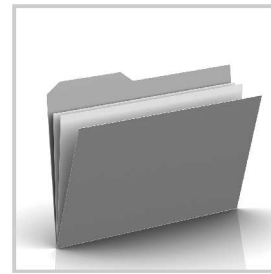
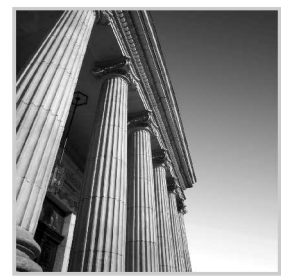
civil procedure

only study guide for CIP201G





compiled by
PROF JA FARIS
PROF E HURTER
PROF F CASSIM
PROF OS SIBANDA

department of criminal and procedural law
university of south africa, pretoria

© 2000 University of South Africa

Revised Edition 2008

All rights reserved

Printed and published by the
University of South Africa
Muckleneuk, Pretoria

CIP201G/1/2009–2011

98296078

3B2

WORKBOOK-STYLE

Contents

Orientation

HOW TO USE THE STUDY GUIDE

Getting started

Before commencing your studies, it is important that you orientate yourself in respect of Civil Procedure. Please read this introduction carefully.

Structure of the study guide

The tutorial matter for **CIVIL PROCEDURE MODULE 1** (CIP201G) has been divided into parts and study units. Where necessary, the units have been further subdivided into paragraphs and points. The study unit forms the core of this study guide. Each study unit forms a complete whole and deals with a specific aspect of the tutorial matter.

Structure of a study unit

In order to gain the maximum benefit from the study guide, it is important that you understand the manner in which each study unit has been structured. Each study unit consists of —

- an overview
- study objectives
- a reference to compulsory reading, if any
- the tutorial matter that comprises the unit
- an activity, and
- the related feedback

Numbering of study units

Each study unit describes and analyses a particular procedure or process and, by means of cross-referencing to other study units, enables you to place that particular procedure or process in the context of its procedural relevance as a whole. In order to facilitate cross-referencing, the study units have been numbered consecutively from the beginning to the end of the study guide

Cross-referencing

To illustrate the interrelatedness of the study units consider Part IV which deals with jurisdiction in the magistrates' courts, and in which numerous cross-references are made to the study units in Part III that relates to jurisdiction in the High Court. This is so because the procedure in both courts is so similar. Therefore, it is important that you follow up the cross-referencing in order to place the subject matter of a specific study unit in its general procedural context.

PRESCRIBED TEXTBOOK

There is only one prescribed textbook for the course. The details are as follows:

Faris and Hurter *The Student Handbook for Civil Procedure* Butterworths (2002) soft cover 233 pages.

Remember that the prescribed work supplements the information in the study guide. Therefore, you cannot solely rely on the contents of the study guide.

The prescribed text, *The Student Handbook for Civil Procedure* contains the rules of court and the relevant statutes that relate to Civil Procedure.

COMPULSORY READING

You will find it difficult to understand the tutorial material without simultaneously referring to the compulsory reading material.

It is essential that, whenever directed to do so, you consult the *Student Handbook* when you are working through the study guide. The section "**Compulsory reading material**" contains the exact page numbers and references to rules of court or legislation that relate to a particular study unit.

All compulsory reading is viewed as part of the course material and must be studied carefully.

STUDY OBJECTIVES

Please pay attention to the study objectives for a particular study unit. They are there to show you what information is contained in that particular study unit. This enables you to start your study with a clear idea of what you are expected to learn from the study unit.

PRESCRIBED CASES

Please note that no case law has been prescribed for this module.

Moreover, you are not required to memorise the case names. However, you are expected to acquaint yourself with the principles which have been stated in particular cases as set out in the study guide.

ACTIVITIES AND FEEDBACK

At the end of each study unit, you will find an activity. The activities consist mostly of problem-type questions or short questions aimed at guiding you through the tutorial material and testing your insight and understanding of a particular study unit.

Each activity is followed by a feedback that contains the answers to the questions posed in the activities.

The study guide represents the entire study package for Civil Procedure. The activities and related feedback therefore **replace compulsory assignments**.

Practically speaking, each activity is in effect an assignment for a specific study unit. The feedback contains the necessary comments that enable you to evaluate the correctness of your answers. Therefore, you must work carefully and meticulously through the activities and related feedback since they replace assignments.

END-PLAY

Your study of this module ends with an examination. However, the examination is also a beginning, for you should now have attained the basic skills for entering practice. Study this module well because it contains some of the most basic information that you will be using in practice.

As your lecturers we wish you every success with your studies.

PART I

Introduction to civil procedure

STUDY UNIT

1

SUBSTANTIVE AND ADJECTIVE LAW

OVERVIEW

LEARNING OUTCOMES

After you have finished studying this study unit, you should understand

- the classification of civil procedure within the legal system as a whole
- the basic differences and distinctions between substantive and adjective law

COMPULSORY READING MATERIAL

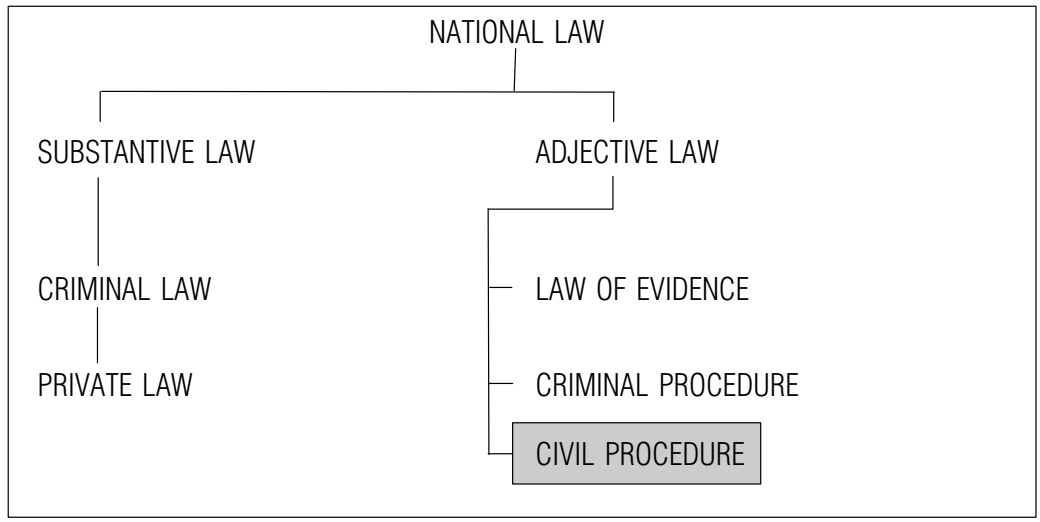
None

1.1 CLASSIFICATION

As you commence your study of law you will discover that national law is classified into substantive law and adjective law.

Adjective law covers the law of evidence, civil procedure and criminal procedure. Obviously, in this course, we are dealing with a study of civil procedure.

The diagram below illustrates these distinctions.



1.2 DIFFERENCES AND DISTINCTIONS

Before proceeding further, you should note that criminal procedure enforces the substantive principles of criminal law just as civil procedure enforces the rules and provisions of civil law (all substantive provisions other than the criminal law). See study unit 2 for the differences between criminal procedure and civil procedure.

The rules of substantive law define the rights and duties of persons in their ordinary relationship with each other. For instance, think of the law of parent and child that determines the rights and duties parents and their children have in respect of each other.

In elementary terms, adjective law could be described as "**procedural law**". However, the word "**adjective**" describes this law better because it clearly implies that **the law of procedure exists for the sake of something else, namely substantive law**. In effect, the law of procedure enforces the rules and provisions of substantive law. It would make no sense to grant a person rights without ensuring that these rights could be enforced by means of procedural rules.

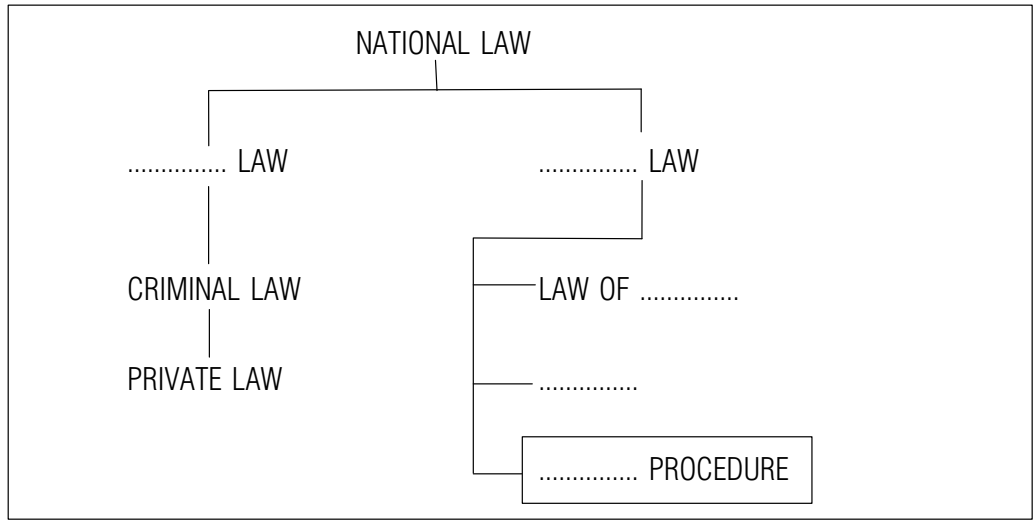
As mentioned above, substantive law determines the rights and obligations of persons. It therefore describes the nature of these rights and duties; the manner in which they are established; what their legal effect is and how they are terminated. By way of illustration: if X owns a motor vehicle, substantive law determines what is meant by ownership; how it arises; what the rights and duties of the owner are and how ownership is terminated, for instance by sale.

Adjective law, however, deals with the procedure to be adopted in order to enforce a right or duty. To return to our example: X lends his car to Z, who refuses to return it. Adjective law sets out the procedural steps which X must follow in order to regain possession; in which court he must institute proceedings; the procedure to be adopted and what evidence will be required to prove his claim. It is clear that adjective law is **accessory to substantive law.** In other words, the existence of substantive law creates the need for rules of procedure to enforce substantive provisions.

To summarise: adjective law provides the procedures through which the courts may enforce compliance with the provisions of substantive law.

ACTIVITY

(1) Complete the following diagram that relates to the classification of civil procedure:



(2) In your own words, briefly explain the relationship between substantive law and adjective law.

_____
_____
_____
_____
_____
_____
_____
_____

(3) X issues summons against Y for damages on the grounds of breach of contract. Analyse this statement by identifying the portion that relates to substantive law and the portion that relates to adjective law.

_____
_____
_____
_____
_____

FEEDBACK

(1) Refer to the diagram contained in 1.1.

(2) Substantive and adjective law are dependent on one another. Substantive rights could not be enforced if adjective law did not exist for this purpose. Likewise, adjective law is accessory to substantive law since it is dependent on the existence of substantive law.

(3) The rules in regard to damages and the grounds for breach of contract are related to substantive rights whereas the issuing of the summons is regulated by adjective law.

STUDY UNIT

2

ENFORCING THE LAW

X and Y are involved iin a motor-car colllision. Y drives through a red traffic light under the influence of alcohol. X sustains damages in the amount of R140 000 in respect of his motor car and his medical costs amount R150 000. X alleges that his damages are due solely to Y's negligence.

X is your uncle. As you are a law student, he asks you how he should enforce his rights. Should he institute civil or criminal proceedings?

OVERVIEW

LEARNING OUTCOMES

After you have finished studying this study unit, you should understand

- the general differences between civil and criminal proceedings
- the function of the courts
- the subject matter of the proceedings in each instance
- the role of and terminology relating to the parties to these proceedings
- the differing objectives of civil and criminal proceedings
- the nature of the compulsion involved
- the onus of proof

COMPULSORY READING MATERIAL

None

2.1 INTRODUCTION

Students often become muddled between civil and criminal proceedings. This study unit is devoted to illustrating the difference between the two types of proceedings. However, it is important to realise that in so doing, the emphasis is not on criminal proceedings but rather on the basic terms and concepts relating to civil procedure and underlying principles that support the system of civil proceedings.

It is extremely important that you master the content of this study unit because students very often muddle terminology. For instance, a "defendant" is sometimes called the "accused". Moreover, in civil proceedings, **liability** — not guilt — is established. It is therefore quite incorrect to use the words "accused" and "guilty" in the following context: "The accused is guilty for damages". Instead, the sentence should read: "The defendant is liable for damages".

2.2 FUNCTION OF THE COURTS

The function of the courts is to resolve disputes between legal subjects or between legal subjects and the state. At this early stage it is important to understand that both civil and criminal proceedings may be described as formal systems of dispute resolution that are sanctioned (enforced) by the state. In practical terms, this means that the judicial officer (ie a judge, magistrate or commissioner of small claims) will hear the presentation of evidence and arguments of both parties in an environment that is controlled by formal rules, and then decide the matter in the form of a judgment or order that is enforced by the state.

2.3 SUBJECT MATTER

The subject matter of court proceedings can either be of a civil or criminal nature.

Civil proceedings relate to a dispute between legal subjects (one of which may be the state or an official of the state). More specifically, a dispute of this nature is described as a claim. Therefore, we speak of a claim for damages arising out of breach of contract or a delict, a claim of goods sold and delivered that the purchaser refuses to pay despite constant demand, or even a claim against the state as in the case of unlawful arrest.

However, criminal proceedings are between the state and an ordinary citizen. The state acts through a prosecutor in the magistrates' courts or the state advocate in the High Courts on behalf of the citizen against whom the alleged criminal offence has been committed (**the complainant**). Criminal proceedings therefore arise only from an alleged transgression of the rules of common law dealing with crimes or statutory provisions of the criminal law.

What is clearly evident is that because civil and criminal proceedings rely on different areas of substantive law and are based on different procedures, it is quite possible for a person to lay a

criminal charge and institute civil proceedings on the same of cause of action. For instance, if D assaults G, G may lay a criminal charge against D on the grounds of assault and may **also** institute civil proceedings to claim compensation for the personal and monetary damages allegedly incurred.

