION OF THE LOWER COURTS

QUESTION 4

- (a) Peter is a mechanical engineer. He lives in Randburg and owns immovable property in Pretoria. Peter designs a specialised machine for Price Clothing (Pty) Ltd which has its registered office in Johannesburg, where the contract is concluded. The machine in Johannesburg malfunctions in breach of the guarantees given by Peter. Consequently, Price Clothing suffers damages in an amount of R90 000. Will a magistrate's court be competent to exercise jurisdiction in each of the following instances, if Price Clothing institutes an action for damages in an amount of R90 000? Give full reasons for each answer.
- (i) May Price Clothing institute proceedings against Peter in the Randburg magistrate's court? (2)
 - (ii) Does the Pretoria magistrate's court have jurisdiction? (2)

[TURN OVER]

- (b) **Would XYZ Insurers (SA) Ltd be able to institute an action in the Johannesburg High Court? Explain your answer in detail. (4)**

Yes. The Durban High Court may be vested with jurisdiction on the basis of the arrest or attachment *ad fundandam iurisdictionem*. Whenever the defendant is a *peregrinus* of the whole of the Republic (foreign *peregrinus*) and if the court arrests or attaches the defendant's person or property, then the court will assume jurisdiction if the plaintiff is an *incola* of the court. Arrest or attachment of the defendant's person or property must have taken place within South Africa.

It is not necessary that the cause of action should have arisen within the court's area of jurisdiction. Arrest or attachment *ad fundandam iurisdictionem* alone founds jurisdiction and constitutes the ground on which the assumption of jurisdiction is justified, provided the plaintiff is an *incola* of the court concerned. This has been illustrated in a series of court decisions. In *Einwald v German West African Company* 1887 (5) SC 86, the Court held that the arrest or attachment *ad fundandam iurisdictionem* was not permissible and that the cause of action must have arisen in a court's area of jurisdiction before that court could adjudicate on the matter. This decision was reversed in *Halse v Warwick* 1931 CPD 233, in that the Court approved and adopted the approach prevailing in the Transvaal where in *Lecomte v W and B Syndicate of Madagascar Ltd* 1905 TS 295, 1905 TS 696, it was established that an *incola* plaintiff could be granted an order for arrest or attachment *ad fundandam iurisdictionem* even though the cause of action arose outside the court's area of jurisdiction.

In terms of the present facts, the plaintiff, XYZ Insurers, is an *incola* of the Johannesburg High Court because it has its headquarters in Johannesburg. Accordingly, the Johannesburg High Court will be competent to exercise jurisdiction on the basis of the attachment of defendants' property *ad fundandam iurisdictionem*. Arrest or attachment *ad fundandam* alone will confer jurisdiction on the Johannesburg High Court, provided that the plaintiff (XYZ Insurers in this case) is the *incola* of the court. It is therefore not necessary that the cause of action arose within the court's area of jurisdiction. [See SGU 14.1.]

- (c) **Suppose the cargo vessel carrying the racing cars had already left Durban harbour and was lying at anchor in Cape Town harbour, bound for Argentina. Would that fact affect your answer to (a) above? (2)**

The crux of the question is whether, given the fact that the property to be attached has been removed from area of jurisdiction of the Durban High Court, the Durban High Court may still exercise jurisdiction in this case. The fact that the cargo vessel carrying the racing cars had already left Durban harbour and was now in Cape Town harbour does not affect the ability of the Durban High Court to attach the property in question. The property which has to be attached need not be within the area of the Durban High Court. Section 19(1)(c) of the Supreme Court Act of 1959 provides that arrest or attachment, both to found and to confirm jurisdiction, may take place anywhere in South Africa. " [See SGU 14.3.]

QUESTION 3**Briefly discuss what is understood by an automatic rent interdict.****[4]**

"Automatic rent interdict" is created in section 31 of the Magistrate's Court Act for use by landlords to prohibit removal of the goods from the leased premises as security for rent. When summons is issued for arrear rental, the plaintiff may include in the summons a notice prohibiting anyone from removing from the leased premises any of the household effects/items (*invecta et illata*) that are subject to the hypothec as security for the rent which is due until an order dealing with such goods has been made by the court. The notice in the summons serves automatically as an interdict, hence the name "automatic rent interdict", which forbids anyone with knowledge thereof from removing goods from the premises.

