

QUESTION 1

Dino lives in Soweto and works in Pretoria, and owns a soccer club with headquarters in Johannesburg. Dino concludes a contract with Clive, a sports apparel manufacturer, in terms of which Clive undertakes to manufacture and supply Dino with specially embroidered 2010 soccer world cup T-shirts for his team in Johannesburg. The contract is concluded at Clive's business in Durban. Clive lives in Pietermaritzburg. Clive wishes to institute proceedings against Dino in the magistrate's court in the amount of R90 000 for goods sold and delivered.

- (a) Does the magistrate's court for the district of Durban have jurisdiction over the action? (2)
- (b) Does the magistrate's court for the district of Johannesburg have jurisdiction over the action? (2)
- (c) Does the magistrate's court for the district of Pretoria have jurisdiction over the action? (2)
- (d) Name four matters that fall beyond the jurisdiction of all magistrate's courts in terms of the Magistrates' Courts Act of 1944. (4)

QUESTION 2

Jake is a resident of Pretoria. While on a holiday in Durban Jake was involved in a motor accident with Tino, who was driving recklessly in the city's streets. Tino is domiciled in Johannesburg. Jake suffered damages in the amount of R150 000.

Answer the following questions and give reasons for each answer:

- (a) Can Jake institute proceedings against Tino in the Johannesburg High Court? (2)
- (b) Can Jake institute proceedings against Tino in Durban High Court? (2)
- (c) Can Jake institute proceedings against Tino in the Pretoria High Court? (1)
- (d) If, on the same facts, Tino is now an Egyptian citizen who is domiciled in Cairo, and no longer resident in Johannesburg, under what circumstances could Jake institute proceedings against Tino in the Durban High Court? (5)

QUESTION 10

X lives in Pretoria and buys a house situated in Bloemfontein from Y. Y lives in Durban. The contract of purchase and sale was signed in Cape Town while they were both on holiday there. Y subsequently refused to sign the transfer documents and X decided to institute an action against Y.

Indicate the statement which is the closest to correct:

- (1) X institutes an action against Y and asks the court to order Y to effect transfer. This action can be instituted in the Natal Provincial Division, the Cape Provincial Division (the Cape High Court) and the Durban and Coast Local Division.
- (2) X institutes action against Y for damages on the grounds of breach of contract. This action can only be brought in the Bloemfontein High Court.
- (3) X institutes action against Y for damages on the grounds of breach of contract. This action can only be brought in the Durban and Coast Local Division, the Cape Provincial Division (the Cape High Court) and the Transvaal Provincial Division (the Pretoria High Court).
- (4) X institutes action against Y and asks the court to order Y to effect transfer. This action can only be brought in the Bloemfontein High Court.

QUESTION 6

Indicate the statement which is the closest to correct:

Diddy and Xolani run a restaurant selling burgers which is situated in Soweto. Both Diddy and Xolani live in Lenasia, south of Johannesburg. Bunny and Chow are business partners. Their partnership business Meat 4 Africa is situated in Garankua, north of Pretoria. Bunny lives in Garankua and Chow lives in Johannesburg. Diddy and Xolani conclude a contract in Pretoria with Bunny and Chow in terms of which Bunny and Chow undertake to supply the former with beef platters at their restaurant in Soweto. Bunny and Chow fail to supply the meat as agreed. Diddy and Xolani suffer damages in the amount of R100 000. The following courts have jurisdiction:

- (1) the magistrate's court of the district of Lenasia, because this is where Diddy and Xolani reside.
- (2) the magistrate's court for the district of Soweto, because this is where delivery should have taken place.
- (3) the magistrate's court for the district of Garankua over Bunny and Chow, and Meat 4 Africa, jointly and severally, because this is where Meat 4 Africa's business premises are situated.
- (4) the magistrate's court for the district of Garankua, and for the district of Johannesburg, because this is where Bunny and Chow are resident respectively.

QUESTION 7

Indicate the statement which is the closest to correct:

- (1) Residence and domicile are mutually inclusive requirements for the divorce jurisdiction in terms of the Divorce Act of 1979.
- (2) More than one court may be able to exercise jurisdiction in the same action, if different *rationes jurisdictionis* exist in respect of different courts.
- (3) 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 ordinarily resident in the Republic for a period of not less than twelve months since their marriage.
- (4) Divorce action means an action by which a decree of divorce or other related order such as nullity of a marriage is sought.

QUESTION 1

Indicate the statement which is the closest to correct:

- (1) The South African High Courts are creatures of a statute, namely, the Supreme Court Act of 1959.
- (2) The Uniform Rules of Court are a common set of rules that uniformly regulate the conduct of the proceedings in all High Courts.
- (3) Since court rules exist for a court, a court cannot condone a party's non-compliance with its rules.
- (4) The Minister of Justice and the Rules Board may make rules relating to the manner in which the Constitutional Court may be engaged.

QUESTION 2

Indicate the statement which is the closest to correct:

- (1) Arbitration is an alternative-dispute resolution (ADR) process that has much in common with litigation, including guaranteeing procedural rights of litigants.
- (2) When we refer to the reform of civil procedural law, we are in fact merely referring to certain proposed cosmetic changes.
- (3) Both negotiation and arbitration are processes because they lack formalities and the technical procedure of litigation.
- (4) A hybrid process of ADR is constituted when two or more elements of primary processes are combined.

QUESTION 3

Indicate the statement which is the closest to correct:

- (1) A juristic person is allowed to commence an action in the Small Claims Courts only when represented by a duly nominated director or other natural persons.
- (2) One of the objects of instituting Small Claims Courts is to increase ordinary citizens' access to justice.
- (3) The cases that Small Claims Courts are absolutely not competent to adjudicate are identical to those that the magistrate's courts are not competent to hear in terms of the Magistrates' Courts Act 32 of 1944.
- (4) Small Claims Courts are limited to hearing only claims of up to R7 000, except where the parties consent in writing for the court to hear a claim in excess of R7 000.

QUESTION 8

Indicate the statement which is the closest to correct:

- (1) In terms of section 28 of the Magistrates' Courts Act the court has jurisdiction over a person who was "employed within the district" of such court when summons was issued.
- (2) The Johannesburg magistrate's court will have jurisdiction over any person who owns land within its area of jurisdiction, despite the fact that such person is resident, employed or carries on business in Pretoria.
- (3) The magistrate's court has jurisdiction over interpleader proceedings if the defendant consent to the jurisdiction of the court.
- (4) In terms of section 28(1)(f) of the Magistrates' Courts Act the court shall have jurisdiction in any claim where the defendant appears and takes no objection to the jurisdiction of the court.

QUESTION 9

Indicate the statement which is the closest to correct:

- (1) A counterclaim that exceeds the jurisdiction of a magistrates court must be instituted in a high court having jurisdiction before the plaintiff's claim is heard in the magistrates court.
- (2) Cumulative jurisdiction is when different claims which are based on different causes of action are contained in one summons.
- (3) A lack of jurisdiction, either in terms of sections 28, 29 or 46 of the Magistrates' Courts Act 32 of 1944 can always be rectified by consent to jurisdiction in terms of section 45 of the Magistrates' Courts Act 32 of 1944.
- (4) Section 39 is used in cases where the plaintiff's claim exceeds the quantitative jurisdiction limit of the magistrate's court and the defendant files a counterclaim. The effect of this is that the counterclaim is automatically deducted from the amount claimed to bring the claim within the quantitative jurisdiction limit.

QUESTION 4

Indicate which statement is true:

- (1) A "foreign peregrine" is a person who is neither domiciled nor resident within the court's area of jurisdiction.
- (2) The *forum rei sitae* principle amounts to the fact that a court within whose area of jurisdiction a thing or a person is situated has exclusive jurisdiction over such thing or person.
- (3) The concept "domicile" is synonymous to the concept of "residence."
- (4) An order *ad factum praestandum* refers to a judgment in which a person is ordered to perform or to refrain from performing some act.

QUESTION 5

Indicate the statement which is the closest to correct:

- (1) Unlike the High Court and the Supreme Court of Appeal, the Constitutional Court cannot be approached directly.
- (2) In a dispute between the residents of an informal settlement and the local authority regarding the local authority's refusal to supply the residents with water and sanitation, the residents may approach the Constitutional Court directly since the right to water is protected in the Bill of Rights contained in the Constitution and refusal to supply water amounts to an infringement of that right.
- (3) A High Court may, in terms of section 19(1)(a) of the Supreme Court Act 59 of 1959, try any matter that arises within its area of jurisdiction, whereas a Constitutional Court may only hear constitutional matters.
- (4) Although the Supreme Court of Appeal may hear appeals in respect of both constitutional and non-constitutional matters, it is not the final court of appeal in the case of constitutional matters.