2.4 PARTIES

The respective parties to civil and criminal proceedings each have different roles and objectives.

In criminal proceedings, the parties are the **state** and **the accused**. The person who has suffered as a result of the criminal conduct of the accused is called the **complainant**. Apart from rare instances of private prosecutions, the state prosecutes the accused on behalf of the complainant. This means that the state initiates the proceedings and conducts the various procedures involved.

Whenever a criminal matter goes on appeal at the instance of the convicted person (ie the accused), the accused is known as the **appellant**.

In civil proceedings, the terminology differs according to the type of procedure involved. In matters commenced by summons, the person who starts the proceedings by issuing a summons is known as the **plaintiff**; the person against whom the summons is issued is called the **defendant**. Whenever proceedings are brought on application, the person bringing the application is known as the **applicant** and the opposite party is called the **respondent**. If the matter goes on appeal, the person who lodges the appeal is known as the **appellant** and the other party as the **respondent**.

2.5 OBJECTIVES

The object of civil proceedings is to establish the **liability** of the defendant/respondent to compensate the plaintiff or to perform or not to perform certain acts in relation to the plaintiff/applicant.

In criminal proceedings, the objective is to establish whether the accused is **guilty** of a crime and, if so, to impose a penalty.

2.6 COMPULSION

Civil proceedings are voluntary in the sense that the aggrieved party (plaintiff/applicant) is not compelled to commence these proceedings. The institution of civil proceedings is entirely in the discretion of the aggrieved party. If the aggrieved party chooses not to initiate civil proceedings, the matter ends there. Similarly, if the defendant/respondent chooses not to defend or respond, then judgment will be granted in his/her absence (this is known as judgment by default). As an aside, please note that **in law "judgment" is spelt without the "e"** to distinguish the word from, for instance, a moral "judgement". The voluntary nature of the proceedings is emphasised by the fact that the parties can reach an out-of-court settlement by negotiation; the plaintiff/applicant may even choose to withdraw the proceedings.

The state has no direct interest in civil proceedings — it merely provides the infrastructure within which the dispute may be resolved and, if necessary, enforces the order or judgment of a

court. Court administration and court time are therefore provided by the state free of charge to citizens involved in a civil dispute. In this context, the parties to a civil dispute conduct civil proceedings independently and without interference from the state. Even during the pre-trial stage (see study unit 6.3 below), the court will not interfere except upon the application of one of the parties. During the pre-trial stage, the parties exchange pleadings and once pleadings have closed, prepare for trial. However, the parties to civil proceedings are compelled to follow the rules of court (see study unit 4.3 below) which **prescribe the minimum standards for the conduct of proceedings.**

In criminal proceedings, there is a very strong element of compulsion. The state may initiate criminal proceedings without the consent of the complainant and the accused is compelled to appear before the court to hear and defend the criminal charge.

2.7 ONUS OF PROOF

In civil proceedings, the burden of proof is on **the balance of probabilities.** This means that the court must be satisfied that the version put forward by the plaintiff/applicant is more probable than that put by the defendant/respondent.

The burden of proof in criminal proceedings is far more stringent than in civil proceedings. The onus is on the state to prove **beyond all reasonable doubt** that the accused committed the offence as charged. This means that the court must be satisfied that no probable conclusion other than that the accused committed the offence so charged, can be reached.

ACTIVITY

Read the factual situation stated at the beginning of this unit. Now answer the following questions:

(1) Should X institute civil or criminal proceedings against Y, or both?

.....

.....

.....

.....

(2) If X laid criminal charges, he would be called the ..... and Y would be known as the ..... .

(3) If X instituted civil proceedings by issuing a summons, he would be described as the ..... and Y would be the ..... . Assuming that it is possible to commence proceedings by application, X is the ..... and Y would be called the ..... . If judgment is given against Y and he takes the matter on appeal, Y is known as the ..... and X as the ..... .

(4) Determine whether the following statements are true of false. Give reasons for each answer.

(a) X is compelled by the state to institute civil proceedings.

.....

.....

(b) In the civil proceedings between X and Y, the court may interfere in the manner in which they conduct the proceedings.

.....

.....

(c) X is compelled to lay criminal charges against Y.

.....

.....

(d) If Y is found guilty in the criminal proceedings, he is liable to X.

.....

.....

(e) If Y is found not guilty in the criminal proceedings, this means that X has a minimal chance of success if he institutes civil proceedings.

.....

.....

FEEDBACK

(1) X has a number of choices. He may either institute civil proceedings or lay criminal charges. He may also use either civil or criminal proceedings.

(2) If X laid criminal charges, he would be called the **complainant** and Y would be known as the **accused**.

(3) If X instituted civil proceedings by issuing a summons, he would be described as the **plaintiff** and Y would be the **defendant**. Assuming that it is possible to commence proceedings by application, X is the **applicant** and Y would be called the **respondent**. If judgment is given against Y and he takes the matter on appeal, Y is known as the **appellant** and X as the **respondent**.

(4) (a) False. X is not compelled to institute civil proceedings because this is voluntary.

(b) False. The court is only involved during the trial stage. A court may not interfere with the conduct of civil proceedings during the pre-trial stage except upon the request of one of the parties.

(c) False. X has no discretion as to whether to institute criminal proceedings or not. The decision is entirely up to the state, acting through the Director of Public Prosecutions.

(d) False. Y is liable to X only if judgment is given against Y in civil proceedings instituted by X.

(e) False. The statement is not necessarily true because a diminished burden of proof is required for civil proceedings. X need only prove Y's liability on the balance of probabilities and not beyond all reasonable doubt as is the standard of proof in criminal proceedings.

STUDY UNIT

3

INHERENT JURISDICTION

As a student of Civil Procedure, you are curious about what actually happens in a court. You decide to visit both the magistrate's court and High Court in your city.

You are rather confused by the fact that in the High Court the judge is able to condone a mistake relating to procedure whereas in the magistrate's court the magistrate is very hesitant to exercise his or her discretion and may even sometimes postpone the matter until the mistake is corrected or dismiss the matter.

OVERVIEW

LEARNING OUTCOMES

After you have finished studing this study unit, you should understand

- the fundamental distinction between the superior and lower courts
- the implications of the term "inherent jurisdiction"
- the meaning of the phrase "creatures of statute"

COMPULSORY READING MATERIAL

None

3.1 SUPERIOR AND LOWER COURTS

A definite distinction is made between the superior courts and the lower courts. The superior courts are

- the Constitutional Court
- the High Courts
- the Supreme Court of Appeal

Apart from the superior courts, there are other subordinate courts, known as lower courts. These include

- magistrates' courts that have been established in terms of the Magistrates' Courts Act 32 of 1944
- small claims courts that have limited jurisdiction and are conducted according to simplified procedures to hear minor civil claims in terms of the Small Claims Courts Act of 61 of 1984
- customary courts of the chiefs and headmen
- other bodies vested with judicial or quasi-judicial powers, which have been established by virtue of particular legislation, such as the children's courts and licensing boards

3.2 MEANING OF INHERENT JURISDICTION

Civil procedure as applied in the superior courts does not depend solely on statutory provisions and the rules of court. Because of this, the superior courts are sometimes said to exercise an "inherent jurisdiction".

When it is said that a court exercises "inherent jurisdiction", this simply means that its jurisdiction is derived from common law and not from statute (although statute, in certain cases, may limit or increase this jurisdiction). One of the implications of a superior court exercising its inherent jurisdiction is that it has a discretion in regard to its own procedure. In other words, a court may condone any procedural mistakes or determine any point of procedure. See, further, 4.3.2 below.

The Constitution of 1996 confirms the continued existence of this common-law power of superior courts. Section 173 states

> The Constitutional Court, the Supreme Court of Appeal and the High Courts have the *inherent power to protect and regulate their own process,* and to develop the common law, taking into account the interests of justice.

3.3 "CREATURES OF STATUTE"

Lower courts do not have inherent jurisdiction. The reason for this is that they derive their powers from the particular statute which created them. Because of this, lower courts are sometimes called "creatures of statute". The exercise of jurisdiction in the lower courts is therefore dependent on the extent to which its enabling statute permits it to exercise such jurisdiction. Consequently, each enabling statute has to be carefully interpreted in order to determine the scope of the jurisdiction so conferred.

This is best illustrated by referring to the magistrates' courts. A magistrate's court is often referred to as a "creature of statute" because it has been created by legislation and derives its

powers and competence from the Magistrates' Courts Act of 1944. Erasmus *Jones and Buckle: The civil practice of the magistrates' courts in South Africa* 8 ed vol 1 at 32 succinctly sum up the situation as follows:

> The magistrate's court is a creature of statute and has no jurisdiction beyond that granted by the statute creating it. It has no inherent jurisdiction such as is possessed by the superior courts and can claim no authority which cannot be found within the four corners of its constituent Act.

The distinction between the phrases "inherent jurisdiction" and "creatures of statute" is aptly expressed by Herbstein and Van Winsen. *The Civil Practice of the Superior Courts in South Africa* 38

> ... whereas inferior courts may so nothing which the law does not permit, superior courts may do anything that the law does not forbid.

ACTIVITY

Read the factual situation stated at the beginning of this study unit. Now answer the following questions:

(1) Explain in your own words why

(a) superior courts may exercise an inherent jurisdiction

_____

_____

_____

_____

(b) inferior courts are creatures of statute

_____

_____

_____

_____

FEEDBACK

(1) (a) A superior court exercises inherent jurisdiction because its competence is not reliant only on statutory law but also on common law. This is confirmed by section 173 of the Constitution of 1996. Because it has inherent jurisdiction, a superior court may condone a mistake in its procedure (see 3.2). For further details in this regard also note the information contained in 4.3.2 below.

(b) A lower court is a creature of statute because it is restricted to the competence conferred upon it by its enabling (constituent) Act (see 3.3).

STUDY UNIT

4

SOURCES OF CIVIL PROCEDURAL LAW

OVERVIEW

LEARNING OUTCOMES

After you have finished studying this study unit, you should know

- the main statutes that are sources of civil procedure for the purposes of this course
- who has the competence to make, amend or repeal rules of court
- the nature of the rules of court
- important common-law sources for civil procedure

COMPULSORY READING MATERIAL

Sections 2, 3 and 6 of the Rules Board for Courts of Law Act 107 of 1985

4.1 INTRODUCTION

In this unit your attention is focused on the sources of civil procedural law.

Unlike the magistrates' courts, the civil procedure of the High Court does not consist solely of statutory provisions and rules of court. A substantial part of it consists of common-law rules. For this reason, common-law rules of procedure will be dealt with very briefly (see 4.4 below).

The Constitution of 1996 serves as the supreme law of the Republic and any laws that are inconsistent with it may be declared invalid. The discussion of the legislation that follows must be studied with this in mind.

4.2 STATUTORY LAW

When dealing in this course with the High Courts, frequent reference will be made to the Supreme Court Act 59 of 1959. At the moment, the name of this Act is rather confusing. In describing the judicial structure of the Republic, section 166(c) of the Constitution of 1996 specifically refers to the **"High Courts".** At some stage the name of the Supreme Court Act of 1959 will have to be changed in order to bring it into line with the existing situation.

As its name suggests, the Magistrates' Courts Act 32 of 1944 is the statutory source of procedural law for the magistrates' courts.

The Small Claims Courts Act 61 of 1984 is the only statutory source of procedure for the small claims courts.

These are the main statutory sources of procedural law for the purposes of your study of Civil Procedure. As you progress with your studies or enter into practice you will discover that there are additional statutory sources that provide for the procedure in special courts.

There are also numerous statutory provisions that confer jurisdiction on a court. For example, see section 2(1) of the Divorce Act 70 of 1979 discussed in study unit 17.3.

4.3 RULES OF COURT

4.3.1 Competence to make the rules

Until 1965, the various divisions of the then Supreme Court had different rules of court that applied separately in a particular division. In that same year, under the provisions of section 43(2)(a) of the Supreme Court Act of 1959, the Uniform Rules of Court were promulgated with effect from 15 January 1965 regulating the conduct of proceedings in all provincial and local divisions of the then Supreme Court. The effect of these rules was to repeal all the previous rules of the various divisions of the then Supreme Court, except those rules of particular divisions regulating court terms, vacations, sessions and set down. These remaining matters now exist as the rules for specific High Courts. What should be understood is that as from 1965, **proceedings have been uniformly conducted** in all the divisions of the then Supreme Court, now the High Courts, **under a common set of rules still known as the Uniform Rules of Court.**

Section 25 of the Magistrates' Courts Act of 1944 similarly provided for the making, amendment and repeal of rules for the magistrates' courts. The present magistrates' court rules came into operation on 30 August 1968.

Rules regulating the proceedings of the Appellate Division (now the Supreme Court of Appeal) could be promulgated under section 43(1) of the Supreme Court Act of 1959. The present Supreme Court of Appeal Rules were promulgated on 15 December 1961.

This background information explains the important change that occurred in 1985. In that year, the power to make rules for the Supreme Court of Appeal, as well as for the various High Courts was conferred upon the Rules Board for Courts of Law in terms of the provisions of the Rules Board for Courts Act 107 of 1985. This also applied in respect of the rules for magistrates' courts.

The Rules Board was established in 1985 (s 2). The members of the Board are appointed by the Minister of Justice for a period of five years and are eligible for reappointment (s 3). Section 6 specifies the powers of the Rules Board to make, amend or repeal rules "for the efficient, expeditious and uniform administration of justice" in the Supreme Court of Appeal, the High Courts and the magistrates' courts. (Study s 6(1) for the powers of the Rules Board.) **The competence to make rules for all these courts now vests in the Rules Board.**

Section 16 of the Constitutional Court Complimentary Act 13 of 1995 provides that the president of the Constitutional Court, in consultation with the chief justice, may make rules relating to the manner in which that Court may be engaged and for all matters relating to the proceedings of and before that Court. The present Rules of the Constitutional Court came into operation on 23 October 1998.