Note: A true interdict is obtained by way of *ex parte* application. Section 31 interdict is established by notice in a summons.

Further note: The question was restricted to section 31 of the Magistrate's Court Act. Reference to section 32 was therefore not necessary. Be that as it may, note that section 32 is designed to supplement the effect of the section 31 interdict, by effectively prohibiting any person from removing property from the leased premises as security for rent. [See SGU 23.3.2, and 23.3.3.]

3 CONCLUDING REMARKS

We trust that this commentary on the assignment will improve your insight into the contents of this module. We wish you well in your studies.

Regards

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UNISA

/as

QUESTION 2

Indicate the statement which is the closest to correct:

- (1) The situation where two litigants in a civil action reach a settlement out of court and then request the court to make the settlement an order of court, illustrates the adversarial character of South African civil procedural law.
- (2) When we refer to the reform of civil procedural law, we are in fact merely referring to certain proposed cosmetic changes (eg amendment of the court rules).
- (3) The aim of ADR processes is to replace the litigation process in the administration of justice.
- (4) All primary ADR processes are consensual.

QUESTION 3

Indicate the statement which is the closest to correct:

- (1) A juristic person may not appear in a small claims court.
- (2) The main object of instituting small claims courts is the increase of access to justice for ordinary citizens.
- (3) The cases that small claims courts are not competent to hear correspond to those that the magistrates' courts are not competent to hear in terms of section 46 of the Magistrates' Courts Act 32 of 1944.
- (4) Although the jurisdiction for small claims courts is limited to R9 000, these courts can hear actions that are beyond this limit of jurisdiction with the consent of the parties.

QUESTION 4

Indicate the statement which is the closest to correct:

- (1) A corollary to the concept "territoriality" is that only a certain court within whose area of jurisdiction an action arises has jurisdiction over the matter.
- (2) Any party who is dissatisfied with a decision of the Supreme Court of Appeal is free to appeal to the Constitutional Court as the highest court of appeal, even in the case of non-constitutional matters.
- (3) Both the Constitutional Court and the Supreme Court of Appeal and the High Courts are competent to rule on the constitutionality of legislation.
- (4) A High Court exercises its jurisdiction within its territorial area in terms of the provisions of the Supreme Court Act 59 of 1959 and the court rules promulgated in terms thereof.

QUESTION 7

Indicate the statement which is the closest to correct:

In terms of the provisions of section 2(1) of the Divorce Act of 1979, read with section 1(1) of the Domicile Act of 1992 a court may exercise jurisdiction with regard to divorce on the following grounds:

- (1) if the wife is the plaintiff and the husband is resident and domiciled in the area of jurisdiction of the court on the date on which the action is instituted
- (2) if the husband is ordinarily resident in the area of jurisdiction of the court and has been ordinarily resident in the area of jurisdiction of the court for period of 18 months
- (3) if the wife is domiciled in the area of jurisdiction of the court on the date on which the action is instituted
- (4) if, on the date on which the action is instituted, both or either of the parties is ordinarily resident in the area of jurisdiction of the court and has ordinarily been resident in the Republic for a year immediately prior to entering into the marriage.

QUESTION 8

Indicate the statement which is the closest to correct:

A magistrate's court does not have jurisdiction to hear the following matters:

- (1) a claim for the delivery of five motor bikes to the value of R90 000
- (2) a claim for arrear mortgage payments in the amount of R80 000 where the mortgage bond was registered for R300 000
- (3) an application for the liquidation of Disenchanted CC
- (4) an action by X to compel ABC Construction (Pty) Ltd to build a garage on X's property in terms of a valid building contract.