QUESTION 10***Most accurate answer (3):***

This statement relates to the application of section 28(1)(a) of the Magistrate's Court Act. Section 28(1)(a) provides that a court will have jurisdiction over any person or defendant who resides, carries on business or is employed within the district. So Cape Town magistrate's court will have jurisdiction as X (the defendant) lives or resides in Cape Town and carries on business or trades as a fishmonger in Cape Town. See section 28(1)(a) of the Magistrate's Court Act and study unit 22.2.1 on page 133.

Commentary on statement (1)

This statement is incorrect. Section 28(1)(d) provides that the cause of action must arise wholly in the relevant area before a court will be vested with jurisdiction. Thus, in the magistrate's court, it must be shown not only that the contract was concluded within the district concerned but also that the breach occurred there as well. Thus, both the conclusion and the breach must take place in the district of Pretoria and Johannesburg in terms of section 28(1)(d). The conclusion of the contract took place in Cape Town but the breach took place in Pretoria and Johannesburg. Therefore, the whole cause of action did not take place "wholly" in the district of Pretoria and Johannesburg in terms of section 28(1)(d). See section 28(1)(d) of the Magistrate's Court Act and study unit 22.2.4 on page 135.

Commentary on statement (2)

This statement is incorrect because the reference to "persons" in section 28 of the Magistrate's Court Act means the defendant only, not either of the parties. Thus, the situation of the defendant, not the plaintiff, will give the court jurisdiction. Thus, Y is the plaintiff and not the defendant as required in terms of section 28; the district of Johannesburg will not have jurisdiction as it is the district where the plaintiff resides and carries on business. See study unit 22.1 on page 133.

Commentary on statement (4)

As stated above, the magistrate's court for the district of Cape Town would have jurisdiction in terms section 28(1)(a) so a link between the jurisdictional area of the court and the defendant would give the court jurisdiction; it is therefore irrelevant that the cause of action did not occur "wholly" in any district in terms of section 28(1)(d), as Cape Town magistrate's court would have jurisdiction in terms of section 28(1)(a). See study units 22.2.1 and 22.2.4 on pages 133 and 135 respectively.

3 CONCLUDING REMARKS

Once again, you are reminded that this commentary forms part of the tutorial material that should be studied in preparation for the examination. We trust that this assignment helped to facilitate your understanding of the work. You need to understand that you will not master the work for the examination without a great deal of preparation and unless you start examination preparation early.

QUESTION 8***Most accurate statement: (4)***

This statement is correct because a magistrate's court is not competent to hear an action by X to compel the construction of a garage in terms of a valid building contract. This is so because one cannot ask a magistrate's court to force someone to build or construct a garage. This can only be done in the High Court, as this is a true claim for specific performance. The magistrate's court can make such an order only if a claim for damages is included as an alternative, that is, where a construction company can be ordered to build a garage, or alternatively to pay damages. This is a true claim for specific performance as ABC Construction (Pty) Ltd is forced to build a garage or perform a particular action. X can only institute such an action against ABC Construction (Pty) Ltd in a magistrate's court if X includes a claim for damages as an alternative, otherwise X must sue the company in the High Court. See section 46(2)(c) of the Magistrate's Courts Act and study unit 20.2.4 on pages 121-122.

Commentary on statement (1)

This statement relates to the application of section 46(2)(c)(ii) of the Magistrate's Courts Act 32 of 1944. This statement is incorrect as a magistrate's court is competent to hear the claim for the delivery of five motor bikes to the value of R90 000 because the order which may be granted is limited to the delivery or transfer of movable or immovable property (movable property in this instance). Therefore, this claim or action may be brought in the magistrate's court as it can be classified as one of the exceptions listed in section 46(2)(c)(ii) namely, the delivery of movable property such as motor bikes and the amount of R90 000 falls within the quantitative jurisdictional limit in terms of section 29. See section 46(2)(c)(ii) and study unit 20.2.4.2, page 123.

Commentary on statement (2)

This statement relates to the application of section 29(1)(d) of the Magistrate's Court Act. The statement is incorrect because a magistrate's court can exercise jurisdiction in terms of section 29(1)(d) of the Magistrate's Court Act as the financial limitation relates to the amount that may be claimed in the summons, not to the amount of the liquid document or bond. Therefore, a magistrate's court is competent to hear a claim for payment of R80 000 even if the amount of the bond is for R300 000. See section 29(1)(d) of the Magistrate's Court Act and study unit 21.2.6 on page 128.

Commentary on statement (3)

This statement is incorrect because a magistrate's court is competent to hear an application for the liquidation of Disenchanted CC in terms section 29(1)(fA) of the Magistrate's Court Act, including an application for liquidation in terms of the Close Corporations Act 69 of 1984. This is the only insolvency application which a magistrate's court may hear. Otherwise, the Insolvency Act 24 of 1936 provides that sequestrations and liquidations must be decided by the High Courts. See section 29(1)(fA) of the Magistrate's Court Act and study unit 21.2.9 on page 129.

Commentary on statement (1)

This statement is incorrect. As the action relates to the signature of transfer documents in respect of immovable property, only the court in whose territorial area the property is situated will have exclusive jurisdiction to hear the action (the *forum rei sitae* applies). It does not matter whether the defendant is an *incola* or a *peregrinus* or where the cause of action occurred. Therefore, only the Bloemfontein High Court will be able to hear the action. See study unit 16.2 on page 99.

Commentary on statement (2)

The statement is incorrect. The Bloemfontein High Court would not have jurisdiction because Bloemfontein is the area where the property is situated and not where the breach of contract occurs. Regarding breach of contract, the action can only be brought in the court's area of jurisdiction where the contract was concluded or breached or where the performance of the contract was intended to be effected within the court's area of jurisdiction. Then the court is said to be vested with jurisdiction *ratione contractus*; so the Cape Town High Court could have jurisdiction because the contract of purchase and sale was signed there. The Durban High Court would also have jurisdiction on the basis of *ratione domicilii* because the defendant lives in Durban. See study units 13.1 and 13.2 on page 86.

Commentary on statement (3)

The statement is incorrect. As stated above, either the Durban High Court or the Durban and Coast Local Division (*ratione domicilii*) or the Cape Town High Court (*ratione contractus*) would have jurisdiction to hear the action. The Transvaal Provincial Division (Pretoria High Court) would have no jurisdiction to hear the action because the fact that the plaintiff lives in Pretoria does not confer jurisdiction on the court. It is irrelevant whether the plaintiff is an *incola* of the court. See study unit 13.1 on page 86.

Please note: If more than one court may be able to exercise jurisdiction in the same action, then the plaintiff as *dominus litis* (master of the suit) may choose in which of these courts which are vested with jurisdiction he wishes to institute the action.

QUESTION 7**The most accurate statement: (3)**

This statement is correct since a court may exercise divorce jurisdiction if both or either of the parties are or is domiciled in its area of jurisdiction on the date on which the action is instituted (s 2(1)(a) of the Divorce Act 70 of 1979). The domicile of the one spouse is sufficient to confer jurisdiction even if the other spouse is domiciled outside the Republic. Therefore, from the facts, if the wife is domiciled in the court's area of jurisdiction on the date on which the action is instituted, then that is sufficient to confer jurisdiction on the court in terms of section 2(1)(a). See study unit 17.3 on page 103.

Commentary on statement (1)

This statement is incorrect because the jurisdiction of courts is confined to matters which arise within their area of jurisdiction and to persons resident within that area. No court will exercise jurisdiction unless there is a presence of some link or jurisdictional connecting factor (nexus) between the court and the parties or the cause of action known as *ratio jurisdictionis*. The court must also have the power to enforce the judgment. See study units 8.2 and 8.3.1 on pages 67-68.

Commentary on statement (2)

This statement is incorrect because the Supreme Court of Appeal is the highest court of appeal regarding nonconstitutional matters and its decision is final. The Constitutional Court is the highest court of appeal in respect of constitutional matters (see section 167(3)). It is possible to appeal against the decision of the Supreme Court of Appeal on a constitutional issue to the Constitutional Court, but no further appeal is available on a nonconstitutional issue. Therefore, one cannot appeal against the decision of the Supreme Court of Appeal in the case of nonconstitutional matters as it is the final court of appeal. See study unit 9.2.1 and 9.2.2 on pages 71-72.

Commentary on statement (4)

This statement is incorrect as High Courts may hear any matter or adjudicate on any cause of action arising within their territorial area of jurisdiction except where exclusive jurisdiction has been vested in another court or tribunal (s 19(1)(a) of the Supreme Court of Appeal 59 of 1959). They may hear all constitutional matters except those contained in section 167(4) of the Constitution (exclusive jurisdiction of the Constitutional Court) or those assigned to another court in terms of section 169(a)(ii). See study unit 9.3.3 on page 73.