The Minister of Justice may make rules that regulate the proceedings in small claims courts (see s 25 of the Small Claims Courts Act 61 of 1984).

For the sake of completeness, it should be mentioned that the rules of court contain annexures that set out the **forms** prescribed by the rules. These forms contain the wording of various processes mentioned in the rules. This is done for the benefit of litigants and legal practitioners and also to maintain uniformity and consistency. See, for instance, form 3: Summons for Provisional Sentence contained in the first schedule to the Uniform Rules of Court in the *Student Handbook*.

4.3.2 Nature of the rules

Since they are, in their nature, delegated legislation, the rules of court have statutory force and are therefore binding on a court.

However, the rules exist for a court and not the court for the rules. The rules are not an end in themselves but rather a means to an end. The very purpose of the rules is to facilitate inexpensive and efficient litigation and not to obstruct the administration of justice. This means that a court, subject to its competence to do so, may condone non-compliance with procedure that would lead to substantial injustice to a litigant. A superior court may also exercise its inherent jurisdiction (see study unit 3 above) to grant relief in circumstances where the rules do not cover a particular matter or where strict compliance with a rule would result in substantial prejudice to a litigant.

4.3.3 Method of reference

In both Module 1 and Module 2, unless expressly stated to the contrary, the word **"Rule"** (capitalised) is a reference to the Uniform Rules of Court.

The word **"rule"** (lower case) is a reference to the magistrates' courts rules.

The Supreme Court of Appeal Rules are referred to by means of the abbreviation "SCA Rule".

4.4 COMMON LAW

The civil procedure of the High Court does not, however, consist exclusively of statutory provisions and rules of court. A considerable portion of it comprises rules of common law. Especially in the matter of provisional sentence *(namptissement),* one finds the appropriate rules in the common law, with the rules of court themselves affecting only a small part of *namptissement*.

Most of the well-known Roman-Dutch writers paid some attention to the law of procedure in their works — see, for example, De Groot, Voet, Van Leeuwen and Groenewegen. But there were also certain writers who concentrated on the laws of procedure in particular, for example Lubrecht: *Notaris ampt,* Van Alphen: *Papegaij*, Van Zutphen: *Judiciële Practijck*, Damhouder: *Praeijtycke in Civile Saecken*, Van der Linden: *Judiciële Practijck*, Merula: *Manier van Procederen.* The latter was the leading work on procedure in the Netherlands when Roman-Dutch law still applied there, and still enjoys authority in South Africa today.

Students should also bear in mind that many of our rules of courts and statutes are based on English law, and that our system of pleadings is largely modeled on the English one. Thus, when it comes to the interpretation of such rules of court and statutes, or when guidance is sought in drawing up pleadings, it is often profitable to refer to English procedural law.

ACTIVITY

(1) What are the Uniform Rules of Court?

_____
_____
_____
_____

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

_____
_____
_____
_____
_____
_____

(3) "The rules exist for the court and not the court for the rules". Discuss briefly.

_____
_____
_____
_____
_____
_____
_____

_____
_____
_____

FEEDBACK

(1) The Uniform Rules of Court are a common set of rules that uniformly regulate the conduct of proceedings in all High Courts. See 4.3.1.
(2) Refer to section 6(1) in the *Student Handbook* in order to answer this question. Select any six areas of competence of the Rules Board in this regard.
(3) Summarise the content of 4.3.2 above.

Your basic answer should state that the rules of court are binding on a court but that, if competent to do so, a court may condone non-compliance, or grant relief for a matter not covered by a rule or where a rule is so strict that it causes substantial prejudice to a litigant.

STUDY UNIT

5

CIVIL PROCEDURE IN CONTEXT

You are visiting the High Court in your city. What you discover could have been equally relevant in the magistrates' courts, but you happen to be in the High Court.

As you enter the court building, you see a sign that reads: *Registrar*. You enter the Registrar's office. You notice that there are no judicial officers but only clerks who, from behind a counter, accept process and pleadings lodged by the representative of various legal firms. You also notice that court clerks are issuing summonses on behalf of attorneys.

You are uncertain about the submission of evidence. So you ask one of the clerks about it. The clerk responds: "The court has nothing to do with the gathering of evidence — attorneys and advocates do that! All this office can do is issue subpoenas to summon witnesses to give oral evidence".

You then sit in at a civil trial. The atmosphere is very formal. The judge is very distant. He does not interfere with the trial except to ask questions occasionally. Counsel on both sides are very assertive, and sometimes even aggressive towards each other or the witnesses for the opposing side. Your impression is that of a legal contest between counsel in respect of their clients' rights. The judge acts as an umpire in that he only enforces the rules of procedure and at the end of the trial hands down judgment.

OVERVIEW

5.5 Critical appraisal
5.5.1 Litigants
5.5.2 Competitive representation
5.5.3 Public proceedings
5.5.4 Delay
5.5.5 Costs of litigation
5.5.6 Adjudicatory process
5.5.7 Reforming civil procedure

LEARNING OUTCOMES

After you have finished studying this study unit, you should

- have acquired a general understanding of the adversarial system of procedure
- have a basic grasp of the major differences between the Anglo-American and Continental systems of civil procedure
- understand the underlying principles of bilaterality, party-prosecution and party presentation
- understand the role of the court
- have developed a critical appreciation of the adversarial system as well as methods of civil procedural reform

COMPULSORY READING MATERIAL

None

5.1 GENERAL PERSPECTIVE

Because it is part of the system of Anglo-American civil procedure, a dominant characteristic of South African civil procedure is that it adheres to the adversarial system of litigation. All South African courts of law, except the small-claims courts, apply adversarial principles and procedures.

What is meant by an adversarial system of litigation? Because of its complexity, a simple definition is not possible. However, a basic understanding can be gained by briefly contrasting and comparing the application of adversarial litigation with Continental procedure.

Continental civil procedure is characterised as being inquisitorial, or being in the nature of an inquiry which is controlled and conducted by a judicial officer. The inquisitorial system is common in many civil-law-system countries in Continental Europe, such as France, Germany, and Switzerland. In the inquisitorial system, the judicial officers participate directly in the process of litigation, from the commencement of the proceedings until the conclusion of the hearing. Along with the parties, judicial officers are actively involved in the conduct of proceedings and in determining the facts of the case. Other characteristics of the Continental

system are as follows: "pleadings" are in the form of notice to the parties, and include evidence; In certain instances, judicial officers are involved in the gathering of evidence; the trial is in the form of a hearing in which a judicial official may participate actively by asking questions, and sometimes by leading evidence. It can simply be said that in the Continental system, a judicial officer is the trier of both fact and law. Unlike the Anglo-American system that relies on case law and precedent, the Continental system places more reliance on statutory (code) provisions than on the precedents arising out of decided cases. The creation of law through case precedent is sometimes viewed, at least to some degree, as an improper usurpation of power reserved solely for the legislature. Since the precedent system does not apply, a court's decision (what we call a "judgment") is only of persuasive value, and not binding as law in regard to other courts.

In contrast, Anglo-American civil procedure is adversarial in nature. It is a system generally adopted in common-law countries. The system regards litigation as a private matter, and relies on the legal representatives of parties to prosecute their respective claims or defences. Therefore, the Anglo-American civil-procedure system is a contest between the parties and/or their representatives. The legal representatives are also responsible for gathering and presenting their evidence to a judicial official at trial. The trial in Anglo-American civil procedure is marked by its orality (it is predominantly oral in nature). This means that *viva voce* evidence (oral evidence given by witnesses in person) is led by the counsel for both litigants by means of examination, cross-examination and re-examination. The orality of the proceedings also applies to the judicial official who gives oral judgment (often written, but always read) immediately, unless judgment is reserved.

What is evident is that the proceedings are marked by distinct pretrial and trial stages. Two distinctive activities occur during the pretrial stage. Firstly, the pretrial stage opens with the exchange of pleadings between the litigants in order to define issues in dispute that must be presented and proved at the trial. Secondly, after the pleadings have closed, a trial date is requested, and during this waiting period the litigants prepare their respective cases for trial.

During both the pretrial and the trial stages, the judicial official plays a passive role. This means that the judicial official does not interfere in the proceedings, except upon the request (motion) of one of the litigants. Like an umpire of a game, the judicial officer is more interested in ensuring the fair play of due process, or of fundamental justice.

One should be cautious about generalising about the inquisitorial system and the adversarial system. Both the inquisitorial system and the adversarial system vary from country to country. There may be subtle, or even substantial, differences among countries that have adopted either an inquisitorial or an adversarial system of civil procedure.

5.2 ADVERSARIAL PROCEDURE

5.2.1 Introduction

A dominant element of the Anglo-American civil procedural system is its adversarial nature. Being part of the system of Anglo-American civil procedure, the adversarial nature of South African civil procedure is characterised by the following:

- **both litigants**
- **independently initiate and prosecute** their respective claims or defences, and

- **investigate and gather** information that supports their respective claims or defences, and present this as evidence before a court.

This brief description expresses three fundamental principles that underlie our system of civil procedure. These principles are those of

- **bilaterality** (in the present context, "bilateral" means between two parties)
- **party prosecution**
- **party presentation**

Although discussed separately, it should be remembered that in a practical setting these principles are interdependent and interrelated.

5.2.2 Bilaterality

The principle of bilaterality assumes that both litigants (or all parties, if there are more than two litigants) will have a fair and balanced opportunity to present either their respective claims or defences.

Inherent in this principle is the belief that the truth will emerge if each party presents his or her own biased view of the issues in dispute. Litigants are therefore placed in an adversarial (competitive) relationship with each other. As rivals, each litigant presents separate and contradictory versions of the case for consideration by the court.

5.2.3 Party prosecution

Party prosecution refers to the competence of a litigant either to commence (begin) or defend proceedings and to move (prosecute) the case forward through all its procedural stages.

This principle reinforces the notion that litigation is a private matter that is conducted by both litigants without any interference from the court, except where its intervention is requested by one of the litigants.

In practical terms this means that a person whose substantive rights have been infringed or alienated has a choice either to commence civil proceedings or simply to do nothing about the matter. So too, if as plaintiff or applicant, that person does commence proceedings, then the person against whom proceedings have been commenced (ie the defendant or respondent) may also make certain choices.

For instance, a defendant may consent to judgment (see Module 2, study unit 12.2), defend the action (see Module 2, study unit 9.2) or simply ignore the summons, in which case default judgment will be taken (see Module 2, study unit 12.3). If the defendant decides to defend the matter, then the litigants will exchange pleadings without the assistance of the court; once pleadings have closed, they will independently prepare for trial (see Module 2, study unit 13).

Another option that is frequently used is that both litigants may negotiate what is called an "out-of-court settlement".

What the above illustrates is that the litigants actively conduct civil proceedings as a private matter without any interference from the court. However, both litigants must conduct the proceedings according to certain minimum standards that are prescribed by the Rules of Court (see study unit 4.3 above). The court will only become involved in the proceedings if, for

instance, 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 (overlook) a mistake in procedure.

5.2.4 Party presentation

Party presentation refers to the competence of a litigant to investigate his or her own cause or defence, to formulate the issues in dispute as well as to present the material facts concerned, and to prove these facts and raise legal argument in support of these facts before a court.

The principle of party presentation confirms that a litigant has control of the **content** of his or her cause of defence, as the case may be. Litigants are competent to determine the scope of the controversy (ie the issues in dispute) as well as to define the boundaries (scope) of the dispute without the interference of the court.

The principle of party presentation supports the idea that the litigants should be masters of their rights. Litigants take primary responsibility for determining the issues in fact and in law that relate to the dispute, without judicial interference.

5.3 THE ROLE OF THE COURT

As in other Anglo-American jurisdictions, in South Africa the role of the judicial officer is passive. The notable exception is that of the commissioner of a small claims court (see further study unit 7.2 and 7.7 below).

Often the passive role of the judicial official is compared to that of an umpire who ensures compliance with the rules of the game but does not participate in the game itself.

In its absolute sense, the role of the judicial official is passive in that he or she is restricted to the evidence that the litigants have chosen to present during a trial or a hearing on motion. Usually the judicial official may not introduce new evidence or raise additional matters of law. In brief, the judicial official is not responsible for ensuring that the case presented by each litigant is complete. The judicial official reaches a decision on the case purely on the basis of the evidence and arguments in law put by each litigant. Unlike the judge in a Continental system of civil procedure (see further study unit 5.1 above), the judicial official is not burdened with the official duty of judicial investigation.

Unlike Continental procedure, the judicial official is not permitted to participate in the pre-trial stage. This may occur only when the judicial official is requested to intervene by one of the litigants. In this regard, the application of the principles of party prosecution and party presentation override the competence of a judicial officer.

The comparison goes further. In Anglo-American systems, there is a clear separation between the investigative and decision-making (ie adjudicative) aspects of litigation. This explains the definite distinction between the pre-trial and trial stages of litigation. During the pre-trial stage, the investigative function is the sole responsibility of the litigants; during the trial stage the judicial official is dependent on how well the litigants performed their investigative function during the pre-trial stage, as well as on the thoroughness of their presentation at the trial.

However, the principles of party prosecution and party presentation do not have unqualified application. It is accepted that the judicial official may direct the case within the confines (scope) of the issues presented by the parties during the trial stage. During a trial, the judicial official

may, for instance, raise issues by questioning witnesses or testing the legal arguments of counsel.

In fact, there is a growing tendency to encourage judicial activism. Limited judicial intervention is permitted in systems where fast-track litigation has been introduced (eg in Australia) or in respect of schemes relating to the judicial management of complex litigation (eg in the USA).

In the final instance, the role of the judicial official remains passive because the litigants bear the final responsibility for commencing proceedings, defining the issues in dispute, gathering facts for presentation as evidence, and generally conducting the case through the successive stages of litigation.