2 COMMENTARY ON ASSIGNMENT 2

QUESTION 1

Most accurate statement: (1)

This statement is correct because section 173 of the Constitution 108 of 1996 confirms the common-law power of the superior courts. Section 173 states *inter alia* that the High Court, the Supreme Court of Appeal and the Constitutional Court have inherent power to protect and regulate their own process and to develop the common law, considering the interests of justice. Therefore, the High Courts are competent to develop the common law in terms of section 173 of the Constitution. See study unit 3.2 on page 11 and section 173 of the Constitution.

Commentary on statement (2)

This statement is incorrect since proceedings have been uniformly conducted since 1965 in all the divisions of the then Supreme Court, now the High Courts, under a common set of rules known as the Uniform Rules of Court. Previously, the various divisions of the then Supreme Court had different rules of court that applied separately in a particular division. However, this changed with the promulgation of the Uniform Rules of Court in 1965. The effect of these rules was to repeal all the previous rules of the various divisions of the then Supreme Court, except those rules of particular divisions regulating court terms, vacations, sessions and set down. These remaining matters exist as rules for specific High Courts. See study unit 4.3.1 on page 14.

Commentary on statement (3)

The statement is obviously incorrect since the rules exist for a court and not the court for the rules. The rules are not an end in themselves but rather a means to an end. The purpose of court rules is to facilitate inexpensive and efficient litigation, and not to obstruct the administration of justice. This means that if the application of a particular rule would lead to substantial injustice, a superior court may, on account of its inherent jurisdiction, condone noncompliance. Therefore, a court, subject to its competence to do so, may condone noncompliance with procedures that would lead to substantial injustice to a litigant. Similarly, a superior court is competent to grant relief if a matter is not covered by the rules. See study unit 4.3.2 on page 15.

Commentary on statement (4)

The inferior courts are also known as the subordinate courts or lower courts. The statement is incorrect since inferior courts include the magistrates' courts established in terms of the Magistrates' Courts Act 32 of 1944, small claims courts, customary courts of the chiefs and headmen, and other bodies vested with judicial or quasi-judicial powers, established by virtue of particular legislation, such as the children's courts and licensing boards.

See study unit 3.1 on page 11.

QUESTION 2

Most accurate statement: (1)

QUESTION 3***Most accurate statement: (2)***

This statement is based on the understanding of the objectives of the small claims courts. The purpose of the small claims courts is to make the administration of justice more accessible to all citizens by extending the basis of every citizen's right to have access to justice. To this end, there is self-representation by both plaintiff and defendant, there is simplified pre-trial proceedings and the commissioner is granted an inquisitorial function. The small claims courts also provide a forum for settling minor disputes and it removes time-consuming, formalistic and expensive procedures. Regarding the other objectives, see study unit 7.1 on page 56.

Commentary on statement (1)

This statement is incorrect. Although a juristic person such as a company or close corporation may not commence action in a small claims court as a plaintiff, a juristic person may become a party to an action as a defendant (see section 7(1)). This restriction limits the right of a juristic person to appear in a small claims court. See section 7(1) of the Small Claims Courts Act 61 of 1984 and study unit 7.4 on page 58.

Commentary on statement (3)

This statement is incorrect. Section 16 of the Small Claims Courts Act 61 of 1984 deals with the instances where the small claims court has no jurisdiction. All causes of action contained in section 46 of the Magistrate's Courts Act 32 of 1944 are repeated in section 16, but a few other instances in which the small claims court has no jurisdiction, are also mentioned in section 16(f)-(g). See section 16 and study unit 7.5 on pages 58-59.

Commentary on statement (4)

This statement is incorrect, because the jurisdiction for small claims courts is limited to claims not exceeding R7 000 (See *Government Gazette* No 26113), and the small claims court cannot hear actions that are beyond this limit of jurisdiction with the consent of the parties in terms of section 22. Section 22 provides that the small claims courts have no jurisdiction to hear a matter, which otherwise exceeds their jurisdiction, by virtue of the consent of the parties. See study unit 7.5 and section 22 on pages 58-59.

QUESTION 4***Most accurate statement: (3)***

This statement is correct in terms of section 167(5) of the 1996 Constitution. Although under the Interim Constitution of 1993, only the Constitutional Court could decide on the constitutionality of legislation, s 167(5) of the 1996 Constitution authorises the Supreme Court of Appeal and High Courts to make such decisions. However, if a superior court makes such a decision, it is of no force until it is confirmed by the Constitutional Court. See study unit 9.3 on page 72 and section 167(5) of the Constitution.