QUESTION 5**The most accurate statement: (4)**

In the instance where the plaintiff is an *incola*, the defendant is a *peregrinus* of the court and the Republic (foreign *peregrinus*), the cause of action occurred outside the court's area and arrest and attachment of the defendant's person and property has taken place, then the court can exercise jurisdiction *ad fundandam jurisdictionem*. It is not necessary that the cause of action should have arisen within the court's area of jurisdiction. Arrest or attachment *ad fundandam jurisdictionem* alone founds jurisdiction and constitutes the ground on which the assumption of jurisdiction is justified. The order for arrest or attachment *ad fundandam jurisdictionem* is permissible only if a further condition is complied with, that is, if the plaintiff is an *incola* of the court concerned. This principle is based upon policy considerations which evolved through a series of court decisions: In *Einwald v German West African Company* 1887 (5) SC 86, the Cape SC held that the arrest or attachment *ad fundandam jurisdictionem* was not permissible and that the cause of action must have arisen in a court's area of jurisdiction before it could adjudicate on the matter. This decision was reversed in *Halse v Warwick* 1931 CPD 233, in that the *Halse* 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 jurisdictionem* even though the cause of action arose outside the court's area of jurisdiction. From the facts, the requirement that the plaintiff must be an *incola* of the court has not been fulfilled. See study unit 14.1 on page 89.

This statement is based on an understanding of the principle of party prosecution. The adversarial nature of South African civil procedure is characterised by *inter alia* the principle of party prosecution, whereby the litigants negotiate an out of court settlement. The litigants actively conduct civil proceedings as a private matter without any interference from the court. Nevertheless, both litigants must conduct the proceedings according to certain minimum standards that are prescribed by the Rules of Court. The court will only become involved in the proceedings if one of the litigants approaches the court to compel the other litigant to comply with the Rules of Court, or requests the court to condone or overlook a mistake in procedure. See study unit 5.2.3 on pages 21-22.

Commentary on statement (2)

This statement is incorrect. The reform of civil procedure entails or encapsulates the following: the continual revision of the rules of court; increasing the jurisdictional limits of the lower courts in order to give more people access to court; the exclusion of specific types of disputes from the court system; the establishment of alternative *fora* such as the small claims court; and the use of informal dispute resolution processes known as "alternative dispute resolution" to save costs and avoid delays. Therefore, the reform of civil procedure involves more than the amendment of court rules or cosmetic changes as it is a highly complex matter. See study units 5.5.7 on page 25.

Commentary on statement (3)

This statement is incorrect since ADR processes challenge the process of litigation but do not replace the litigation process. Therefore, ADR processes may sometimes offer an alternative to the process of litigation. Litigation is the mainstream model of dispute resolution against which ADR processes are presented as an alternative. See study unit 6.1.2 on page 32.

Commentary on statement (4)

The system of ADR is based on three primary processes, namely, negotiation, mediation and arbitration. Negotiation and mediation are consensual processes because the outcome is not imposed but rather achieved by the agreement of both disputants, which could be contained in a written contract. Arbitration on the other hand, is a command process like litigation in that a decision in the form of an award is imposed on the disputants. However, unlike litigation, the arbitrator's competence to impose the award arises from the consent of the disputants to accept the award. Therefore, negotiation and mediation are the only primary ADR processes which are consensual. Arbitration is a primary ADR process that is a command process. See study unit 6.2.4 on page 39.

QUESTION 9

Indicate the statement which is the closest to correct:

- (1) When more than one claim, each based on a separate cause of action, is contained in a single action, we are dealing with a splitting of claims.
- (2) The spoliation order amounts to an order for specific performance and is therefore a contravention of the provisions of section 46(2)(c) of the Magistrates' Courts Act of 1944.
- (3) In certain circumstances a magistrate's court summons can serve as a summons in the High Court.
- (4) The issue of the automatic rent interdict has the automatic result that the lessor has the right to attach the *invecta et illata* belonging to the lessee if the rent is not paid.

QUESTION 10

Indicate the statement which is the closest to correct:

X and Y conclude a contract in Cape Town in terms of which X has to supply fresh fish to Y's restaurants in Pretoria and Johannesburg. X lives in Cape Town, where he trades as a fishmonger. Y lives in Johannesburg. X fails to supply the fish as agreed and Y suffers damage because he has to purchase more expensive fish from Mozambique from Z. Which of the following courts has jurisdiction?

- (1) the magistrate's court for the district of Pretoria and Johannesburg, because this is where delivery should have taken place (s 28(1)(d))
- (2) the magistrate's court for the district of Johannesburg, because Y "resides" and "carries on business" there, as contemplated in section 28(1)(a)
- (3) the magistrate's court for the district of Cape Town, because X "resides" and "carries on business" there, as contemplated in section 28(1)(a)
- (4) none of the courts, because the cause of action did not arise "wholly" in any district, as required in section 28(1)(d)

QUESTION 5

Indicate the statement which is the closest to correct:

A division of the High Court can exercise jurisdiction *ad fundandam 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, the plaintiff is an *incola* of the Republic 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 in question, the defendant is a *peregrinus* of the court and the entire Republic and the cause of action has taken place outside the area of jurisdiction of the court (provided that arrest or attachment has taken place).

QUESTION 6

X lives in Pretoria and buys a house situated in Bloemfontein from Y. Y lives in Durban. The contract of purchase and sale is signed in Cape Town while they are both on holiday there. Y subsequently refuses to sign the transfer documents and X decides to institute an action against Y.

Indicate the statement which is the closest to correct:

- (1) X institutes an action against Y and asks the court to order Y to effect transfer. This action can be instituted in the Natal Provincial Division, the Cape Provincial Division (the Cape High Court) and the Durban and Coast Local Division.
- (2) X institutes action against Y for damages on the grounds of breach of contract. This action can only be brought in the Bloemfontein High Court.
- (3) X institutes action against Y for damages on the grounds of breach of contract. This action can only be brought in the Durban and Coast Local Division, the Cape Provincial Division (the Cape High Court) and the Transvaal Provincial Division (the Pretoria High Court).
- (4) X institutes action against Y and asks the court to order Y to effect transfer. This action can only be brought in the Bloemfontein High Court.

ANNEXURE 2**CIVIL PROCEDURE (CIP 201-G)****SEMESTER 1
ASSIGNMENT 02****Due Date: 15 March 2007****Unique number: 373742**

1. Your unique number is: **373742**
2. This number must appear on your mark-reading sheet cover.

Instructions

1. Your answer must be completed on a Unisa mark-reading sheet.
2. Only one of the statements (ie (1)-(4)) is correct. You must therefore mark only one of the squares in respect of each and every question. If you mark more than one square in respect of a specific question, you will receive no mark for that particular answer to that question.
3. Bear in mind that some of the statements in a given question might be partially correct. However, you must select the one which is most accurate.

Marking of assignment 02

1. Each answer carries one mark.
2. No mark will be awarded for an incorrect answer.
3. No mark will be awarded for an unanswered question.
4. This assignment is not marked negatively, that is, marks will not be deducted for incorrect answers.

Tutorial comment

1. This assignment covers the whole Study Guide.
2. Whether you have selected this assignment as a compulsory or a self-assessment assignment, it is very important that you give it your full attention since it gives important guidance for examination purposes.

QUESTION 1

Indicate the statement which is the closest to correct:

- (1) The high courts in the country are competent to develop the common law.
- (2) The High Courts in the respective provinces function and regulate their proceedings in accordance with their own, separate court rules.
- (3) Since court rules are binding on a court, a court cannot condone a party's noncompliance with its rules.
- (4) The inferior courts only consist of the magistrates' courts, the small claims courts, other specific courts (eg children's courts) and administrative bodies that exercise legal functions.

The current position on attachment to find or confirm jurisdiction is different to that which prevailed under common law prior to 1999, as interpreted in *Ewing McDonald & Sons Co Ltd v M & M Products Co* 1991 (1) SA 252 (A), when it was required that the property to be attached to find or confirm jurisdiction must be within the area of the court in which the plaintiff wished to institute action. If the pre-1999 position was still applicable, the answer could probably have been "Yes", because the property to be attached had been removed from the area of the Durban High Court, as the court within whose area the plaintiff instituted the action, to the Cape Town High Court's area. [See SGU 14.3.]

To sum up, the Durban High Court has jurisdiction. The Court may in terms of section 19(1)(c) issue an order for arrest or attachment *ad confirmandum*, and have such order served and executed in the Cape Town High Court, since the attachable property is situated in the area of jurisdiction of the Cape Town High Court.

Note: Reference to section 19(1)(c) and not to section 26(1) of the Supreme Court Act of 1959 is important. The question concerns jurisdiction of the court to start with. Thus, section 26(1) is not strictly relevant to the question; it is essentially a procedural enactment to make execution and service of process more convenient, and can not be used to found or confirm jurisdiction. Section 26(1) of the Supreme Court Act of 1959 states that a summons issued out of another High Court "shall run throughout the Republic and may be served or executed within the jurisdiction of any division". [See SGU 14.3.] Therefore, it could have been different if the question concerned the service of summons in Cape Town, thus making reference to section 26(1) relevant.