5.4 THE LEGAL PROFESSION

In principle, every litigant is entitled to appear personally before a court to plead a cause or to raise a defence. However, because the conduct of litigation is so specialised, litigants normally instruct attorneys and advocates to conduct litigation on their behalf. The only exception is in the small claims court where legal representation is prohibited (see further study unit 7.4 below).

Members of the legal profession therefore act as agents for their clients and represent their clients' rights in court. However, these functions occur within the context of adversarial procedure. Consequently, legal representatives are duty bound to promote and protect their litigant clients' interests. It is in this sense that it is said that legal representatives must take a partisan stance on behalf of their clients.

5.5 CRITICAL APPRAISAL

5.5.1 Litigants

In the context of Anglo-American procedure, the purpose of the adversarial system is to elicit (arrive at) the truth by means of presenting opposing views in respect of the same case. However, the system is based on certain assumptions that do not always reflect reality.

Although, in theory, both litigants have an equal opportunity to present their cases, they do not necessarily always have the same financial resources to conduct litigation nor are the skills of counsel always equally matched.

Moreover, rivalry caused by a competitive approach to litigation does not necessarily ensure that the litigants, acting through counsel, will fully disclose the facts, especially those which might discredit their own cases. Furthermore, because the system operates in a manner that promotes a partisan approach to litigation, litigants are prone to using procedure for tactical purposes in order to further their own individual interests and to demoralise opponents.

In psychological terms, an adversarial approach does not reconcile the litigants but rather tends to accentuate their differences, and consequently heightens the conflict.

5.5.2 Competitive representation

Owing to the technical nature of procedure and the competitiveness of proceedings, lawyers

must re-interpret a litigant's rights and interests into procedural terms as a claim or defence that complies with the standards of adversarial proceedings.

In other words, the system itself forces the lawyer **to reshape the litigant's human problem into legal and procedural categories which meet the demands of the system but very often do not represent the litigant's actual human needs.** One need only think, for example, of the trauma of divorce that is heightened by the adversarial nature of the related proceedings.

5.5.3 Public proceedings

Courts are public institutions. They play a vital role in fulfilling the governmental function of maintaining order in society. Because courts have a public function, proceedings are conducted in open courts. Consequently, private grievances, especially those of a domestic nature, are made public. The same is true of commercial matters that may be highly confidential and best kept secret in a competitive market.

5.5.4 Delay

"Justice delayed is justice denied". This phrase expresses the frustration of many litigants whose rights remain undecided while they wait for their day in court. Frequently, delays are caused by the technical nature of procedure, the formality of proceedings, and competitive tactics and strategies that are the inevitable result of adversarial litigation.

Procedural delays have serious personal and financial consequences for litigants because they are unable to lead normal lives or continue trading freely, for example, while litigation is in progress.

5.5.5 Costs of litigation

In principle, access to the courts is free. Court administration and court time is provided for free by the state. The problem lies with the transactional costs of litigation, that is, costs incurred by lawyers who conduct litigation of behalf of their clients, the litigants.

Owing to the complexity of legal issues and the intricacy of procedure, representation by a lawyer is normally essential. In return for acting as agents for their clients, lawyers charge a fee that is often beyond the means of the average citizen, not to mention poor persons. The result is that recourse to the courts is restricted mainly to those who can afford it or who qualify for legal aid.

5.5.6 Adjudicatory process

The judicial officer decides (adjudicates) the matter impersonally in the role of a passive umpire. Attention focuses on the weight of evidence and the merits of the legal arguments presented by each party.

Because adjudication occurs in an adversarial setting, judgment is granted in favour of only one of the litigants. Unless absolution of the instance is granted, there is always a winner and a loser. The system does not permit a method of decision-making that reconciles the conflicting interests of litigants. This has the effect of increasing the tension between litigants, especially

where they are bound to each other in a continuing or long-term relationship — as in the case of neighbourhood, testamentary or domestic disputes. The same sometimes applies in regard to partners, members of a close corporation or company directors.

The judgment of a court is enforced by executionary procedures that are sanctioned by the state. Consequently, compliance with a judgment is ensured by means of coercion and not by means of the consent of the parties concerned.

5.5.7 Reforming civil procedure

The reform of civil procedure is a highly complex matter that obviously cannot be dealt with in any depth here. What follows is only a very brief outline of the various methods for reforming civil procedure that will hopefully sharpen your critical perspectives.

The first way in which to reform civil procedure is by means of the **continual revision** of the rules of court. This is the primary responsibility of the Rules Board. See study unit 4.3 above in this regard.

Another method is to **increase the jurisdictional limits** of the lower courts in order to give more people access to court but at a lower cost by comparison to access to a High Court. For instance, in 1995, the jurisdiction of the magistrates' courts was increased from R20 000 or R50 000, as the case may have been, to a global figure of R100 000.

Another method of reform is to **exclude**, in part or in whole, **specific types of disputes** from the court system. A good example of an Act which does this, is the Labour Relations Act 66 of 1995 which prescribes dispute resolution procedures and also establishes courts that deal only with labour matters. Another example of this kind of reform is the payment of compensation under the provisions of the Compensation for Occupational Injuries and Diseases Act 130 of 1993. This Act repealed and replaced the Workmen's Compensation Act 30 of 1941.

Reform is sometimes effected by means of **establishing alternative fora** (*fora* is the plural of the Latin word, *forum,* which in this context means "a court".) The small claims courts, as courts of minor jurisdiction, have been established as an alternative to litigating in the magistrates' courts. The intention is to extend access to justice in cases of small claims relating to consumer matters, neighbourhood disputes and, in general, minor disputes that are not worth the cost of litigating in a higher court (see study unit 7 below).

Another method encourages the resolution of disputes outside of the court system through the **use of informal dispute resolution processes.** This is known as "alternative dispute resolution". In certain Anglo-American jurisdictions, informal processes have sometimes been introduced within the court system. This means that informal processes have been incorporated into the rules of court in order to encourage the settlement of disputes by means of arbitration or mediation so as to save costs, avoid delays or to make allowances for the personal interests of the litigants (see study unit 6 below).

The last two methods of effecting procedural reform will be dealt with extensively in Part 2 which covers alternative models of dispute resolution.

ACTIVITY

Read the factual situation set out at the beginning of this study unit. Now answer the following questions:

(1) Why did judges not prepare the summonses but rather attorneys on behalf of their clients?

_____
_____
_____
_____

(2) When could a judge be involved with process and pleadings?

_____
_____
_____
_____

(3) Explain the significance of the subpoenas issued from the Registrar's office.

_____
_____
_____
_____

(4) While presiding in court, the judge's behaviour is distant and reserved. Explain his behaviour.

_____
_____
_____
_____

(5) How does the function of a South African judge differ from that of a Continental judge?

_____
_____
_____
_____

(6) Explain the assertive, and even at times aggressive, behaviour of counsel for both litigants.

_____
_____
_____

(7) Write a short essay describing the areas of South African civil procedure that you believe are in need of reform.

_____
_____
_____
_____
_____
_____
_____
_____
_____
_____

FEEDBACK

(1) In Anglo-American systems of civil procedure, as in South Africa, litigation is regarded as being a private matter between the litigants. The litigants conduct litigation without the interference of the court. On the given facts, the attorneys therefore prepare the summons in order to commence action. Judges are not involved.

The attorneys were applying the principle of party prosecution. Attorneys must actively conduct civil proceedings and move the case forward on behalf of their clients. For this reason they were also lodging pleadings and process to be placed on record in the Registrar's office. See further 5.2.3 and 5.2.4.

(2) A judge may not intervene in the conduct of civil proceedings between the litigants unless requested to do so by one of the litigants. See 5.2.1, 5.2.3 and 5.2.4.

(3) Anglo-American systems of procedure are characterised by the oral nature of the trial. Witnesses are summoned by subpoena to give evidence personally before the court. See 5.2.1.

(4) In Anglo-American systems of procedure the judge is accorded a passive role that is limited to presiding over the trial, hearing evidence and giving a judgment. The judge is therefore dependent on the litigants regarding the investigation of the facts, the gathering of information, the determination of the issues in dispute and the presentation of these issues. See further 5.2.3, 5.2.4 and 5.3.

(5) A Continental judge has an active rather than a passive role in the proceedings, and may therefore participate in both the pre-trial and trial stages of litigation. See further 5.2.1 and 5.3.

(6) Counsel's behaviour is influenced by principles that underlie adversarial litigation. The system of litigation is based on the assumption that the truth will be discovered if both litigants give opposing versions of the same case. Legal representatives therefore take a partisan stance in order to promote and protect their client's rights. See further 5.4 and 5.5.1

(7) There is no definite answer to this question. You are encouraged to think critically about the adversarial system of litigation, especially as it is applied in South Africa. Use 5.5 as a whole, as the basis of your answer and a starting point to enable you to formulate your own critical views.

PART II

Alternative models for resolving civil disputes

STUDY UNIT

6

ALTERNATIVE DISPUTE RESOLUTION

You have a friend who owns a medium-sized shopping center. Over supper one night, he tells you about his problem. One of his tenants owes him R240 000 for rental that is in arrears. The tenant tenders only R150 000 in full and final settlement, contending that he is going to withhold the balance as compensation for improvements that have substantially increased the value of the property. The tenant made the improvements contrary to the conditions of the contract of lease.

The situation has reached a deadlock. Your friend is tempted to resolve the matter by means of litigation. However, he hesitates to commence action because of the delay, uncertainty and high cost of litigation. Moreover, he would like to avoid the publicity of litigation.

He asks your advice in regard to any alternative methods for resolving the dispute. Should he re-open the negotiations that are deadlocked? Or, should he now proceed to mediation? Would facilitation be better because of the relatively low level of intervention by the facilitator? What about conciliation? Being based on a contract of lease, the dispute is rights-based and therefore might need the direct intervention of a conciliator.

Would arbitration be a better option? Would a binding arbitral award be better than an informal agreement produced by negotiation or mediation? On the other hand, would conventional (or full) arbitration be a good option if it were almost as time-consuming or as costly as litigation? Would it be possible to expedite (speed up) the process of arbitration? Could the arbitration be based on documents only? For that matter, could the best elements of mediation and arbitration be combined into a single process? Could a mini-trial be used to settle the dispute?

OVERVIEW

LEARNING OUTCOMES

After you have finished studying this study unit, you should understand

- the development, general structure and principles of ADR
- negotiation, mediation and arbitration as primary processes
- derivative processes, such as conciliation, facilitation, expedited arbitration and documents-only arbitration
- the formation of hybrid process, such as the mini-trial and Med/Arb or Arb/Med
- the critical strengths and weaknesses of ADR by comparison to litigation

COMPULSORY READING MATERIAL

None

6.1 BACKGROUND

6.1.1 Understanding ADR

ADR is an acronym that stands for the words, "Alternative Dispute Resolution".

ADR can no longer be described as a movement that advocates the use of informal processes for the purposes of resolving disputes (dispute resolution). This was the case approximately twenty years ago. However, by now, the depth, extent and scope of the critical literature contained in

journals and textbooks indicate that ADR is a science in the making. In fact, matters have progressed so far that ADR is often taught as a full course at Law Schools, particularly in the United States.

Because ADR is as yet an immature science, it is difficult to define it conclusively and comprehensively. At best it is possible to describe ADR as a system of dispute resolution that uses a variety of informal processes as a means of resolving disputes both inside and outside of the court system.

This description is quite meaningless if it is not understood that many informal processes, such as negotiation, mediation and arbitration, have been used since time immemorial to resolve disputes. These traditional processes are also known as the **primary processes**. However, what is new is the manner in which the primary processes have been interpreted and applied within the system of ADR (see 6.2 below). Possibly of even greater importance is the manner in which **derivative processes** have been created from these primary processes (see 6.3 below), as well as the fact that **totally new processes** have been devised as **hybrids**, that combine elements of the primary processes (see 6.4 below).

Although many of these processes are dissimilar to each other, they all fall within the system of ADR because they share a number of common factors. ADR processes are

- **informal**, that is, by comparison to the process of litigation, ADR processes are not bound by strict rules of procedure nor are they constrained by technicalities
- **flexible**, that is, ADR processes can be adapted to suit the needs of particular types of disputes in different contexts (situations), such as in the case of labour, commercial, industrial, family and divorce, and environmental issues, or in the case of international relations and out-of-court-settlements
- **voluntary**, that is, the disputants are not compelled to enter into the process (except when an ADR process is used within the court system)
- **consensual**, that is, they function on the basis that the outcome (result/decision) of a process is reached through the **consent** of both disputants
- **interest based**, that is, the interests of disputants are allowed to predominate rather than their rights in law
- **relational**, that is, ADR processes place emphasis on the relationship between the disputants and are therefore highly suited to disputes between persons who are in a continuing or long-term relationship (eg a dispute between directors of a company)
- **future orientated**, that is, apart from the case of full arbitration, ADR processes do not focus on blame for past events but rather concentrate on establishing or re-establishing the future relationship between the disputants

6.1.2 Litigation as a method of dispute resolution

What is evident is that the characteristics common to all ADR processes are diametrically opposed to those of the process of litigation. This is, in fact, the main reason for including this study unit on ADR in this module. ADR processes challenge the process of litigation. Indeed, as the word "alternative" suggests, 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 posed as alternative. In order to understand ADR, it is necessary to briefly analyse the process of litigation.

Litigation is not only based on rules that prescribe how proceedings must be conducted, but it has a broader social purpose. Litigation is a process used to compensate for unlawful injury (eg a claim for damages), adjust behaviour (eg an interdict to order that something be done or not done) or regulate and maintain public policy (eg the court acts as the upper guardian of all minors).

Seen from this broad perspective, the process of litigation may be described as a state-sponsored method of resolving civil disputes, that is applied through the court system. Because the state, through the court system, has provided the process of litigation as a method of dispute resolution, litigation may also be characterised as being a **public process** by comparison to a **private process** such as negotiation or mediation.