Please note: This ground of policy whereby the court would come to the assistance of the *incola* plaintiff should not be confused with *ratione domicilii*, which refers to the instance where the court where the defendant is either domiciled or resident always has jurisdiction to hear a claim sounding in money.

Commentary on statement (1)

This statement is incorrect because arrest or attachment *ad fundandam jurisdictionem* will only take place where the defendant is a *peregrinus* of the whole of the Republic (that is, foreign *peregrinus*), the plaintiff is an *incola* of the court, and arrest or attachment of the defendant's person or property has taken place. Thus, the plaintiff must be an *incola* of the court as well and the defendant must be a foreign *peregrinus*. From the facts, the defendant is a *peregrinus* of the court and not the Republic as required. See study unit 14.1 on page 89.

Commentary on statement (2)

This statement is incorrect since a High Court will exercise jurisdiction *ad fundandam jurisdictionem* where the defendant is a *peregrinus* of the whole Republic (foreign *peregrinus*) and the plaintiff is an *incola* of the court and if the arrest or attachment of the defendant's person or property has taken place. So the defendant must be a foreign *peregrinus* and the plaintiff an *incola* of the court. From the facts, the defendant is a *peregrinus* of the court but he should be a *peregrinus* of the Republic; so all the requirements are not met for jurisdiction *ad fundandam jurisdictionem*. See study unit 14.1 on page 89.

Commentary on statement (3)

As stated earlier, arrest or attachment *ad fundandam jurisdictionem* occurs where the defendant is a *peregrinus* of the whole of the Republic, the plaintiff is an *incola* of the court and arrest or attachment of the defendant's person or property has taken place. The *Halse* decision illustrates that an *incola* plaintiff could be granted an order for arrest or attachment *ad fundandam jurisdictionem* even though the cause of action arose outside the court's jurisdiction. From the facts, the cause of action has taken place within the court's area of jurisdiction. However, it is not necessary that the cause of action should have arisen within the court's area of jurisdiction. See study unit 14.1 on page 89.

QUESTION 6

Most accurate statement : (4)

As this action concerns the transfer of immovable property, only the court in the area where the immovable property (house) is situated (that is, the *forum rei sitae*) will have exclusive jurisdiction to hear the matter. So it will be the Bloemfontein High Court as the house is situated in Bloemfontein. The *forum rei sitae* means that where the object of relief is immovable property, the court in whose territorial area the immovable property is situated has exclusive jurisdiction in actions, *inter alia* for the transfer of immovable property. See study unit 16.2 on page 99.

Please note:

Alternatively, a court may also exercise jurisdiction if both or either of the parties are/is ordinarily resident in its area of jurisdiction on the date on which the action is instituted and have/have been ordinarily resident in the Republic for a period of not less than one year immediately prior to the institution of the action (s 2(1)(b)). Domicile or residence are established as independent and alternative jurisdictional grounds; so the domicile or residence of one spouse alone is sufficient to confer the competence to exercise divorce jurisdiction over the other spouse.

Commentary on statement (1)

This statement is incorrect. It is not clear from the facts where the wife is domiciled or resident. In terms of section 2 of the Divorce Act, jurisdiction is conferred by the domicile or residence of either spouse and not both spouses; so the domicile or residence of the one spouse alone is sufficient to confer divorce jurisdiction, and the jurisdictional status of the other spouse would be irrelevant. Also, the husband need not be domiciled **and** resident in the court's area of jurisdiction as domicile and residence are separate and alternative grounds. See study unit 17.3 on page 103.

Commentary on statement (2)

This statement is incorrect since the husband must be ordinarily resident in the court's area of jurisdiction on the date on which the action is instituted and has been **ordinarily resident in the Republic** for a period of not less than one year immediately prior to the institution of the action (s 2(1)(b) of the Divorce Act) for the court to exercise divorce jurisdiction. Therefore, the requirement that the one spouse, the husband in this instance, must be ordinarily resident in the Republic for a period of not less than one year (and not within the court's jurisdiction as set out in the facts) has not been fulfilled in terms of section 2(1)(b). See study unit 17.3 on page 103.