Note further: The order for arrest or attachment must be issued by the court in which the main action is instituted [in this case the Durban High Court], and not in the court where the person or property of the *peregrinus* defendant is situated [in this case the Cape Town High Court].

QUESTION 2

Name and briefly discuss three actions derived from arbitration.

[6]

You were expected to **name and briefly discuss** the derivatives of arbitration. The question was therefore two-pronged. Firstly, you **name** the derivatives of arbitration; secondly, you **briefly discuss** the named derivatives of arbitration. In the latter prompt of the question you had to proceed by summarising fully with details any three of the various derivatives of arbitration, namely:

- Expedited arbitration
- Documents-only arbitration
- Quality arbitration
- Final-offer arbitration

The answer is clearly set out in SGU 6.3.3 and you should consult the study guide to acquaint yourself with the details of the above-mentioned derivatives of arbitration.

(2007)

2

2 COMMENTARY ON ASSIGNMENT 01

General

The assignment questions were specific, and a general discussion of concepts and procedures was not sufficient. Please note that direct questions required direct answers: "woolly" answers created the impression that you do not know what the correct answer is, and that you therefore leave it up to your lecturer to sort through the detail to try and find the relevant information.

QUESTION 1

A spectacular motor car race through the streets of Durban was arranged by ABC Organisers. Drivers from 10 overseas countries took part. Their cars, together with replacement cars and complete sets of spares and tyres, were transported to South Africa by air and sea. Because of the risks attached to the race and the transporting of the vehicles and equipment in South Africa, the 10 overseas racing car companies that own the cars arranged insurance through the local insurance company, XYZ Insurers (SA) Ltd. This insurance company has its headquarters in Johannesburg. After the race had taken place it transpired that five of the racing car companies had omitted to pay their premiums in Durban, as previously agreed. The racing cars in question are about to be shipped out of Durban harbour to an overseas destination.

- (a) **Would XYZ Insurers (SA) Ltd be able to institute an action against the five overseas companies in the Durban High Court? Explain your answer in detail.** (4)

Yes. Whenever the cause of action arises within a court's area of jurisdiction, and the defendant is a *peregrinus* of the whole Republic (that is, a foreign *peregrinus*), and if it arrests or attaches the defendant's person or property, a court may exercise *ad confirmandam iurisdictionem*. Arrest or attachment of the defendant's person or property must have taken place within South Africa.

In terms of the present facts, the cause of action arose in the area of jurisdiction of the Durban High Court – that is, the non payment of insurance premiums – and the defendants are *peregrini* of the whole of the Republic. Accordingly, the Durban High Court will be competent to exercise jurisdiction *ad confirmandam iurisdictionem* by attaching the defendants' cars in Cape Town.

The fact that the cause of action arose in the area of jurisdiction of the Durban High Court confers an inchoate (or imperfect) jurisdiction that is perfected by attachment *ad confirmandam iurisdictionem* of the defendants' racing cars [See SGU 14.2].

Take note: When jurisdiction is exercised on the basis of arrest or attachment *ad confirmandam iurisdictionem*, it is irrelevant whether the plaintiff is an *incola* or *peregrinus* of the court concerned.

ALTERNATIVE MODELS OF DISPUTE RESOLUTION**QUESTION 2**

- (a) Explain the basic differences between mediation, conciliation and facilitation. (6)
(b) Name the four (4) stages that characterise negotiation as a process. (4)
[10]

JURISDICTION OF THE SUPERIOR COURTS**QUESTION 3**

- (a) A spectacular motor race through the streets of Durban was arranged by ABC Organisers. Drivers from 10 overseas countries took part. Their cars, together with replacement cars and complete sets of spares and tyres, were transported to South Africa by air and sea. Because of the risks attached to the race and the transporting of the vehicles and equipment in South Africa, the 10 overseas racing car companies that own the cars arranged insurance through the local insurance company, XYZ Insurers (SA) Ltd. This insurance company has its headquarters in Johannesburg. After the race had taken place it transpired that five of the racing car companies had omitted to pay their premiums in Durban, as previously agreed. The racing cars in question are about to be shipped out of Durban harbour to an overseas destination.
- (i) Would XYZ Insurers (SA) Ltd be able to institute an action against the five overseas companies in the Durban High Court? Explain your answer in detail. (5)
- (ii) Would XYZ Insurers (SA) Ltd be able to institute an action in the Johannesburg High Court? Explain your answer in detail. (5)
- (iii) 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 (i) above? (2)
- (iv) If XYZ Insurers (SA) Ltd decides to institute an action against the five overseas companies in the Durban High Court, and the overseas companies want to avoid having their property attached, can they submit to the jurisdiction of this court? (3)
- (v) Suppose that the racing car companies are local racing car companies. Could XYZ Insurers (SA) Ltd institute action against them to attach their property in the Durban High Court? (3)
- (vi) Which court/s would be competent to exercise jurisdiction if the claim related to a dispute regarding the ownership of the racing cars? (2)
[20]

[TURN OVER]

Question 4(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 21.2 and 24.3.

Question 4(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 24.5.

Question 3(a)(iii)

Yes: based on the Roman law rule *actor sequitur forum rei*, which means that the plaintiff must institute action against the defendant in the area in which the defendant is domiciled or against the defendant in the area in which the defendant is domiciled or resident. The reason for the court having jurisdiction is seated in this principle. If you simply answered that Z lives or is domiciled there, your answer is worth half a mark. See study unit 13.1.

Question 3(a)(iv)

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. For a full discussion of these principles, see study units 14.1 and 14.2.

Question 3(a)(v)

No: section 19(1)(c) of the Supreme Court Act provides that arrest or attachment can take place anywhere in the Republic. Attachment of the property in Pretoria will be sufficient for jurisdictional purposes. Section 26 provides that execution of an order or of a process can take place throughout the Republic. See study unit 14.3.

Question 3(a)(vi)

Yes: according to the *forum rei sitae*, which basically 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 *inter alia* the transfer of immovable property. Therefore, the Durban court has exclusive jurisdiction since the property is situated in Durban. Please note that both the principle and the nature of the jurisdiction must be stated for two marks. See also study unit 16.2.

Question 3(a)(vii)

Yes: the principle relating to exclusivity of jurisdiction does not apply to movable property and therefore the *forum domicilii* may also be vested with jurisdiction. See study unit 16.3.

Question 3(b)(i)

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

- (iv) Would your answer to (i) differ if Z was a *peregrinus* of the whole Republic? (6)
- (v) Would your answer to (iv) differ if Z is not present in Cape Town and has attachable property and the property is situated in Durban? (3)
- (vi) Would your answer to (i) differ if the claim related to the registration of fixed property and the property is situated in Durban? (2)
- (vii) Would your answer to (vi) differ if the claim related to movable property situated in Durban? (1)
[16]
- (b) 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.
- (i) 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)
- (ii) Briefly indicate whether or not your answer would differ had Mary instituted proceedings for divorce when John decided to leave for Kimberley. (3)
[6]
- (c) The Supreme Court of Appeal is the final court of appeal in all matters. Is this statement true or false? Give reasons for your answer. (2)
[24]

JURISDICTION OF THE MAGISTRATE'S COURT

QUESTION 4

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 it was agreed that the goods would be delivered in Johannesburg and X failed to do so despite demand? (4)

Option 3 is incorrect. As under option 2 above, reference to the **plaintiff is irrelevant**. It makes no difference whether or not the plaintiff is a *peregrinus* of the court concerned. (See SGU 14.2.)

Option 4 is incorrect. The **defendant** should be a **peregrinus of the whole Republic**, not only of the court concerned. (See SGU 14.2.)

Question 9

Correct answer: (3) (See SGU 17.2, & s 2(1) (a) of the Divorce Act of 1979.)

Option 1 is incorrect. The Domicile Act of 1992 introduced both domicile and residence of both or either of the spouses as separate grounds for the exercise of jurisdiction. Therefore, the current law is that the wife **need not be resident in the same High Court's jurisdiction as the husband** for the court to exercise divorce jurisdiction. (See SGU 17.2.)

Option 2 is incorrect. The use of the phrase "domicile **and** resident" suggest that the requirement of "domicile" and of "residence" are not mutually exclusive. Therefore, for a court to exercise jurisdiction, a party should be both domiciled and resident in its area of jurisdiction. The correct position is that a court can exercise jurisdiction if the wife is "domiciled" or "resident" in the area of jurisdiction of a High Court at the time of the institution of the action. (See SGU 17.3, and s 2(1) (b) of the Divorce Act.) Option 4 is incorrect. In terms of s 2(1) (b) of the Divorce Act, both or either of the parties should have been resident in the area of the jurisdiction of the court for a period at least of **not less than one year** immediately prior to the **date on which the action** is instituted.

Question 10

Correct answer: (3) (See SGU 22.2.6.)