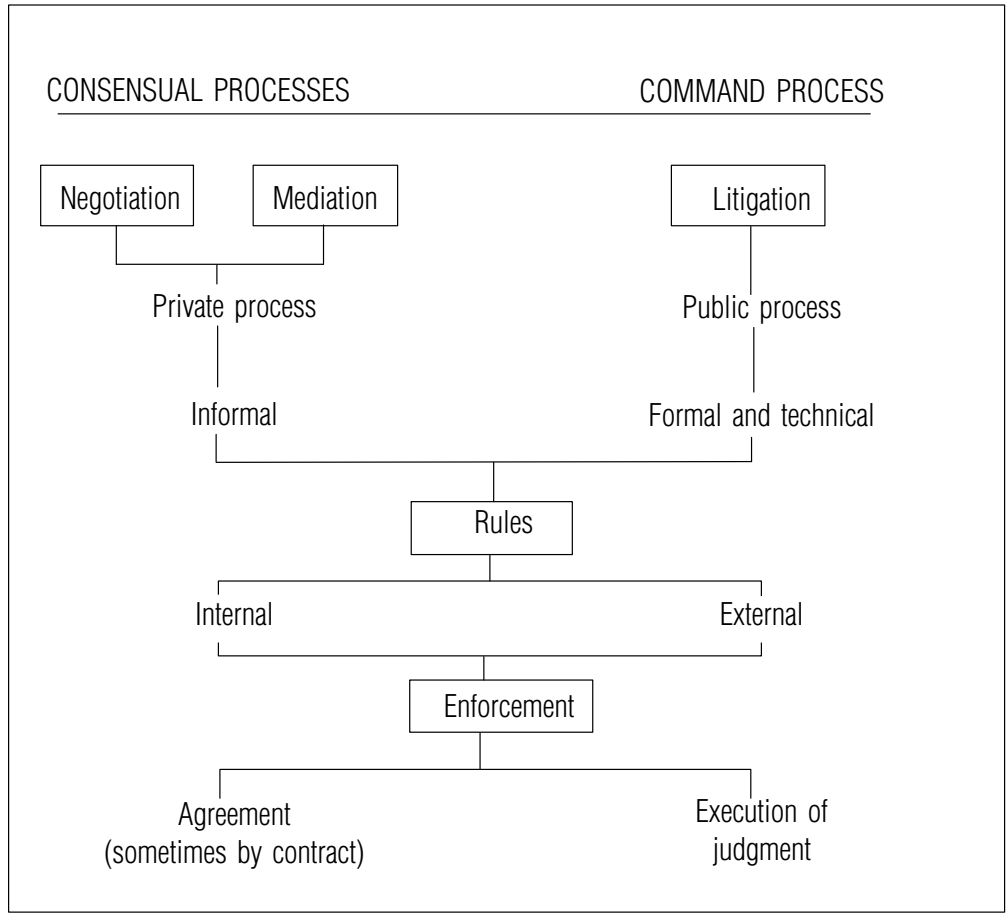
Its public nature also explains its **formal and technical** characteristics. Formality and technical processes and procedures are necessary to protect the **procedural rights** of litigants. In contrast, negotiation and mediation are **informal processes** that deal with the **interests** of the disputants.

As a public process, litigation is regulated and controlled by **external rules,** such as the rules of court and statutory provisions. See further study unit 4.3 above regarding the rules of court. The meaning of this becomes apparent if the process of litigation is compared to negotiation or mediation where there are rules but these rules are **internal** to the process itself. In other words, the disputants themselves determine the rules for their negotiations or, in the case of mediation, the disputants in conjunction with the mediator agree on the rules for a specific mediation.

Litigation is a **command process.** This means that a decision in the form of a judgment is imposed on the litigants by a judicial official and that this decision is enforced under the sanction of the state. In other words, a judgment is enforced by execution proceedings. 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.

Finally, the purpose of litigation is the resolution of a dispute (claim or defence) in the form of a judgment of court. **Judgment is the purpose to which all proceedings are directed.**

The diagram below summarises the fundamental characteristics of litigation by means of a comparison with other informal processes.



6.2 PRIMARY PROCESSES

6.2.1 Introduction

The system of ADR is based on three primary processes: **negotiation, mediation and arbitration**.

These processes are not original to the system of ADR, nor do they owe their existence to ADR. For centuries these processes have been used in all cultures as traditional methods of non-judicial (outside the court system) dispute resolution.

However, within the context of ADR, each of the primary processes has now taken on a new meaning. Because of ADR, negotiation, mediation and arbitration are applied in **different contexts.**

For instance, mediation has been traditionally recognised as a method of resolving international disputes and, in Western culture, as a means of settling ecclesiastical disputes (ie disputes within and between various Christian denominations). Today, however, mediation has come to be used in divorce and family matters, in labour disputes, in environmental issues, where there is dissent in communities or where parties in victim/offender programmes are reconciled. The list is unending.

Similarly, conventional (full) arbitration was used only to resolve commercial disputes arising

out of contract. However, arbitration is now accepted as a method of resolving disputes in other contexts, such as in the case of labour disputes, environmental issues or setting the annual fee for professional sportpersons.

Furthermore, under the direct influence of ADR, two important developments have occurred

- the **function** of each primary process has been extended by means of the development of independent processes derived from a primary process, known as **derivative processes** (see 6.3 below), and
- elements of two or more of the primary processes have been **combined** to form totally new processes that are called **hybrid processes** (see 6.4 below)

Against this background, we will next look at each of the primary processes.

6.2.2 Negotiation

Negotiation, as a method of dispute resolution, is a private, voluntary and consensual process whereby two (or more) disputants seek to resolve their differences personally by means of an agreement that governs their future relationship.

An evaluation of this definition, explains many of the characteristics of the process of negotiation.

(1) *Resolution of disputes.* Our definition restricts negotiation to the resolution of disputes. This is because this module and Module 2 concentrates on litigation as a method of dispute resolution. However, do not forget that negotiation is also used for the purposes of transactions, such as when agreeing on the terms of a contract.

(2) *Private.* Negotiation is a "private" process in that the disputants are able to choose the venue for the negotiations and also agree on the rules and standards that they will apply. Because negotiation is a private process, it is sometimes possible for the disputants to ensure the confidentiality of their communications and even the outcome of their negotiations. However, publicity and confidentiality cannot always be maintained when the negotiations are in the public interest, such as in the case of political, labour or international trade negotiations.

(3) *Voluntary* means that the process of negotiation is not imposed on the disputants. All the disputants choose to enter into and participate in the process of negotiation.

(4) *Consensual* has a similar meaning to "voluntary" but is mainly used to indicate that the outcome of a negotiation (whether it ends in an agreement or a failure to agree) is based on the consent of both disputants. A dominant principle of ADR is that there is a greater probability that disputants will co-operate with each other to keep to the terms of the agreement to which they have consented than to a decision that is imposed and enforced by law.

(5) *Negotiation is a process.* Because negotiation lacks the formalities and technical procedures of litigation, this does not mean that negotiation is not a process. Negotiation is not a casual event, such as a soccer match or a wedding reception. Like litigation, negotiation has a definite point of commencement and ends either with an agreement or the failure to reach an agreement. Between these two moments in time a negotiation must move through the following uniform stages:

   - An **orientation stage,** that is, the disputants assess each other as well as the issues under negotiation.

- A **positioning stage,** that is, the disputants gather information and take fixed positions on the issues in dispute.
- A **bargaining stage,** that is, the issues are narrowed and concessions traded in order for the parties to reach agreement.
- A **close-out stage,** that is, the negotiation terminates either in a failure to agree or in an agreement, which is often put into writing. If an agreement has been reached, arrangements are made to carry out the terms of the agreement.

Remember that every negotiation must go through all these stages. If not, the process is not one of negotiation but might be one of debate, consultation or the giving of instructions.

(6) *Two (or more) disputants.* Negotiation is a bilateral process. Although this implies that two parties participate in the process, if more than two parties are involved, the process of negotiation remains bilateral because the participants invariably form coalitions that oppose each other.

Also, negotiation is considered to be a bilateral process in the fullest sense because only two sides are involved. In other words, there is no third party intervenor, such as a mediator, arbitrator or judicial officer. The disputants therefore take full responsibility for the process, content and outcome of their negotiations. This also explains why the word "personally" is contained in the above definition.

(7) *Agreement that governs future relationships.* Because the process of negotiation is voluntary and the outcome is based on the consent of each of the disputants, agreement cannot be imposed on the disputants. It is therefore possible for the outcome of a negotiation to be the failure to agree. However, the object of negotiation is to reach agreement. By comparison to a judgment of court, an agreement reached through negotiation is non-binding. Normally when the issues are complex, the negotiated agreement is reduced to writing and is consequently regarded as being contractually binding.

In negotiation, the emphasis is on the disputants' relationship and not on the development of consistent legal rules, as is the case in litigation. The purpose of the agreement is therefore to regulate the future relationship between the disputants based on respect for their common interests rather than on the maintenance of their legal rights.

6.2.3 Mediation

Mediation is a private, voluntary and consensual process whereby two (or more) disputants agree to resolve their dispute through the intervention of a third party, a mediator, who should be impartial and accepted by both disputants.

Once again, an analysis of every element of the definition will better explain the nature of mediation.

(1) *Private, voluntary and consensual.* These elements are common to both the process of negotiation and the process of mediation, and thus the above information relating to negotiating about the elements applies equally to mediation, and should also be studied in relation to mediation.

Mediation has become such a popular process that in certain countries (eg the USA) it is included as a settlement process under the rules of court, and is known as "court-annexed mediation". So too, the rules of court sometimes authorise a court to order that the

disputants enter into mediation. This is called "court-ordered mediation". As yet, these two instances of mediation are not used in South Africa.

The matter goes even further. Certain statutes prescribe mediation as a settlement process. See, for instance, section 13 of the Restitution of Land Rights Act 22 of 1994 or section 18 of the National Environmental Management Act 107 of 1998 (which provides for conciliation discussed in 6.3.2 below).

In all these instances, mediation is imposed and therefore is no longer voluntary. However, the mediation remains consensual — an agreement cannot be imposed but remains dependent on the consent of the disputants.

Note that because a mediated agreement is dependent on the consent of both disputants, the outcome is non-binding and at the most can be enforced only through the law of contract.

(2) *Process.* Like negotiation, mediation is a process. The fact that mediation lacks the formalities of a process like litigation should not detract from the fact that mediation is still a process. In keeping with other forms of process, whether formal or informal, mediation is a process because it consists of a number of distinct and uniform stages.

Commentators identify up to 12 stages of mediation. Since it is not possible to cover all this detail for present purposes, only a basic outline of the mediation stages will be given. However, before doing so, it is necessary to understand that mediation is not a one-off event. The mediation process may stretch over a number of sessions or what may be called "mediation meetings". For instance, between four to five sessions are recommended in the case of divorce mediation.

The following are the basic stages of mediation:

(a) **the pre-mediation stage** when

- initial contact is made between the mediator and the disputants
- the mediator explains the process and its implications
- arrangements are made in regard to venue and costs
- rules for the mediation are discussed with a view to signing an agreement to mediate between the mediator and the disputants

(b) **the opening stage** when

- the mediation commences with the mediator's opening statement
- each disputant makes a statement on his or her view on the problem (sometimes called "story telling")
- the mediator responds by summarising and defining the issues for the disputants

(This stage concentrates on defining the problem.)

(c) **the middle stage** when

- through the mediator the disputants explore options for resolving the dispute on the basis of their mutual interests
- the mediator assists the disputants to test the reality of these various options — a process of prioritising by distinguishing between needs and wants
- possible solutions are negotiated between the disputants with the assistance of the mediator

(**Problem solving** is the main focus of this stage of the process.)

(d) the closing stage when

- final bargaining occurs especially in regard to practical arrangements
- decisions are recorded
- the mediator makes a closing statement and the process is terminated

(3) *Intervention by a third party (the mediator).* Like arbitration and litigation, mediation functions on the basis of the intervention of third party, in this instance, called the "mediator". The degree to which the mediator may intervene differentiates mediation from arbitration and litigation.

The mediator actually has a very limited role. Generally, the understanding is that the mediator controls the **process** of mediation; the disputants control the **content** and **outcome** of the mediation. This means that the mediator's main role is to **assist and guide** the disputants as they interact with each other during the various stages of the process

The disputants own the content of the mediation — they state their views on the dispute, give their own interpretation of the facts, explore possible solutions and negotiate with each other through the mediator. Moreover, the outcome of the mediation belongs to the disputants — the mediator may not impose a decision on the disputants

The role of the mediator is limited to control of the mediation process in order to assist and empower the disputants to achieve a lasting settlement of their dispute.

(4) *Impartial and accepted by both disputants.* Certain commentators require that the mediator should be **neutral**. There is no general agreement on this requirement. Neutrality seems to be an impossible standard in culturally diverse societies, of which South Africa is one. The best compromise is that the mediator should be **impartial and accepted** by both disputants.

"Impartial" means that the mediator should be fair and act without prejudice in regard to both disputants. For instance, a mediator might not be neutral when the rights or interests of an innocent third party (eg a minor child) could be affected by a decision made by the disputants. However, in these circumstances, the mediator should still remain impartial in regard to the control of the mediation process.

Yet another example might clarify the matter. A mediator appointed under the provisions of a statute cannot remain neutral in respect of the aims and objectives of the statute or even in regard to the interests of the state. However, this need not affect the impartiality of the mediator regarding the conduct of the mediation in a fair and unbiased manner.

"Impartiality" also refers to the manner in which the mediator controls the mediation process. In practice, this means that a mediator must be accepted by and be able to retain the trust of the disputants. Ultimately, the acceptability of the mediator depends on whether the disputants perceive him or her to be impartial.

Lastly, it should be noted that a mediator need not be a lawyer. Social workers, psychologists, ministers of religion, community workers or any other acceptable person who is trained as a mediator, may act as a mediator irrespective of educational qualifications. However what is important is that when acting as a mediator the person concerned must leave his or her personal or professional background behind, and act only as mediator. For instance, as a mediator, a lawyer should not impose legal standards on the

disputants, a social worker should not become therapeutically involved nor should a community worker allow personal animosities to affect the mediation. If this should happen there would be a breach of impartiality and the mediator would probably **lose the disputants' acceptance**.