Commentary on statement (4)

This statement is incorrect. As stated above, the court will exercise divorce jurisdiction if both or either parties are or is ordinarily resident in the court's area of jurisdiction on the date on which the action is instituted and have or has been ordinarily resident in the Republic for a period of not less than one year immediately **prior to the institution of the action** (s 2(1)(b)). Therefore, the phrase "prior to the entering into the marriage" is obviously incorrect. See study unit 17.3 on page 103.

QUESTION 9***Most accurate statement: (3)***

Section 50 of the Magistrate's Court Act gives a defendant the opportunity to have a matter moved from the magistrate's court to the High Court if he or she is not satisfied with having it heard by the lower court. An application must be made to the court where summons has been issued and the defendant must state the following: for example, if the amount of the claim exceeds R3 000, the applicant objects to the matter, notice of intention to defend has been given to the plaintiff and other defendants, furnishing of security. If the applicant complies with these requirements, the case must be stayed in the magistrate's court and the action will be removed to the appropriate provincial or local division of the High Court having jurisdiction. Upon removal, the summons in the court will stand as the summons in the division to which the action is removed (so the magistrate's court summons can serve as summons in the High Court in terms of section 50). The plaintiff may elect to have the matter transferred to the relevant High Court having jurisdiction, or he may decide to issue fresh summons in the High Court. See study unit 23.5 on page 148.

Commentary on statement (1)

This statement is incorrect since the statement relates to section 43 (cumulative jurisdiction) and not splitting of claims. Section 43 of the Magistrate's Court Act provides that where more than one claim, each based on a different cause of action, is contained in one summons, the court has the same jurisdiction in respect of each claim that it would have had if separate actions had been instituted regarding each claim. Section 40 of the Magistrate's Court Act (splitting of claims) is the counterpart of section 43 and it provides that the various claims embodied in one summons must be based on different causes of action. This section prevents one cause of action, which would result in more than one claim which would together exceed the court's jurisdiction, from being split in such a way that separate claims can be brought in separate actions, each of which falls within the court's jurisdiction. See sections 43 and 40 and study units 24.5 and 24.6 on pages 156-157.

Commentary on statement (2)

This statement is incorrect since the spoliation order or *mandamenten van spolie* is a form of order that appears to contravene s 46(2)(c) of the Magistrate's Court Act. However, the order is usually not "in terms of a contractual obligation". It has been held that a *mandament van spolie* does not contravene the provisions of s 46, because s 46 is not concerned with "extraordinary remedies of a temporary nature" (*Zinman v Miller* 1965 (3) SA 8(T)). See study unit 23.2.3 on page 144.

Commentary on statement (4)

This statement is incorrect. The landlord acquires a tacit hypothec over all household effects (*invecta et illata*) which are on the leased property for arrear rental. However, the tacit hypothec falls away as soon as the household effects are removed from the leased premises. The landlord has recourse to sections 31 (automatic rent interdict) and 32 (attachment order which prohibits removal of the goods from the leased premises). The automatic rent interdict (created by section 31) forbids anyone with knowledge from removing goods from the premises. However, it is effective only against persons who have knowledge of it. Section 32 provides for an attachment order to supplement the effect of the interdict and to secure the goods effectively. See ss 31 and 32 of the Magistrate's Court Act and study unit 23.3 on pages 146-147.

(2008)

CIP201G/101

QUESTION 1

Indicate the statement which is the closest to correct:

- (1) The Small Claims Court have quasi-judicial powers which, unlike in the magistrates courts, enables the judicial officer to play an active role in the proceedings.
- (2) In terms of section 167 of the Constitution of 1996, the Constitutional Court is the only court that is competent to hear constitutional matters.
- (3) The Labour Appeal Court has inherent powers to promote and regulate its own processes, and to develop the common law taking into consideration the interest of justice.
- (4) In the Anglo-American system operating in countries like South Africa there is a clear distinction between the investigative and the decision-making aspects of litigation.