Option 1 is incorrect. A claim for delivery of movable property without an alternative claim for damages can be instituted in any magistrate's court in terms of s 29(1) (a) of the Magistrate's Courts Act of 1944. The claim is **not specific performance** as prohibited by the provisions of s 46(2) (c) of the Magistrate's Courts Act of 1944. In fact, s 29(1) (a) claims are **permissible exceptions** in terms of s 46(2)(c) (ii) of the Magistrate's Courts Act of 1944. (See SGU 21.2.3, read with SGU 20.2.4.2.)

Option 2 is incorrect. In terms of s 29(1)(e) of the Magistrate's Court Act of 1944, a magistrate's court may adjudicate a claim under the Credit Agreements Act of 1975 for recovery of goods if the **value** of such goods **at the time action is instituted** is below the financial limit. In this case, the **initial** contract price or the initial value (R200 000) of the goods is **irrelevant** since the current value (R90 000) is below the financial limit of the court. (See SGU 21.2.7.)

Option 4 is incorrect. In terms of s 39 of the Magistrate's Courts Act of 1944, the effect of deduction of an admitted debt is that the plaintiff will be awarded the amount proved in court, less the amount admitted as due to the defendant. In this case P must be awarded R70 000, which is the amount proved in court less the amount admitted (R90 000 - R20 000 = R70 000). (See SGU 24.3.1 - 24.3.2.)

The section implies that at **least one lecturer and not three** must be appointed to the Board. (See *Student handbook to Civil Procedure* (2002), p 41.)

Question 3

Correct answer: (4) (See SGU 5.2.2.)

Option 1 is incorrect. In continental civil procedure, the judicial officer is **actively involved** in the process of litigation **from the commencement** of proceedings **until the conclusion** of the hearing. (See SGU 5.1.)

Option 2 is incorrect. The judicial officer may **be actively involved** during the pretrial stage of the proceedings **upon the request** of one of the litigants. (See SGU 5.1.)

Option 3 is incorrect. Orality is a **predominant** characteristic of Anglo-American civil procedure. (See SGU 5.1.)

Question 4

Correct answer: (4) (See SGU 6.2.4.)

Option 1 is incorrect. ADR processes are consensual because they function on the basis that the **outcome** of the process is reached through **consent** of both parties. (See SGU 6.1.)

Option 2 is incorrect. Although bilateralism implies that two parties are involved in the process, if more than two parties are involved, the process remains **bilateral** because the **participants invariably form coalitions** that oppose each other. (See SGU 6.2.2.)

Option 3 is incorrect: A mediator must always be impartial and accepted by both disputants. "Impartiality" and not "neutrality" is the best requirement in this regard. The requirement of "neutrality" seems to be an impossible standard in culturally diverse societies. (See SGU 6.2.3.)

Question 5

Correct answer: (3) (See SGU 6.4.3.)

Option 1 is incorrect. Conciliation and facilitation are derivatives of mediation, which in turn is a primary process of ADR. (See SGU 6.2.3 & 6.3.2.)

Option 2 is incorrect. While facilitation and final offer arbitration are all derivative ADR processes, **arb/med is a hybrid process** of ADR. "Hybrid process" means that they are original to ADR. (See SGU 6.4.3.)

QUESTION 10

Indicate the most accurate statement.

- (1) A claim for the delivery of specific movable property without an alternative claim for damages, even though the claim does not exceed R100 000, cannot be instituted in any magistrate's court because it is a claim for specific performance.
- (2) A magistrate's court is not competent to adjudicate a claim under the Credit Agreements Act of 1975 for the recovery of goods valued in the amount of R90 000 because the initial contract price was in the amount of R200 000.
- (3) A magistrate's court is not competent to exercise jurisdiction in terms of the provisions of section 28(1)(f) of the Magistrates' Courts Act of 1944 in an instance where there is not compliance with the provisions of both section 29 and 46.
- (4) If P has a claim of R130 000 against Q and deducts an amount of R20 000 which P acknowledges that he owes Q, and if P succeeds in proving that Q is liable for R90 000, the court must award the amount of R90 000 to P.

QUESTION 5

Indicate the most accurate statement.

- (1) Mediation, conciliation and facilitation are all derivative ADR processes.
- (2) Facilitation, final offer arbitration and arb/med are all derivative ADR processes.
- (3) Quality arbitration is a derivative ADR process.
- (4) ADR processes are always private.

QUESTION 6

Indicate the most accurate statement.

- (1) If a particular small claims court does not have jurisdiction, both parties may consent to the jurisdiction of that court.
- (2) A registered company may not commence action in a small claims court.
- (3) Proceedings in a small claims court must be commenced by summons.
- (4) A small claims court may grant an interdict.

QUESTION 7

Indicate the most accurate statement.

- (1) A High Court exercises jurisdiction *ratione domicilii* whenever the *actor sequitur forum rei* rule is followed.
- (2) A *peregrinus* is a person who is not a citizen of the country in whose courts the claim is instituted.
- (3) In terms of the doctrine of effectiveness, a court will not be competent to exercise jurisdiction if a factory is attached *ad confirmandam jurisdictionem* and destroyed by a fire while pleadings are being exchanged between the parties.
- (4) If a defendant is an *incola* of a particular court, that court has no jurisdiction if the defendant is not present in person in that court's area of jurisdiction at the time of the institution of the action.

Nov 2005

QUESTION 1

Indicate the most accurate statement.

- (1) When a claim for damages is instituted, the plaintiff must prove the guilt of the defendant.
- (2) In criminal proceedings, the person against whom a crime has been committed is called the "plaintiff".
- (3) In civil proceedings, judgment will be granted in favour of the plaintiff if the plaintiff's version put to the court is more probable than that put by the defendant.
- (4) In law, a court gives a "judgement" and not a "judgment".

Question 3(e)

No: section 19(1)(c) of the Supreme Court Act provides that arrest or attachment can take place anywhere in the Republic. Attachment of the property in Pretoria will be sufficient for jurisdictional purposes. Section 26 provides that execution of an order or of a process can take place throughout the Republic. See study unit 15.3.

Question 3(f)

Yes: according to the principle *forum rei sitae* the Durban court has exclusive jurisdiction. Please note that both the principle and the nature of the jurisdiction must be stated for two marks. See also study unit 17.2.

Question 3(g)

Yes: the principle relating to exclusivity of jurisdiction does not apply to movable property and therefore the *forum domicilii* may also be vested with jurisdiction. See study unit 17.3.

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 study unit 18.

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 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 18.

Question 5(a)

Johannesburg. See study unit 10.2.1 for the answer.

QUESTION 5

- (a) Where is the Constitutional Court situated? (1)
 (b) How many judges must hear a matter before the Constitutional Court? (1)
 [2]

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 it was agreed that the goods would be delivered in Johannesburg and X failed to do so despite demand? (4)
- (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]

Exam 2004 (Nov) 28
Exam 2004

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]

- (b) B and D are married to each other in Lesotho. Their communal home is in Lesotho where both parties are domiciled. B, the husband resides in Pretoria where he has worked for over 10 years. The couple decide to divorce. On the basis of these facts, determine
- (i) whether B may institute proceedings in the High Court of Pretoria; (2)
 - (ii) whether D may institute proceedings in the High Court of Pretoria; (2)
 - (iii) whether D may institute proceedings in the High Court of Lesotho for the declaration of the nullity of the marriage. (2)
- [6]**
- (c) Answer **ALL** the following questions.
- (i) **Explain** the term *ratione rei gestae*. (4)
 - (ii) **Explain** the doctrine of effectiveness. (4)
 - (iii) **Discuss** the meaning of the terms *incola* and *pergrinus*. (6)
 - (iv) **Name** any **three** functions of the Constitutional court. (6)
- [20]**

JURISDICTION OF THE LOWER COURTS

QUESTION 4

- (a) C and D enter into a contract in terms of which D undertakes to build a factory for C. D lives in Pretoria and owns fixed property in Benoni.

D works in partnership with E. The partnership premises are situated in Johannesburg. E lives in Soweto.

The contract is concluded at C's offices situated in Roodepoort but the construction site is situated in Alexandra.

The construction of the factory is defective and C suffers damages in the amount of R90 000. C wishes to institute proceedings against D.

In relation to these given facts, answer the following questions, **giving reasons** for each answer

- (i) Does the magistrate's court for the district of Pretoria have jurisdiction? (2)
- (ii) Does the magistrate's court for the district of Benoni have jurisdiction? (2)

[TURN OVER]

UNISA
UNIVERSITY OF SOUTH AFRICA

7/5/04

C.T.

26

CIP101-D

May/June 2004

CIVIL PROCEDURE 101

Duration : 2 Hours

100 Marks

EXAMINERS :

FIRST :

PROF E HURTER

PROF OS SIBANDA

MS 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 THE EXAMINATION PAPER

Answer all FOUR 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 you devote to each question is proportionate to the marks allotted.