6.2.4 Arbitration

Arbitration is a process whereby the disputants voluntarily and jointly ask a third party, the arbitrator, to hear both sides of the dispute and, thereafter, to make an award which the disputants undertake in advance to accept as final and binding.

In this case, we will not be analysing the elements of this definition but rather discussing it in broad terms.

The definition shows that there is more in common between arbitration and litigation than there is between negotiation and mediation. The reason is that negotiation and mediation are **consensual** processes whereas arbitration and litigation are **command** processes (see study unit 6.1.2 above for the meaning of these terms).

As in the case with litigation, in arbitration a decision in the form of an award is **imposed** on the disputants. In fact, under section 31 of the Arbitration Act 42 of 1965 an arbitral award can be made and enforced as an order of court. The outcome of both processes is a final and binding decision. However, unlike in the case of litigation, the arbitrator's competence to impose the award arises from the **consent of the disputants** to accept the award.

Furthermore, in the case of both litigation and arbitration, the method of decision making is by means of **adjudication**. This means that the adjudicator, whether a judicial official or arbitrator, makes a binding decision on the basis of the evidence and arguments both sides present. However, there is one fundamental difference between these two processes in this regard. Being binding in law, a judicial decision forms part of the precedent system — it binds not only the litigants but also third parties in the present and in the future. An arbitral award, however, is binding only on the disputants. In this respect, arbitration may be regarded as an adjudicative method of problem solving — **it addresses and resolves a problem by means of a final and binding decision that applies only to the disputants, and to no one else.**

The question that you should be asking yourself is why arbitration is regarded as a primary ADR process if it is a command process that has so much in common with litigation. The answer is that, like negotiation and mediation, arbitration allows a great deal of party control over the process. The disputants may

- **select** the arbitrator on the grounds of his or her relevant expertise
- **choose the rules of arbitration** that must be applied by the arbitrator
- **determine the issues** in their submission to arbitration
- **arrange matters** relating to the venue for the arbitration, the date for the hearing, as well as the payment of costs

By comparison to litigation, arbitration is therefore an extremely **flexible** process. This makes it possible to **adapt** the process of arbitration to suit the needs of different situations. See the processes derived from arbitration in 6.3 below.

Its inherent flexibility allows the application of the process of arbitration in diverse contexts, such as in the fields of commerce, industry, labour, land claims, and environmental matters. However, it should be noted that section 2 of the Arbitration Act of 1965 prohibits the arbitration

of matters relating to the status of a person. This therefore excludes the arbitration of matrimonial disputes and matters arising out of insolvency.

6.3 DERIVATIVE PROCESSES

6.3.1 Introduction

Due to the influence of ADR, the **form** of a primary process has been retained but its **function** has been has been adapted to suit specific circumstances. As a result different processes have been developed that are derived from a particular primary process.

6.3.2 Derivatives of mediation

The processes described below can be traced to the primary process of mediation. Notice the extent to which each of these derivative processes shares the characteristics of the process of mediation.

(a) *Conciliation.* The distinction between mediation and conciliation is not always clear. Conciliation refers to a form of mediation, with the difference being that the third-party intervenor (now called the "conciliator") takes a more directive approach during the mediation and may make a recommendation in regard to the outcome. What does this mean?

A mediator also has a directive function but it is restricted to guiding and assisting the disputants in their negotiations. However, a conciliator may go further and actually **advise the disputants** during their negotiations in the hope that this advice will lead to a settlement.

Furthermore, unlike the mediator who does not interfere in the outcome of the mediation, the conciliator may finalise the process by giving a **non-binding recommendation** which it is hoped will persuade the disputants to settle their dispute. For this reason, conciliation is sometimes called "advisory mediation".

(b) *Facilitation.* In this instance, the third-party intervenor is called a "facilitator". Even more so than in the case of conciliation, the dividing line between mediation and facilitation is very thin.

Facilitation can be used in situations where reaching an agreement is not necessary. For instance, at a workshop, conference or meeting, a facilitator could assist the parties in communicating with each other.

Facilitation is extremely well suited to **creative problem solving rather than specifically settling disputes**. For example, a facilitator might be called to assist the parties to define and prioritise their future planning or to help parties to develop processes and structures within an organisation, especially when there is a great deal of conflict within the organisation.

Facilitation is also used in group dynamics as a means of assisting the group and individuals within a group to come to certain personal realisations.

Facilitation is therefore more flexible, less structured and has more potential uses than mediation.

6.3.3 Derivatives of arbitration

In the case of the following derivatives of arbitration, the form of arbitration remains the same but the function has been adapted.

The following are derivatives of arbitration

(a) *Expedited arbitration.* Conventional (or full) arbitration is very formal and conducted in much the same manner as litigation. In order to overcome this problem, here the rules of arbitration have been **simplified in order to avoid delays and to speed up the hearing**. This is sometimes called "fast track arbitration".

The pace of the process of arbitration may be speeded up (expedited) by, for instance

- doing away with (waiving) certain formal rules of evidence
- shortening the periods within which documents must be exchanged
- giving the arbitrator an active rather than a passive role at the hearing

These are only some of the options that may be used to shorten the process.

(b) *Documents-only arbitration.* This type of arbitration is conducted purely on the basis of the documents submitted by each disputant to the arbitrator, **without the need for an arbitral hearing**.

This occurs when there is little or no dispute on the basic facts and the dispute relates to a matter of interpretation of a contract or where certain conclusions need to be drawn from the facts.

(c) *Quality arbitration.* This is a derivative of arbitration that is used in very limited circumstances. It is discussed because it is so unique and is also an extreme example of a derivative process.

Quality arbitration is also known as "look-sniff" or "taste-look" arbitration. It occurs in the major commodity centers of the world (especially London) where an expert is requested by the disputants to give a binding decision in regard to the type or quality of a certain product, such as the quality of coffee beans or whether olive oil has been adulterated (is pure). By smelling, tasting or looking, the expert is able to make an accurate determination to which the disputants are bound.

Quality arbitration is a unique derivative because **the presentation and testing of evidence** as well as an **arbitral hearing** are **dispensed with** — the arbitral decision is based solely on the credibility, experience and expertise of the arbitrator.

(d) *Final-offer arbitration.* Final-offer arbitration has a number of other names. It is also known as "pendulum" or "flip-flop" arbitration in the United Kingdom, and in the United States, it is sometimes called "baseball" arbitration since this process is mainly used to revise the annual fees of professional baseball players.

In the case of final-offer arbitration, **the arbitrator's competence to decide the matter is modified**. The arbitrator may make an award only on the basis of the **most reasonable** of the last offers made by each disputant. The arbitrator may not choose a middle path but must **choose only one of the offers**.

Here is an example: A professional soccer player claims an annual fee of R500 000 but the

club is only willing to offer R200 000. Experts in the field set the reasonable fee at R300 000. Normally an arbitrator would make an award close to the reasonable amount of R300 000. However, in the case of final-offer arbitration, the arbitrator may not award R300 000 but must award either of the two amounts offered by the parties, that is, R500 000 or R200 000, whichever is **the most reasonable**. A disputant would therefore moderate his or her final offer to ensure that it is reasonable. In our example, the arbitrator would most probably award R200 000 and reject R500 000 as being excessive. Had the player's final offer been R350 000, it is likely that the award would have been given in the player's favour since it is closer to the average reasonable sum of R300 000.

The purpose of final-offer arbitration is to **discourage excessive demands** on the part of both parties. A disadvantage is that an arbitrator might be compelled to choose between one of two offers, no matter how absurd or irrational each one is.

6.4 HYBRID PROCESSES

6.4.1 Introduction

Although the primary processes of negotiation, mediation and arbitration have been borrowed by ADR, hybrid processes are **original to ADR**. Because, within the system of ADR, the primary processes have proved to be so flexible it has been possible to **combine** elements of one primary process with elements of another process to **form a totally new process**, known as **a hybrid process**.

There are quite a number of hybrid processes. Very few are known in South Africa and even fewer are used in this country. We have chosen to illustrate this important development in ADR by discussing two hybrid processes known as the "mini-trial" and "Med/Arb and Arb/Med" because both these processes are discussed in the South African literature. Moreover, Med/Arb and Arb/Med is practised in South Africa, particularly in the field of labour disputes.

6.4.2 The mini-trial

The mini-trial consists mainly of a combination of the processes of litigation and negotiation.

Stated briefly, the mini-trial imitates the trial procedure as a means of communicating information that eventually forms the basis for a negotiated settlement. This brief description indicates that the mini-trial is conducted in two stages: an **exchange of information** conducted in the manner of an abbreviated (shortened) trial and **settlement negotiations**.

The purpose of the mini-trial is to settle legal disputes between companies, especially when the claim involved is very high. **A legal problem** is translated into **business terms** by means of a mini-trial.

A **neutral advisor** supervises the process. It is essential that the **senior executives** of both companies should attend both stages of the process and that they should have the **authority to settle** the issues on the basis of negotiation.

During the information exchange stage, legal counsel for each side gives an **abbreviated version of each party's "best case"**. Minimum procedural standards are required and each side is given a limited period of time to present its "best case". The neutral advisor controls this stage of the

procedure. The exchange of information is for the benefit of the senior company executives who must be present.

When this stage is completed, the senior company executives meet privately and in good faith, in order to settle the issues on the basis information they have obtained during the first stage.

If they are unable to negotiate a settlement, the neutral advisor must then give an advisory opinion on the merits of the case. The senior company executives meet a second time in an effort to settle the matter on the basis of the advisory opinion. If a settlement cannot be reached, the process is terminated or each party may submit written offers to settle, which in turn form the basis for the neutral advisor to mediate a settlement.

In essence, the mini-trial is a highly sophisticated form of negotiation that is supported by the precision with which the trial procedure determines facts. The process is therefore fast, effective and far cheaper than protracted litigation.

6.4.3 Med/Arb and Arb/Med

a Introduction

Med/Arb is an abbreviation for a process known as Mediation/Arbitration and similarly, Arb/Med is a reference to Arbitration/Mediation.

Initially it might seem that two primary processes are used in sequence but independently. This is not the case. Both primary processes are linked into a single process through the intervention of the **same** third-party intervenor who controls **both** processes, irrespective of their sequence. In other words, the mediator becomes the arbitrator for the purposes of Med/Arb and vice versa in the case of Arb/Med. The result is a **single and continuous** process and **not two separate processes**.

Two primary processes are combined into a single and independent process. The intervenor is no longer a mediator nor an arbitrator but actually a **mediator/arbitrator** or **arbitrator/mediator**, as the case may be.

b Med/Arb

Med/Arb has a definite psychological effect on the disputants. They enter into the mediation first, knowing that if they **do not settle their differences**, the mediation will be **converted into arbitration** in terms of which a decision will be imposed on them. Consequently, the threat of future arbitration impacts on the initial stage of mediation, thereby encouraging a mediated settlement. Another important advantage is that the disputants enter the mediation in an extremely **thorough state of preparedness** in anticipation of the arbitration that might follow if they do not settle. Both disputants therefore fully understand the weaknesses and strengths of their respective cases, which is unusual in regard to a normal mediation. The state of preparedness of both disputants is also an incentive for settlement during the mediation stage of the process.

However, Med/Arb has one major disadvantage — the mediator also acts as the arbitrator. The question is whether the mediator/arbitrator (now acting as an arbitrator), is capable of applying the natural rules of justice to the arbitration. As the former mediator in the matter, the mediator/arbitrator now has intimate knowledge of the merits of both parties' cases, including very confidential information that a disputant might have disclosed privately to the him or her during the mediation but would never have disclosed for the purposes of arbitration. For instance, a

disputant might have made a private disclosure to the mediator/arbitrator during the mediation that he or she was willing to accept R140 000 in full and final settlement of a claim of R350 000 because of certain weaknesses in his or her case. An arbitral award approximating R140 000 (even though the case was worth approximately R240 000) would raise serious concerns about the fairness of the award. Med/Arb therefore always carries the risk that, for the purposes of the arbitration, the mediator/arbitrator might (even unconsciously) **introduce confidential information disclosed during the initial stage of mediation into the arbitral award**.

c Arb/Med

Arb/Med consists of three stages: the **arbitration stage** followed by the **mediation stage** and, if the matter is not settled, the **award stage**.

The **arbitration stage** consists of the normal procedure for arbitration. However, at the close of the cases for both parties (ie before closing arguments are raised), the arbitration is converted to mediation. During the **mediation stage**, a mediation committee is formed, consisting of the arbitrator/mediator, (now acting as mediator), and representatives from both sides. The task of the arbitrator/mediator is to assist and persuade both disputants to settle on the basis of the information and issues that become evident during the arbitration. If a settlement is not reached, the third stage commences. During the **award stage**, a binding arbitral award finalises the process. The award normally reflects the agreement that the disputants should have reached during the mediation stage.

Arb/Med does not suffer from the serious defects of Med/Arb. It has a number of very distinct advantages.

Firstly, the issues that the disputants would have raised at an independent (normal) mediation **are tested in evidence** during the arbitration. When the mediation stage of Arb/Med commences, the disputants are therefore fully aware of the strengths and weaknesses of their respective cases.

Moreover, during the mediation stage, the disputants are able to **influence the process** in that they are able to debate and negotiate the issues with the arbitrator/mediator. In addition, the disputants also have the advantage of negotiating with each other (through the arbitrator/ mediator) an agreement based on what they would like to have in the arbitral award.

By comparison to an independent mediation, the third stage of Arb/Med (the award stage that commences if the parties do not settle during the mediation stage) ensures that the process ends with a **final and binding decision**.