QUESTION 2

Indicate the statement which is the closest to correct:

- (1) Both arbitration and litigation are based on the attribution of blame.
- (2) The arbitrability of matrimonial disputes is in South Africa prohibited.
- (2) Facilitation and negotiation processes result in non-binding recommendations, and are extremely well suited to creative problem-solving rather than specifically settling disputes.
- (4) In the arb/med processes the parties try to resolve their differences first through mediation, failing which they will resort to arbitration in terms of which a decision will be imposed on them.

QUESTION 3

Indicate the statement which is the closest to correct:

- (1) The Roman law rule *actor sequitur forum rei* means that the plaintiff must institute action against the defendant in the division of the high court within whose area of jurisdiction the defendant is an inhabitant.
- (2) The doctrine of effectiveness complements "jurisdiction" since it requires that a court exercising jurisdiction over a matter should be able to ensure that its judgment thereof is complied with.
- (3) In *Tucker's land and Development Corporation (Edms) Bpk v Van Zyl* 1977 (3) SA 1041 the court concluded that the order *ad pecuniam solvendam* is an order for specific performance that falls beyond the jurisdictional competence of a magistrate's court.
- (4) *Forum solutionis* means the place of performance of an obligation.

QUESTION 6

Indicate the statement which is the closest to correct:

- (1) When the defendant is a *peregrinus* of the whole Republic, the court will be competent to exercise jurisdiction if arrest or attachment of the defendant's person or property *ad fundandum jurisdictionem* has taken place and the cause of action arose in the jurisdiction area of the court.
- (2) When the defendant is a *peregrinus* of the whole Republic, the court will be competent to exercise jurisdiction on the basis of cause of action if arrest or attachment of the defendant's person or property *ad confirmandum* has taken place, provided the conclusion of a contract, its performance and its breach have occurred within its jurisdictional area.
- (3) In terms of section 19(1)(c) and section 26(1) of the Supreme Court Act arrest or attachment both to found or confirm jurisdiction may take place anywhere in South Africa.
- (4) When dealing with the application for an order for arrest or attachment the court may not look into the merits of the case.

QUESTION 7

Indicate the statement which is the closest to correct:

- (1) A customary wife who wishes to divorce may institute the action for divorce in the division of the high court within whose area of jurisdiction the husband is domiciled.
- (2) A court may exercise divorce jurisdiction if both or either of the parties are or is domiciled within its area of jurisdiction for a period of not less than one year on the date on which the action is instituted.
- (3) In terms of the Divorce Act of 1979 the court in whose area of jurisdiction both or either of the parties are or is domiciled is competent to exercise jurisdiction in nullity of the marriage action.
- (4) A court may exercise divorce jurisdiction if both or either of the parties are or is ordinarily resident in its area of jurisdiction on the date on which the action is instituted, and have or has been resident in that area for a period of not less than one year immediately prior to the institution of the action.

QUESTION 10

Indicate the statement which is the closest to correct:

- (1) A magistrate may grant a mandatory interdict, irrespective of the limitations in section 46 of the Magistrates' Courts Act.
- (2) An order of *arrest tanquam suspectus de funga* shall be granted only when it appears that the respondent is about to leave the Republic.
- (3) The competence of a magistrate's court to grant an order for the enforcement of a restraint of trade agreement is not subject to the jurisdiction limitations of section 46(2)(c) of the Magistrates' Courts Act.
- (4) A plaintiff can claim two amounts, namely R100 000 and R110 000, in a single claim, even if the joint amount of the claims exceeds the magistrate's court's jurisdiction under section 29, provided the parties are the same and provided each claim is based on a separate cause of action.

QUESTION 4

Indicate the statement which is the closest to correct:

A magistrate's court does not have jurisdiction to hear the following matters:

- (1) an order *ad factum praestandum* as it is practically equivalent to an order for specific performance without the alternative of damages.
- (2) an order for the nullity of a marriage in terms of section 46 of the Magistrates' Courts Act.
- (3) claims in which the subject-matter is worth more than R100 000 in value.
- (4) actions for ejectment relating to the right of occupation of any premises or land.