GENERAL PRINCIPLES

QUESTION 1

- (a) "The rules exist for the court and not the court for the rules". **Discuss** this statement briefly. (4)
- (b) Briefly **describe three** methods which may be used to reform civil procedure. (6)

[10]

[TURN OVER]

Court of Appeal. The CC must give leave for an approach to it. The applicant must show that it is "in the interests of justice" that this court be approached direct.

Commentary:

The answer is clearly set out in unit 9:3.1 and 18.1. This question was well answered.

JURISDICTION OF THE LOWER COURTS

QUESTION 5

- (a) Yes: section 28(1)(a) states that a court in whose area a person resides, carries on business or is employed, has jurisdiction. D lives in Pretoria. Alternatively, students could have indicated that D is a partner and therefore the court has jurisdiction in terms of section 28(1)(b) which provides for jurisdiction where one of the partners live.
- (b) Yes: section 28(1)(b) provides that a court in whose jurisdiction area a partnership is situated or where one of the partners reside has jurisdiction. The business is conducted in Johannesburg (situation of the office) and therefore the court has jurisdiction.
- (c) Yes: section 28(1)(b) provides that a court in whose jurisdiction area a partnership is situated or where one of the partners reside has jurisdiction. E, a partner, lives in Alberton.

Note: Please note that domicile has no bearing on jurisdiction in terms of s28 and therefore it is irrelevant. Common law principles are also irrelevant to determine jurisdiction in the magistrates' court; in fact, students are penalised if these principles are used, since it clearly illustrates their lack of understanding of the fact that the magistrates' court is a creature of statute.

- (d) Yes: section 28(1)(d) requires the whole cause of action to have arisen in a court's area of jurisdiction. According to the facts both conclusion of contract and breach of contract occurred in this jurisdiction area, and according to the interpretation by the courts, the "whole cause of action" has therefore arisen here.

Note: A number of students stated that "performance" is required as well. This is wrong: only conclusion and breach in the same area are required. It is also rather ridiculous to require performance: this would mean that every time a party does what is expected of him/her in terms of a contract, he/she would run the risk of being sued! Surely the cause of action is the **breach** of the contract, in other words, **not** performing according to the terms of the contract.

- (e) Yes: although the quantitative jurisdiction is limited to R100 000, section 39 provides that an admitted debt may be deducted from the amount claimed to bring the total amount claimed within the quantitative jurisdiction limit of magistrates' courts.
- (f) No: although s30 specifically empowers a magistrate's court to grant interdicts, the application for a prohibitory interdict, according to the *Badenhorst* case, amounts to a request for an order for specific performance without an alternative claim for damages which is prohibited in terms of section 46(2)(c) (unit 23.2.2).

Note: If students pointed out that X had already sailed from the harbour and referred to section 19(1)(c), credit was given, depending on the argument and its presentation.

- (ii) The requirements for *ad fundandam iurisdictionem* are arrest or attachment plus that the plaintiff must be an *incola* of the court. In this instance the plaintiff is an *incola* since he lives in Durban and therefore the yacht can be attached.

Note: *Ad confirmandam iurisdictionem* may also be possible if the facts are read in such a way that the contract for the repairs was concluded in Durban. If students took this route, credit was given.

- (iii) Yes - X is now an *incola* of the Republic and section 28 of the Supreme Court Act prohibits the arrest or attachment of such persons. The cause of action (breach of contract, ie failure to pay for the repairs) arose in Cape Town and therefore this court has jurisdiction *ratione rei gestae*.

See units 14.1 - 14.3

General note: Please note that answers must be fully substantiated with reference to the appropriate jurisdictional principles. Marks are awarded for correctly setting out these principles and we suggest you start your answer off with doing so before attempting to give the answer. This will help you to present your answer in a logical manner and you will earn marks even if your conclusion is incorrect.

- (b) (i) Yes: R is ordinarily resident in the Bloemfontein Court's area (he lives and works there) and (plus) he has been doing so for the past five years (therefore he is ordinarily resident for at least one year preceding the action in the Republic). He therefore fulfills the requirements of section 2(1)(b).
- (ii) Yes: Section 2(1) refers to "the parties or any one of them" who is domiciled or resident in either the court's area or the Republic, as the case may be. The husband fulfills these requirements and so the wife can institute action.
- (iii) No: Section 2(1)(b) requires that a party be "ordinarily resident in the Republic" for "at least one year immediately preceding the action". The period stated in the facts is less than the required period.

(See unit 17.3)

QUESTION 4

(a) **TERM ACTOR SEQUITUR FORUM REI:**

It is a Roman law rule which means that the plaintiff must institute action against the defendant in the area in which the defendant is domiciled or against the defendant in the area in which the defendant is domiciled or resident. This rule is merely one of the accepted *rationes iurisdictionis* and, if another link with a court exists, need not be followed. If the *actor sequitur forum rei* is followed to give jurisdiction to a court, such court is said to have jurisdiction *ratione domicili*.

reason is for following certain procedures or processes. Theory determines the procedure and it is our task to ensure that you have this knowledge to equip you for practice. Many reported cases illustrate that practitioners do not always have the necessary theoretical knowledge to avoid unnecessary procedural mistakes.

References to the relevant sections of the study guide where the answers can be found are given as a reference to a particular study unit.

B 3 Answers to examination questions

MEMORANDUM OF OCTOBER 2003 EXAMS: CIP101-D

QUESTION 1

In the Anglo-American legal system (AA), civil procedure litigation is adversarial. The AA civil procedure regards litigation as a private matter between the litigants. The court plays a passive role during the proceedings. It is primarily the duty of litigants to commence proceedings, define disputed issues and gather facts for evidence presentation. The court is not burdened with the official duty of judicial investigation and evidence gathering. The passive nature of the role of the courts in the AA system is further manifested through a rule that the presiding officer may not interfere in the pre-trial and trial stages of the proceedings, unless if so requested by one of the litigants or unless if it is for the purpose of clarity.

The AA system clearly separates investigative and decisionmaking (adjudicative) aspects of litigation. The role of the presiding officer is analogous to that of the umpire in a game, whose duty is ensure that parties comply with the rules of the game they are participating in without taking part in the game him/herself.

In brief, the passive nature of the role of the court in AA jurisdictions is underscored by fundamental principles of: bilaterality, party prosecution and party presentation. See study unit 5.2 and 5.3.

Commentary:

The question was generally well answered.

QUESTION 2

- (a) The common factors are the following: They are
- informal, ie strict rules of procedure are absent
 - flexible, ie a process can be adapted to suit a particular situation
 - voluntary
 - consensual, ie the result is reached through the consent of the different parties
 - interest based rather than rights based
 - relational, ie beneficial to uphold longterm relationships
 - future oriented, ie the focus is not on past events, but on future relationships.

Unit 6.1.1 contains a full discussion of these factors.

- (ii) Can S institute proceedings in the Bloemfontein High Court? (2)
 (iii) Can R institute divorce proceedings in the Bloemfontein High Court if he has worked in South Africa for only 10 months? (2)
 [8]
 [20]

QUESTION 4

Answer the following questions:

- (a) Explain the meaning of the term *actor sequitur forum rei*. (4)
 (b) Discuss the exercise of jurisdiction where the object of relief is movable property. (6)
 (c) Discuss the jurisdiction of the Constitutional Court. (10)
 [20]

JURISDICTION OF THE LOWER COURTS

QUESTION 5

C and D enter into a contract in terms of which D undertakes to develop specialised software for C's business. D lives in Pretoria. D has his office in Johannesburg, where he works in partnership with E who lives in Alberton. The contract is concluded at C's offices situated in Roodepoort. The software malfunctions at C's offices and C suffers damages in the amount of R80 000.

In relation to these given facts, answer the following questions, giving reasons for each answer.

- (a) Does the magistrate's court for the district of Pretoria have jurisdiction? (2)
 (b) Does the magistrate's court for the district of Johannesburg have jurisdiction? (2)
 (c) Does the magistrate's court for the district of Alberton have jurisdiction? (2)
 (d) Does the magistrate's court for the district of Roodepoort have jurisdiction? (2)
 (e) Would it be possible for any of the above courts to exercise jurisdiction if C's claim for damages was in the amount of R130 000 and C owes D an amount of R40 000? (2)
 (f) Would it be possible for any of the above courts to exercise jurisdiction if the contract contained a restraint of trade clause and C wishes to obtain an interdict to enforce this clause which D has breached? (2)
 (g) If D is a close corporation and cannot pay its debts, would it be possible for any of the above courts to exercise jurisdiction in regard to an application by C for the liquidation of D? (2)
 [16]

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 institute divorce proceedings in South Africa. See the study guide, unit 18 on pages 106-111.

Question 5

The Constitutional Court has four functions. See the study guide , unit 10.2.1 on page 77.

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 the study guide, unit 23.2.1 on pages 137-138.