6.5 CRITICAL EVALUATION

6.5.1 ADR: appropriate dispute resolution

Through the process of litigation, the courts play an important role in dispute resolution. However, litigation is **only one method for resolving a dispute**. By its very nature, litigation is formal, prone to delay, extremely costly and concentrates on rights rather than the personal interests of litigants. However, as a method of dispute resolution, litigation has the advantage of establishing **legal certainty** on the basis of **rights** by means of a **binding decision** that is **enforced** through the **sanction of the state**.

The emergence of the system of ADR has shown that there are other dispute resolution

processes that might be more appropriate than litigation. A problem in regard to dispute resolution through the court system is that litigation is the only process that is used to determine all civil disputes, ranging from divorce to commercial disputes, from patent claims to the interpretation of contracts, and from upholding the best interests of a child to determining compensation for damages.

In contrast, under the system of ADR, there are many processes from which to choose the most appropriate one to **meet the needs of a particular type of dispute**. ADR therefore offers the option of selecting an informal and private process as an alternative to the official state-sponsored process of dispute resolution, which is litigation. Litigation becomes one of many processes that may be selected as the **appropriate** method for resolving a particular dispute. Perhaps, ADR should have stood for "appropriate dispute resolution"!

When assessing the positive characteristics and weaknesses of the system of ADR, the process of litigation is used as the basis of comparison. In this context, the process of litigation may be described as the mainstream model. ADR processes are posed as **alternatives to the mainstream model**.

6.5.2 ADR: positive characteristics

There are a number of distinct advantages in choosing an informal ADR process rather than selecting litigation as a formal process for dispute resolution.

- ADR processes have the effect of translating a legal dispute into a frame of reference that expresses the personal needs of the disputants. This has the result of converting a **rights-based dispute** into an **interest-based problem**. ADR processes enable the disputants to "own" the process of dispute resolution: they select the appropriate process, define the issues in dispute, establish standards for its resolution and take responsibility for the outcome.
- Furthermore, ADR processes are **private**. This allows the disputants to settle their differences without having to divulge personal or confidential information, which would happen in a public trial. The only exception to this is in the case of court-ordered or court-annexed mediation or arbitration (see 7.2.3 above).
- ADR processes mainly address the **interests** of the disputants and therefore avoid aggressive bargaining about legal rights.
- The purpose of ADR processes is to achieve a **mutually beneficial settlement** based on the agreement of the disputants. This is particularly true in regard to consensual processes, such as negotiation, mediation, facilitation, the mini-trial and Arb/Med. The object of these processes is to reach agreements of integrity that the parties will uphold because the agreements serve their various interests. The presumption is that parties will take responsibility for their agreements and respect them. This should lead to a higher level of **voluntary compliance** than is the case with compulsory court orders that litigants often resist.

  In the case of arbitration and arbitration-based processes (such as expedited arbitration, documents-only arbitration, final-offer arbitration and Med/Arb), the final and binding arbitral award is founded on the disputants' agreement to be bound thereby.

- The process of litigation focuses on **past wrongs** and is based on the attribution of blame. In contrast, ADR processes concentrate on problem solving directed at the **future relationship** of the parties. ADR processes are therefore extremely suited to resolving disputes in

situations where the disputants will be in a continuing or long-term relationship with each other (eg company directors or a divorced couple).

- Particularly when litigation seems to be the only method of resolving a dispute, ADR processes provides efficient methods for settling these issues out of court. If an out-of-court settlement is achieved, this means a **cost saving** to both the parties and the state. The parties save on the costs of litigation as a result of the quick and efficient resolution of the dispute, while the saving of court time and the reduction in court administration benefit the state.

6.5.3 ADR: weaknesses

No matter how attractive certain ADR processes might seem, it should be realised that the process of litigation still has a number of important advantages over the system of ADR.

- ADR processes **do not guarantee** the procedural rights of litigants. Because ADR processes settle disputes informally, the disputants may place themselves beyond the protection afforded to litigants.

  Moreover, court proceedings are on record. On the basis of this same record, a litigant may later turn to court for further relief (eg taking the matter on appeal) without having to prove again the issues already on the record.

- Another consideration is that the decision of a court is **binding and enforced** through the state by means of execution procedures. At most, with the exception of arbitration or arbitration-based processes, decisions reached by other ADR processes are only contractually binding. It is therefore left to the maturity and goodwill of the parties to comply with their agreement.
- When the process of litigation is used, **access to court** and **court time** are, in principle, free. This is not the case with ADR. The third-party intervenor must be paid as must be other related expenses. Apart from arbitration or arbitration-based processes, ADR processes do not guarantee a final and binding resolution of a dispute. If a settlement is not reached, the costs of an informal process will have to be added to the eventual costs of litigation.

ACTIVITY

Read the factual situation set out at the beginning of this study unit. Now answer the following questions:

(1) The three primary processes are: ....., ... and .....

(2) Fill in the missing words.

(a) Negotiation, as a method of dispute resolution, is a ....., ... and ..... process whereby two (or more) disputants seek to resolve their differences ..... by means of an ..... that governs their future .....

(b) Mediation is a ....., ... and ..... process whereby two (or more) disputants ..... to resolve their dispute through the ..... of a third party, the ....., who should be ..... and ..... by both disputants.

(c) Arbitration is a ..... in which the disputants ..... and jointly ask a third party, the ....., to ..... both sides of the dispute and, thereafter, to make

an ..... which the disputants ..... to accept as ..... and ..... .

(3) Explain why negotiation is a process.

(4) Why is negotiation a bilateral process?

(5) Would you advise your friend to break the deadlock by re-opening the negotiations?

(6) You inform your friend that the process of mediation is conducted in identifiable stages. Draw a diagram that explains the stages of the mediation process.

(7) Do you think that a mediator should be neutral or, if not neutral, then impartial?

(8) Clarify the basic differences between mediation, facilitation and conciliation.

Mediation

Facilitation

Conciliation

(9) Your friend is not sure whether he should use the process of arbitration or litigation. Briefly state the similarities and differences between arbitration and litigation.

(10) Expedited arbitration, documents-only arbitration, quality arbitration and final-offer arbitration are derivatives of the model of conventional (or full) arbitration. State the extent to which each of these processes deviates from the model of full arbitration.

Expedited arbitration

Documents-only arbitration

Quality arbitration _____

Final-offer arbitration _____

(11) The mini-trial is conducted in two distinct stages. Draw two columns and briefly set out the activities that occur during each stage.

(12) Do Med/Arb and Arb/Med consist of two separate primary processes or does each represent a single, independent and continuous process? Give reasons for your answer.

(13) State and explain the three stages of Arb/Med.

(14) Write a critical essay on whether you believe ADR processes should be used as alternatives to the process of litigation.

FEEDBACK

(1) The three primary processes are negotiation, mediation and arbitration (see 6.2.1).
(2) See the definitions contained in 6.2.2, 6.2.3 and 6.2.4.

(a) Negotiation, as a method of dispute resolution, is a **private, voluntary** and **consensual** process whereby two (or more) disputants seek to resolve their differences **personally** by means of an **agreement** that governs their future **relationship**.

(b) Mediation is a **private, voluntary** and **consensual** process whereby two (or more) disputants **agree** to resolve their dispute through the **intervention** of a third party, the **mediator**, who should be **impartial** and **accepted** by both disputants.

(c) Arbitration is a **process** in which the disputants **voluntarily** and **jointly** ask a third party, the **arbitrator**, to **hear** both sides of the dispute and, thereafter, to make an **award** which the disputants **undertake in advance** to accept as **final** and **binding**.

(3) Negotiation is not a casual event. It is a process because it starts at a certain point in time and ends conclusively, either in an agreement or failure to agree.

Between these two points in time, all negotiations follow uniform and stylised stages. See 6.2.2 for the description of these stages.

Every negotiation must go through these stages. If not, then some other process or method of communication is being used.

(4) The obvious answer to the question is that negotiation is a bilateral process because two parties are involved.

However, this answer is not enough because the bilateral nature of negotiation is emphasised by the fact that no third-party intervenor is involved in the process. The negotiators therefore take full responsibility for the process, content and outcome of their dispute (see 6.2.2).

(5) There is no single correct answer to this question. However, the answers to the following questions should be taken into consideration:

- Are the negotiations in deadlock because the disputants are unable to control the process?
- If it is established that the disputants are unable to control the process of negotiation, could these negotiations continue through the intervention of a mediator?
- If neither negotiation nor mediation are suitable options, is this because the dispute can be resolved only by means of the process of arbitration that gives a final and binding decision?

(6) You will find the necessary information to draw the diagram in 6.2.3. There are many ways in which the process of mediation can be represented. The diagram below is only one such representation.

START UP	**Pre-mediation stage** • Initial contact with mediator • Mediation process explained • Physical arrangements eg venue, time, cost
PROBLEM DEFINITION	**Opening stage** • Mediator's opening statement • Story telling • Summarising and defining issues
PROBLEM SOLVING	**Middle stage** • Exploring options • Test reality of options • Distinguishing needs and wants • Negotiation of possible solutions
END PLAY	**Closing stage** • Final bargaining • Agreements recorded • Mediator's closing statement • Termination of the process

(7) There is no definite answer to this question. There is still disagreement on this issue amongst textbook writers. When formulating your answer you should consider the following:

- Is absolute neutrality possible at all?
- Is it fair to expect neutrality from a mediator in a culturally diverse society such as South Africa?
- Surely impartiality on the part of a mediator is a more realistic expectation?
- Does impartiality ensure the fair and unbiased control of the mediation process by the mediator?
- Does mediator acceptance by the disputants ensure the mediator's impartiality?

Study 6.2.3 in this regard which contains sufficient information to assist you in answering the question.

(8) Mediation: A mediator's function is restricted to controlling the mediation process without becoming directly involved in the content and outcome of the negotiations between the disputants.

Facilitation: This process has a broader application and is more flexible than mediation. The facilitator's role is directed at problem solving on an individual or group level, rather than at dealing specifically with a dispute.

Conciliation: A conciliator participates more directly in the interaction between the disputants by advising them during their negotiations and may give a non-binding recommendation at the end of the process.

Study 6.3.2.

(9) Similarities between arbitration and litigation:

- Arbitration and litigation are both command processes.
- In the case of both processes, decision making is by means of adjudication.
- Both processes produce a final and binding decision.
- If an arbitral award is made an order of court, it can be enforced in the same manner as a judicial decision under the provisions of section 31 of the Arbitration Act of 1965.

Differences between arbitration and litigation:

- An arbitral decision is binding only on the disputants involved; a judicial decision forms part of the precedent system and is therefore binding not only on the litigants but on all other third parties.
- Arbitration permits the disputants more control over the process than in the case of litigation.
- Arbitration is a far more flexible process than litigation.

Study 6.2.4.

(10) Expedited arbitration: Conducted in the same manner as full arbitration except that the rules of arbitration are simplified in order to speed up the process.

Documents-only arbitration: The arbitration is based only on the documents that are submitted by both disputants, which in these circumstances dispense with the arbitral hearing.

Quality arbitration: Relies on the arbitral decision only and dispenses with the presentation of any evidence as well as an arbitral hearing.

Final-offer arbitration: Restricts an arbitrator's competence to make an award freely since the award is limited to the most reasonable of two final offers.

Study 6.3.3.

(11) Information exchange
- Each parties' "best case" presented
- Counsel given limited time to present "best case" for each disputant
- Minimum procedural standards applied
- Neutral advisor controls the process
- Company executives must be present

Settlement negotiations
- Senior executives meet privately
- Negotiate in good faith to settle the dispute
- Neutral advisor gives advisory opinion if executives cannot negotiate a settlement
  - Executives meet a second time to attempt a settlement on the basis of the advisory opinion
  - If settlement not reached, offers of settlement are submitted
  - These offers form basis for neutral advisor to attempt to mediate a settlement
  - If the mediation fails, the process is finally terminated

Study 6.4.3.

(12) It might seem that Med/Arb and Arb/Med apply mediation or arbitration independently. However, both Med/Arb and Arb/Med are independent, continuous and individual processes because each combines the primary processes of mediation and arbitration into a single hybrid process. A hybrid process is formed when the role of the mediator or arbitrator is changed into that of a mediator/arbitrator or arbitrator/mediator, depending on the process that is applied.

Study 6.4.3.

(13) Stage 1 The normal arbitration procedure is conducted up until the close of the cases for both disputants.

Stage 2 A mediation committee is formed. The arbitrator/mediator now assists in the negotiations between the disputants and attempts to persuade them to settle the matter

Stage 3 If a settlement is not reached, the arbitrator/mediator then terminates the process by submitting a final and binding award.

Study 6.4.3.

(14) There is no direct answer to this question. You were asked to express your personal opinion. For initial guidance, study 6.5. After doing this, look at the rest of this study unit to come up with some other opinions. Having done this, scan the other study units in Part 1 and Part 2 in order to place your thoughts in the context of Civil Procedure as a whole.

If you are particularly interested in this topic, you could keep a notebook containing references to ADR processes or methods that you come across while you continue with your studies. Also keep a scrapbook for newspaper and other cuttings. Look out for articles dealing with topics, such as the community courts and family courts (a pilot project is being conducted in the Johannesburg area) which use ADR processes, especially mediation.

The purpose of this question was to heighten your awareness of and critical thinking on ADR processes, particularly when used in conjunction with the court system.

STUDY UNIT

7

SMALL CLAIMS COURTS

One evening you visit the small claims court in your hometown. Your first reaction is that of surprise. There are no lawyers in the courtroom. The judicial officer, known as a commissioner, dominates the proceedings. What is most noticeable is that the commissioner is actively involved in the proceedings: he leads evidence by examining, cross-examining and re-examining both the plaintiff and defendant. As you listen to the evidence being led by the commissioner, you note that the strict rules of evidence are not being applied. For instance, at one point in the proceedings, hearsay evidence is admitted.

What is also interesting is that both litigants conduct their own cases with the assistance of the commissioner. In fact, in comparison with a judge, the commissioner is extremely approachable. From the bench, the commissioner speaks to either the plaintiff or defendant and each responds accordingly.

Although the value of the claim is low, you become aware that some of the legal issues are sometimes extremely complex. This brings you to the realisation that a small claims court is a court of law but that its proceedings are very different to those in other courts of law.