QUESTION 5

Indicate the statement which is the closest to correct:

- (1) Magistrate's courts may be competent to exercise jurisdiction over constitutional matters if so empowered by legislation.
- (2) The proceedings in South African courts are accusatorial in nature, except in quasi-judicial tribunals wherein the judicial officer plays an active role.
- (3) Proceedings in the small claims courts, magistrate's courts and in the High Court are initiated with a letter of demand to the defendant/respondent.
- (4) An application for *mandament van spolie* takes place *ex parte* in terms of rule 56 of the Magistrates' Courts Rules, coupled with payment into court of security for any damages which may be caused by such an order.

QUESTION 8

- (1) Although South Africa is a unitary state, each High Court has original jurisdiction over all causes of action arising in its territorial jurisdiction.
- (2) The Supreme Court of Appeal is the highest court of appeal in South Africa.
- (3) Both the Constitutional Court, the Supreme Court of Appeal and the High Courts are competent to rule on the constitutionality of legislation.
- (4) A High Court exercises its jurisdiction within its territorial area in terms of the provisions of the Supreme Court Act 59 of 1959 and the court rules promulgated in terms thereof.

QUESTION 9

Indicate the statement which is the closest to correct:

A division of the High Court can exercise jurisdiction *ad confirmandam iurisdictionem* if

- (1) both the plaintiff and the defendant are *peregrini* of the court in question and arrest or attachment has taken place.
- (2) the defendant is a *peregrinus* of the court in question and the plaintiff is an *incola* of the Republic, provided arrest or attachment has taken place.
- (3) the defendant is a *peregrinus* of the court and the entire Republic, arrest or attachment has taken place, and the cause of action has taken place within the jurisdiction of the court in question.
- (4) the plaintiff is an *incola* of the court, the defendant is a *peregrinus* of the court and the entire Republic and the cause of action has taken place within the jurisdiction of the court in question.

(2008)

QUESTION 1

Shrek undertakes, in terms of a contract, to pay an amount of R50 000 to Fiona upon the occurrence of a certain event. When the event occurs, Shrek refuses to pay. Fiona issues summons against Shrek in the Pretoria magistrate's court demanding performance of Shrek's contractual obligations, namely payment of R50 000. Shrek contends that Fiona's claim amounts to a claim for specific performance of a contractual obligation, which the Pretoria magistrate's court lacks competency to adjudicate over in terms of 46(2)(c) of the Magistrates' Courts Act 1944.

- (a) Fully discuss the merits and/or demerits of Shrek's contention. (6)
- (b) Discuss the meaning of the words "cause of action arose wholly" used in section 28(1)9(d) of the Magistrates' Courts Act of 1944. (4)

QUESTION 2

Fox, a Botswana citizen, and Mariah, a South African citizen, got married in January 2005. Their family home is in Botswana. Fox has been employed since September 2006 as a mechanical engineer in Lichtenburg in North West. In October 2007 Mariah left the family home in Botswana to work as a domestic worker in Soweto. A few weeks after her arrival in Soweto Mariah discovered that Fox had been living with his girlfriend in Lichtenburg. Mariah wants to divorce Fox.

- (a) Briefly explain the domicile of a woman for the purposes of divorce jurisdiction. (3)
- (b) May Mariah institute a divorce action in the Johannesburg High Court? (4)
- (c) May Mariah issue a divorce action in the Mmabatho High Court? (3)

QUESTION 3

- (a) Explain why negotiation is a process. (6)
- (b) Explain how section 26(3) of the Small Claims Courts Act allows the commissioner to play an active role in proceedings in the Small Claims Courts. (4)

QUESTION 4

- (a) On what basis will the High Court be able and competent to exercise jurisdiction of a claim of breach of contract if the defendant is a *perigrinus* of the whole Republic. Fully substantiate your answer. (4)
- (b) Would your answer in (a) above be different if the defendant was a local *perigrinus*? Fully substantiate your answer. (4)
- (c) Critically discuss the difference between sections 19(1) (c) (ii) and 28 of the Supreme Court Act of 1959. (4)