Question 6(b)

The Pretoria magistrate's court will still have jurisdiction, but on different grounds to (a) above. Section 28(1)(b) provides that a magistrate's court is vested with jurisdiction if a partner resides within the district of the court concerned, or the business premises of the partnership are within the district of the relevant court. Therefore, the court will have jurisdiction in terms of section 28(1)(b), because the business premises of the partnership is situated in the magistrate's court for the district of Pretoria, and X resides in Pretoria. See the study guide, unit 23.2.2 on page 138.

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 the study guide, unit 22.2.10 on pages 133 and unit 25.3 on pages 157 -159.

Question 6(d)

Yes, in terms of section 43 of the Magistrate's 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 the study guide, unit 25.5 on pages 160 -161.

GENERAL PRINCIPLES

Question 1 (a)

These principles are those of "bilateralism", "party prosecution" and "party representation". See unit 5.2.1 on page 21.

Question 1(b)

A Continental judge has an active role rather than a passive role in the proceedings. Therefore, he may participate directly in the process of litigation, from the commencement of proceedings until the conclusion of the proceedings. In South Africa, the judicial official plays a passive role in that he or she does not interfere in the proceedings except upon the request of one of the litigants. See unit 5.1 on page 19 and unit 5.3 on page 22.

ALTERNATIVE MODELS OF DISPUTE RESOLUTION

Question 2

The differences between small claims courts and other courts are set out in unit 8.2 of the study guide. Remember that we view the differences set out in the guide as the most relevant and so you will not necessarily be awarded a mark for stating for example, that the jurisdictional limit of the small claims court is R3000 while that of the magistrates' courts is R100 000 or that the small claims court cannot hear a claim for defamation. Please refer to unit 8.2 on page 63 to answer this question.

SUPERIOR COURT JURISDICTION

Question 3(a)

The *forum rei sitae* always has jurisdiction to determine ownership of immovable property. In respect of claims where the object of relief is immovable property (as in the present instance), the court in whose area of jurisdiction the property is situated has exclusive jurisdiction. Therefore, the Cape High Court will have jurisdiction to hear the matter since the farm is situated in Cape Town. The Johannesburg High Court will not have jurisdiction to hear the matter as the *forum domicilii* of the defendant is irrelevant regarding claims relating to immovable property. See the study guide, unit 17 on pages 103-105.

Question 3(b)

Note that the type of claim has changed - we are no longer dealing with a property claim but with a money claim and so different jurisdictional principles must be applied. Where an amount of money such as damages is claimed, a court may exercise jurisdiction if the defendant is an *incola* of its area of jurisdiction or if the cause of action arose within its area of jurisdiction. The Bloemfontein High Court could exercise jurisdiction in respect of the damages claim because the defendant Y is an *incola* of Bloemfontein and so this court has jurisdiction *ratione domicilii*. The cause of action arose in Johannesburg in that the contract of sale was signed in Johannesburg. For this reason, this court has jurisdiction *ratione rei*

ANNEXURE A: SAMPLE EXAMINATION PAPER

CIVIL PROCEDURE

2003

CIP101-D

MODULE 1

Duration: 1 hour

Marks: 50

GENERAL PRINCIPLES

QUESTION ONE

Answer the following questions -

- (a) Name the three principles that underlie our system of civil procedure. (3)
- (b) How does the function of a South African judge differ from a Continental judge? (3)
- [6]

ALTERNATIVE MODELS OF DISPUTE RESOLUTION

QUESTION 2

Briefly discuss three differences between small claims courts and other courts. (6)

[6]

JURISDICTION OF THE SUPERIOR COURTS

QUESTION 3

X who lives in Pretoria, buys a farm situated in the Cape Town area from Y, who lives in Bloemfontein. The parties sign the contract of sale in Johannesburg. Y subsequently refuses to sign the transfer documents and X wishes to institute action against him for transfer of the property. With regard to these facts, answer the following questions, giving reasons for each answer.

- (a) Discuss whether X may institute an action for transfer of the property in the Johannesburg or Cape High Court. (3)
- (b) X requests the court to award damages against Y for breach of contract. Which court now has jurisdiction to hear the matter? (4)
- (c) Would your answer to (b) differ if Y is a German national and he owns a yacht which is moored in Durban harbour? (5)
- [12]

essence of the answer. For a full discussion of these principles, see study units 15.1 and 15.2.

Question 3(e)

No: section 19(1)(c) of the Supreme Court Act provides that arrest or attachment can take place anywhere in the Republic. Attachment of the property in Pretoria will be sufficient for jurisdictional purposes. Section 26 provides that execution of an order or of a process can take place throughout the Republic. See study unit 15.3.

Question 3(f)

Yes: according to the principle *forum rei sitae* the Durban court has exclusive jurisdiction. Please note that both the principle and the nature of the jurisdiction must be stated for two marks. See also study unit 17.2.

Question 3(g)

Yes: the principle relating to exclusivity of jurisdiction does not apply to movable property and therefore the *forum domicilii* may also be vested with jurisdiction. See study unit 17.3.

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 study unit 18.

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 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 18.

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

- (a) Where is the Constitutional Court situated? (1)
- (b) How many judges must hear a matter before the Constitutional Court? (1)
- [2]

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 it was agreed that the goods would be delivered in Johannesburg and X failed to do so despite demand? (4)
- (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]

may be confirmed together with other forms of relief, and here the claims may arise from the same cause of action. See study guide unit 25.5.

- (c) In the small claims court, section 26(3) gives the commissioner an active role in assisting litigants by introducing the inquisitorial system. Students were expected to briefly state the contents of this section and to mention that section 26(1) gives the commissioner a discretion to establish any fact in a manner that is suitable under the circumstances. See study guide unit 8.7.

C TUTORIAL SERVICES

You are probably aware of the fact that learning centres have been established in certain cities. These learning centres are places where students may study and gain academic as well as general support in the form of tutorials given by tutors who are appointed by the University. The aim of a tutor system is to establish contact between tutor and student, to accompany students through their tutorial matter, particularly in problem areas, and to help them become independent, autonomous learners. These services are available to all Unisa students upon payment of R100 per semester. On payment of this amount, you will be entitled to make use of all facilities offered by the learning centre, including the tutorials.

Tutorial services are available only in those courses where there is a demand for them. We include a list of all existing learning centres. Please contact these centres directly if you require any further information, or if you are interested in tutorial services. This will enable these centres to establish whether there is a demand for these services in a particular subject. The success of this undertaking and the possibility of its expansion depend largely on your participation and input.

Western Cape Learning Centre
15 Jean Simonis Street
Parow
Tel (021) 936-4122/3
E-mail oosthmep@unisa.ac.za
Contact person Dr Marietjie Oosthuizen

Johannesburg Learning Centre
25 De Korte Street (Cnr Eendracht)
Braamfontein, Johannesburg
Tel (011) 403-0101
E-mail mabasth@unisa.ac.za
Contact person Mr Thulani Mabaso

Thutong Learning Centre
Cnr Walker & Joubert Streets
Sunnyside Campus, Pretoria
Tel (012) 484 1190/1/2
E-mail masalmc@unisa.ac.za
Contact person Ms Moipone Masalesa

exercise jurisdiction. Students did not get full credits if they did not link the two grounds for the exercise of jurisdiction. See study guide unit 17.3.

QUESTION 4

- (a) Two requirements must be met. First, a court must have the authority to adjudicate or determine matters that come before it. Second, it must have the authority to enforce its judgments. These requirements are confirmed in the *Ewing McDonald* decision. A court will not exercise jurisdiction until both requirements are met. The first necessitates some or other jurisdictional connecting factor between the court and the parties or the cause of action (*ratione jurisdictionis*). The second requirement flows from the doctrine of effectiveness. See study guide unit 9.3.
- (b) A reasonably accurate version of any three of the subsections of section 167(4) of the Constitution must be given. See study guide unit 10.3.1.
- (c) Common law provided that a woman adopted the domicile of her husband on marriage and retained it for the duration of the marriage. In other words, on marriage, she lost her domicile of choice. Section 3 of the Domicile Act abolished this principle and granted an independent domicile to married women. This amendment also resulted in new grounds for the exercise of jurisdiction: domicile and residence are now independent grounds; in fact, the domicile or residence of either spouse in the jurisdictional area of the court is enough to vest that court with divorce jurisdiction. See study guide unit 18.2.
- (d) In the *Briscoe* decision, the court held that, irrespective of whether the plaintiff was an *incola*, parties could not submit to the court's jurisdiction unless the cause of action arose within the court's jurisdictional area. The earlier *Veneta* decision had stated *obiter* that, although courts exercised jurisdiction if the plaintiff is an *incola* and the defendant a *peregrinus* of the Republic, provided that arrest or attachment to found jurisdiction could be effected, this was not a traditional ground for the exercise of jurisdiction but merely a development to help *incolae* to litigate at home. The current position, post-*Briscoe*, is that a *peregrinus* defendant cannot avoid arrest or attachment to **found** jurisdiction by submitting to the jurisdiction of the court. See study guide unit 16.2.3.

JURISDICTION OF THE LOWER COURTS

QUESTION 5

- (a) The answer is "no". In a magistrate's court, it must be shown not only that the contract was concluded within the district concerned, but also that the breach occurred there as well. Therefore, the cause of action must have arisen "wholly" within the district or relevant area in terms of section 28(1)(d) of the Magistrates' Courts Act, before the court will be vested with jurisdiction. From the facts, it is evident that the contract was concluded in Johannesburg but the breach occurred in Port Elizabeth. So the Johannesburg magistrate's court will not have jurisdiction. See study guide unit 23.2.4.

References to the relevant sections of the study guide where the answers can be found are given as a reference to a particular study unit.

B 3 Answers to examination questions

MEMORANDUM OF OCTOBER 2001 EXAMS: CIP101-D

QUESTION 1

(a) A total of 6 marks was allotted for both (i) and (ii). Marks were awarded in the following manner:

- (i) 2 marks
 one mark for stating that the objective of civil proceedings is to determine the **liability** of the defendant
 one mark for stating that the objective of criminal proceedings is to determine the **guilt** of the accused
- (ii) 4 marks
 one mark for stating that the onus in civil proceedings is on the **balance of probabilities**
 one mark for any statement indicating that the plaintiff's/applicant's version is **more probable** than that of the defendant/ respondent
 one mark for stating that the onus in criminal matters is **beyond all reasonable doubt**
 one mark for any statement indicating that the court must be satisfied that **no conclusion other than** that the accused committed the crime can be reached

See further study guide units 2.5 and 2.7.

- (b) Two marks were awarded for each one of the three (out of five) recognised methods so described.
 A technical answer was required based on the content of the study guide.
 Students did not obtain marks for their own views which obviously amounted to "padding".
 A discussion of the principles of bilaterality, party prosecution and party presentation is not a correct answer to this question.

See further study guide unit 5.5.7.

Bloemfontein High Court will be competent to exercise jurisdiction. (8)

- (d) The original facts remain the same. However, John decides to sue Peter for the return of the diamond, which is stored in Peter's bank vault in Cape Town. Explain why both the Cape Town High Court and the Pretoria High Court may exercise jurisdiction. (5)
[20]

QUESTION 4

Answer the following questions:

- (a) Give a **detailed explanation** of the term "jurisdiction". (6)
- (b) **Name** any **three** matters set out in section 167(4) of the Constitution of the Republic of South Africa 108 of 1996 in respect of which the Constitutional Court has exclusive jurisdiction. (6)
- (c) **Discuss briefly** the domicile of a married woman for the purposes of divorce jurisdiction. (6)
- (d) **Explain** the significance of the decision in *Briscoe v Marais* 1992 (2) SA 413 (W) for the doctrine of submission. (4)
[22]

JURISDICTION OF THE LOWER COURTS

QUESTION 5

Phil, who lives in Durban, buys electronic equipment from Agatha, who lives in Pretoria. The contract is concluded in Johannesburg and the equipment is stored in a warehouse beside the docks in Port Elizabeth, where delivery must take place. Phil pays Agatha R70 000 for the equipment, but Agatha, despite demand, refuses to deliver the equipment to Phil. Bearing these facts in mind, answer the questions which follow, in each instance giving brief reasons for your answers.

- (a) Will the magistrate's court situated in Johannesburg have jurisdiction to hear the action instituted by Phil against Agatha in which he claims repayment of R70 000? (4)
- (b) Does section 28(1)(g) of the Magistrates' Courts Act of 1944 give the magistrate's court situated in Port Elizabeth jurisdiction to hear the action instituted by Phil? (3)
- (c) May Phil and Agatha consent to the jurisdiction of a small claims court to hear the matter? (3)

QUESTION 6

(a) Students had to **name** any **three** of the following matters:

- dissolution of a marriage
- validity or interpretation of a will or other testamentary document
- status of a person in respect of mental capacity
- specific performance without an alternative claim for payment of damages (except in certain instances)
- decree of perpetual silence
- damages in respect of defamation, malicious prosecution, wrongful imprisonment, wrongful arrest, seduction and breach of promise
- interdict

See unit 7.5 and section 16, Small Claims Courts Act of 1984.

(b) This is a straightforward question that merely required a brief discussion of section 47 (unit 25.7). A large number of you dealt with the provisions of sections 38 and 39 (abandonment and deduction). You were not given credit for this mistake.

~~E-mail: mabasth@unisa.ac.za~~

~~Contact person: Mr. Thulani Mabaso~~

- (c) The following courts have jurisdiction to declare a marriage void in terms of the common law, namely, the *forum loci celebrationis* (that is, the court where the "marriage" was entered into), and the court where the plaintiff or the defendant (or both) is domiciled at the time that the nullity proceedings are instituted. Thus, either the Durban High Court (place where the parties married) or the Pretoria High Court (where Thandi is still domiciled presumably when nullity proceedings are instituted) or the Bloemfontein High Court (where Peter is domiciled) will have jurisdiction to hear the matter.

Many students only focussed on the one common law principle, namely *forum loci celebrationis* principle. These students were not awarded full marks. The answer to this question is contained in unit 17.3.

- (d) This relates to the ownership or possession of immovable property. Therefore, where the object of relief is immovable property (as in this case, to determine title to immovable property), then the court in whose territorial area the immovable property is situated (the *forum rei sitae*), has exclusive jurisdiction to hear the action. Thus, the Pretoria High Court (court where the house is situated) may be approached to hear the action. See further unit 16.2.

QUESTION 4

- (a) Two requirements must be met. First, a court must have the authority to adjudicate or determine matters that come before it (one mark); in other words, there has to be some or other jurisdictional connecting factor between the court, the parties or the claim (one mark). Second, it must have the authority to enforce its judgments (one mark) according to the doctrine of effectiveness (one mark). See study guide unit 8.3.
- (b) No legal definition exists, but according to decided cases (the *Beedle & Co* case and *Ex parte Minister of Native Affairs*) it would seem that more than mere physical presence at one place is required: there must be an element of the intention towards more permanence than a mere accidental or temporary visit. Furthermore, a person can be resident at one place but domiciled at another: there is a difference between these two concepts. If a person has more than one residence, the court within whose area he is resident at the time of service of summons has jurisdiction. See unit 10.2 and please note the amount of detail in this answer: this is what we require.
- (c) Any three of the following could have been mentioned:
- It is the highest court of appeal in respect of constitutional matters.
 - It has exclusive jurisdiction to: hear disputes between organs of state on a national and provincial level; hear certain applications by the legislator concerning the constitutionality of parliamentary legislation; decide whether parliament or the President fulfilled their constitutional obligations; certify provincial constitutions.
 - It may in exceptional circumstances grant a person direct access in the interest of justice.
 - It must confirm orders of other courts in which legislation has been declared invalid before that order has any force. See unit 9.2.1.

MEMORANDUM OF OCTOBER 2002 EXAMS: CIP101-D**QUESTION 1**

- (a) This question is based directly on activity questions 2 and 3, unit 2. Because the question was elementary, it was marked strictly.
- (b) Five possible methods for reforming civil procedure are set out in unit 5.5.7. You were expected to discuss any three. Two marks were awarded for each method named and discussed. One mark was awarded for the naming of the method and a further mark for a brief explanation of what the method entailed. No mark was awarded for a general explanation that lacked detail or insight.

- (b) Briefly discuss any three recognised methods of reforming civil procedural law.

(6)
[12]

ALTERNATIVE MODELS OF DISPUTE RESOLUTION

QUESTION 2

- (a) Name the four stages of the negotiation process.
(b) Name and briefly describe four the derivatives of arbitration.

(4)
(12)
[16]

JURISDICTION OF THE SUPERIOR COURTS

QUESTION 3

Thandi wishes to obtain a divorce from her husband Peter. The parties were married in Durban. They then lived together in Pretoria until two years ago, when Peter left Thandi for another woman, Salang. Immediately afterwards, Peter moved permanently to Bloemfontein to live there with Salang.

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

- (a) Explain why both Peter and Thandi can institute a divorce action in the Bloemfontein High Court. (6)
- (b) Explain the concept 'domicile' in the context of divorce jurisdiction. (7)
- (c) Thandi wishes to have her marriage declared void as she has discovered that Peter was already married to Salang when he purported to marry her. Which court/courts will have jurisdiction to hear this action? (4)
- (d) After having the marriage declared void, Thandi and Peter need to determine ownership of the house that they bought together in Pretoria. Which court/courts must they approach for this purpose? (3)

[20]

QUESTION 4

Answer the following questions:

- (a) Explain the term 'jurisdiction' as it relates to civil procedure. (4)
- (b) Give an explanation of the concept "reside". (6)
- (c) Name any three functions of the Constitutional Court. (6)
- (d) Discuss briefly the implications of section 19(1)(c) of the Supreme Court Act 59 of 1959 for the exercise of jurisdiction over foreign defendants. (6)

[22]

[TURN OVER]