OVERVIEW

LEARNING OUTCOMES

Once you have finished studying this study unit, you should understand

- the objects and purpose of the Small Claims Courts Act of 1984
- the differences between small claims courts and other courts
- who is entitled to appear in a small claims court
- jurisdictional matters
- the documents that are exchanged during the pre-trial stage
- the role of a commissioner for small claims
- matters relating to evidence
- the restriction in regard to appeals
- the grounds for review

COMPULSORY READING MATERIAL

Sections 3–4, 7, 12, 14–16, 22, 26–27, 29, 45–46 of the Small Claims Courts Act 61 of 1984

7.1 OBJECTIVES AND UNDERLYING PRINCIPLES

Small claims courts are regulated by the Small Claims Courts Act 61 of 1984. The Act came into operation in 1985 when the first small claims courts were established in South Africa.

Small claims courts were introduced in order to achieve the following objectives:

- make the administration of justice more accessible to all South Africans
- provide a forum for the settling of minor civil disputes
- remove time-consuming, formalistic and expensive procedures
- introduce informal and simplified procedures in order to reduce the cost of litigation and provide for the speedy determination of small claims
- further reduce the cost of litigation by prohibiting legal representatives from appearing in a small claims court
- establish a consumer-orientated court

The purpose of the Act is obviously to solve problems experienced by litigants in other existing courts. The purpose is therefore clear: extending the basis of every citizen's right to have access to justice. This is facilitated by

- self-representation by both plaintiff and defendant
- simplified pre-trial proceedings
- granting the commissioner an inquisitorial function

However, the fact that different and simplified procedures are applied does not give small claims courts inferior status. Small claims courts are part of the structures of the court system recognised in terms of section 166(e) of the Constitution of 1996. Small claims courts are courts of law; hence their judgments are binding and execution of judgment is enforced by the state.

Moreover, it also should not be assumed that small claims courts have inferior status to other courts because the value of the claims submitted is very low. The issues in law involved are not necessarily simple and uncomplicated. The contrary is very often true: complex issues of law may arise irrespective of the low value of claims.

The following shortcomings of small claims courts should be recognised:

- the very low jurisdictional limit restricts consumers to extremely minor claims (see 7.5 below)
- certain claims are totally excluded from the jurisdictional competence of a small claims court (see also 7.5 below)
- only natural persons may appear in a small claims court (see 7.4 below)
- review of proceedings is permitted but appeal is prohibited (see 7.8 below)

7.2 DIFFERENCES: SMALL CLAIMS COURTS AND OTHER COURTS

A comparison hereunder of the procedures followed in small claims courts with the equivalent procedures adopted in superior and magistrates' courts illustrates the methods used to make small claims courts more accessible and user-friendly than other courts.

- Representation of a litigant by a member of the legal profession is disallowed. The intention is to keep to a minimum any legal costs, which would otherwise be incurred. In order to facilitate (assist) self-representation by each of the litigants, pre-trial proceedings (see 7.6 below) are informal, the rules of evidence have been relaxed (see 7.7 below) and the role of the judicial officer (the commissioner) has been radically modified (see 7.7 below)
- Pre-trial formalities have been simplified and reduced to the barest essentials (see 7.6 on the exchange and service of documents). Once you have studied the system of pre-trial proceedings in the High Court and magistrates' courts, you will realise the extent to which proceedings in small claims courts have been simplified.
- Although the relationship between the litigants remains adversarial, the role of the judicial officer has changed. In other courts, the judicial officer has a passive role that requires him or her to listen to the evidence which the litigants present during the trial (see study unit 5.3 above). In contrast, in the small claims courts the commissioner plays an active role in assisting the litigants to present their cases at the trial (see 7.7 below).

7.3 ESTABLISHMENT AND NATURE

The Minister of Justice may by, notice in the *Government Gazette*, establish small claims courts in any district or part of a district of a magistrate's court (s 2).

The officer presiding in a small claims court is called the "commissioner for small claims", and is appointed by the Minister (ss 8 and 9(1)).

A small claims court is not a court of record. In other words, the proceedings during a trial are not put into writing. However, there is one exception: the commissioner must record his or her judgment or order and sign it (s 3(1)–(2)). All other courts are courts of record.

Like all other courts, the proceedings in a small claims court must take place in an open court, except in extraordinary circumstances (s 4). In other words, a small claims court is open to any

member of the public to attend its proceedings. Finally, the process of small claims courts is effective throughout the Republic (s 3(4)).

7.4 RIGHT OF APPEARANCE

Only natural persons are allowed to commence an action in small claims courts. The implication is that a juristic person may not commence action in a small claims court as a plaintiff. Examples of juristic persons are companies and close corporations. However, a juristic person may become a party to an action as a defendant (see s 7(1)). This restriction severely limits the right of a juristic person to appear in a small claims court. However, it should be remembered that this restriction maintains small claims courts as consumer courts which would probably otherwise be used by juristic persons to collect small debts, thereby defeating the intention and purpose of small claims courts.

Litigants must appear in person before small claims court and may not be represented by any other person during the trial (s 7(2)). In effect, this means that legal representation in small claims courts is not allowed. The intention is to promote self-representation by the litigants.

However, it is important to consider the provisions of section 7(4), namely that a juristic person may be represented by its authorised officer or other officer. In practice, this means that as the defendant in an action, a juristic person could be represented by one of its in-house attorneys or legal advisors. This would obviously place the plaintiff, as an ordinary member of the public, at a disadvantage.

7.5 JURISDICTION

Jurisdiction is highly technical. It is therefore essential that you study the prescribed sections of the Small Claims Court Act of 1984 when requested to do so. These sections will be briefly explained below.

You should also be aware of the fact that the relevant sections of the Small Claims Courts Act of 1984 that deal with jurisdiction are **almost** identical to the corresponding provisions of the Magistrates' Courts Act of 1944. You are therefore advised to read through this part of the module (ie 7.5) and then study it in detail once you have studied the jurisdictional provisions that apply in the magistrates' courts. You are further advised to note specifically the extent to which jurisdiction in small claims courts **differs** from that in the magistrates' courts.

The area of jurisdiction of a small claims court is that area or district in respect of which it has been established (s 12).

Section 14 indicates the persons in respect of whom the small claims courts will exercise jurisdiction. The section coincides *verbatim* with section 28 of the Magistrates' Courts Act 32 of 1944, which deals with jurisdiction in respect of persons (see study unit 22 below).

The small claims courts' jurisdiction in respect of causes of action is regulated by section 15 of the Act, which is essentially similar to the provisions of section 29 of the Magistrates' Courts Act, 32 of 1944 (see study unit 21 below), except that the quantitative restrictions on all claims in small claims courts is R7 000. Section 16 stipulates which cases the small claims courts are not authorised to hear. All the causes of action contained in section 46 of the Magistrates' Courts Act, 32 of 1944 (see study unit 20 below), are repeated in this section. In addition, a few

other instances, in respect whereof these courts have no jurisdiction, are mentioned. These instances are to be found in section 16(f).

Sections 17–24 deal with various instances related to jurisdiction, namely incidental jurisdiction, abandonment, deduction of an admitted debt, splitting of claims, and cumulative jurisdiction. Here, section 22 may be mentioned specifically, since it provides that the small claims courts have no jurisdiction to hear a matter, which otherwise exceeds their jurisdiction, by virtue of the consent of the parties (see study unit 24.4 below in respect of consent to jurisdiction).

7.6 INSTITUTION OF ACTIONS

You must study section 29. What follows is a brief summary of these provisions.

In summary, the pre-trial stage is conducted as follows:

- A letter of demand is delivered to the defendant allowing 14 days from the date of receipt of the demand to satisfy the claim (s 29(1)(a)).
- If the defendant does not satisfy the claim set out in the letter of demand, summons must be issued out of a small claims court (s 29(2)).
- Before issuing the summons, the clerk of the small claims court must set a time and a date for the hearing, this information also being contained in the summons (s 29(2)).
- The summons is then served on the defendant. The litigants themselves may effect service. Contrary to the practice in other courts, service by the Deputy Sheriff is optional. The letter of demand may be served in the same manner (s 29(2)).
- No pleadings are required from the litigants. However, the defendant may at any time before the hearing, lodge with the Clerk of the court a written statement describing the nature of his or her defence as well as particulars of the grounds on which it is based. A copy of this statement must be supplied by the defendant to the plaintiff (s 29(3)).

7.7 PROCEDURE AND EVIDENCE

In general, the rules of the law of evidence do not apply in respect of proceedings in small claims courts. The commissioner has the discretion to establish any fact in a manner that is suitable under the given circumstances (s 26(1)).

Section 26(3) introduces the inquisitorial system, and provides as follows:

- A litigant may not question or cross-examine any other litigant to the proceedings in question or a witness called by the lastmentioned litigant
- but the commissioner must proceed inquisitorially in order to establish the relevant facts
- and in this regard he or she may question any litigant or witness at any stage of the proceedings
- provided that the commissioner may in his or her discretion allow any litigant to put a question to the other litigant or any witness.

As mentioned above, section 26(3) allows the commissioner to play an active role in the proceedings, which is unlike the passive role played by judicial officers presiding in other courts.

Evidence to prove or disprove any fact in issue may be submitted in writing, or oral evidence

may be heard (s 26(2)). In this regard, a litigant may call one or more witnesses to prove his or her claim or defence (s 27(1)). However, the right of a litigant to call a witness does not affect the commissioner's power to decide that sufficient evidence has been adduced on which a decision can be made, and that no further evidence may be led.

7.8 APPEAL AND REVIEW

Section 45 clearly states that a judgment or order of small claims courts is final and that no appeal will lie against it. Therefore, no appeal is possible against a judgment or order of small claims courts. This is one of the major criticisms against small claims courts. However, it should be noted that small claims courts are not courts of record (see 7.3 above) and appeal is always on the record.

Although appeal is not permitted, proceedings may be reviewed in terms of section 46, but only on the following grounds:

- absence of jurisdiction
- the commissioner's interest in the action, or his or her bias, malice or corruption
- gross irregularity with regard to the proceedings.

7.9 INQUIRY INTO FINANCIAL POSITION

The Act also provides for speedy execution after judgment. The commissioner is obliged to ask the judgment debtor, after judgment has been given, whether he or she is able to comply with the judgment without delay. If the judgment debtor indicates that he or she is unable to do so, the court may conduct an enquiry into the financial position of such debtor.

After this enquiry, the court may make an order to pay the judgment debt in instalments. This procedure is similar to the section 65A procedure in a magistrate's court. However, the most important difference here is that, contrary to the section 65A procedure, the enquiry in the small claims courts takes place immediately after judgment and not, as in the case of the section 65A procedure, only after the lapse of 10 days during which the judgment debt remains unsatisfied.

7.10 ADDITIONAL INFORMATION

Proceedings in small claims courts have been dealt with very briefly. If you require further information, or if you wish to institute or defend a matter in a small claims court yourself, refer to the following: Strauss *You in the small claims court* 2 ed (1990).

ACTIVITY

(1) What are the objects of the Small Claims Courts Act of 1984?

_____

_____

_____

_____

_____

(2) Explain the fundamental differences between small claims courts and other courts.

(3) Write concise notes on the right of appearance in small claims courts.

(4) By comparison to the magistrates' courts, name the matters that have been excluded from the jurisdiction of small claims courts.

(5) Can litigants consent to jurisdiction in regard to any action exceeding the jurisdiction of small claims courts?

(6) Describe the pre-trial procedure in small claims courts.

(7) Explain the inquisitorial role of the commissioner for small claims.

FEEDBACK

(1) The objects of the Act are clearly stated in 7.1.
(2) The basic answer to this question is contained in 7.2. However, 7.2 contains a number of cross-references to other portions of the study unit. This additional information should also have been considered for the purposes of your answer.
(3) The answer is clearly stated in 7.4.
(4) Name the matters that are beyond the jurisdiction of small claims courts stated in section 16(f)(i)–(vi) and (g). The comparison is with section 46 of the Magistrates' Courts Act of 1944.
(5) No. See section 22.
(6) In order to answer this question it was necessary to study section 29. The provisions of section 29 are summarised in 7.6.
(7) The basic answer to the question is contained in section 26(3) read in conjunction with 7.7. For a complete answer it is necessary to include related information contained in other parts of the study unit.

PART III

Jurisdiction of the superior courts

STUDY UNIT

8

THE MEANING OF "JURISDICTION"

You are a candidate attorney in Johannesburg. Anna, a woman who lives in Durban, consults you and asks you to institute divorce proceedings against her husband Jake.

OVERVIEW

LEARNING OUTCOMES

After you have finished studying this study unit, you should:

- understand why one must determine which court can exercise jurisdiction prior to the start of litigation
- be able to distinguish the two aspects of jurisdiction
  - — the power of a court to hear a matter
  - — the power of a court to enforce its judgment

COMPULSORY READING MATERIAL

None

8.1 RELEVANCE OF JURISDICTION FOR CIVIL PROCEDURE

No single court exists in South Africa which has jurisdiction as court of first instance to hear all disputes instituted anywhere in the country. Before an action is instituted, it is therefore essential to ascertain which court is competent to hear the matter. There must be some link *(nexus)* between the court and the parties or the subject matter of the dispute, before a particular court will be vested with jurisdiction. In addition, such court must be able to give an effective judgment, that is, a judgment that can be enforced, before it will hear a matter. Issues relating to jurisdiction must therefore always be considered before aspects of procedure are considered. Once the correct court has been determined, jurisdiction is no longer an issue, since, provided that a court has jurisdiction when an action commences, it will not matter whether the original ground of jurisdiction has ceased to exist. However, failure to consider jurisdictional issues will have serious consequences, since if an action is instituted in a court which is not vested with jurisdiction, such court will refuse to hear the matter and a fresh action will have to be instituted in another court.

8.2 THE CONCEPT OF TERRITORIALITY

In 8.1 above, it was stated that no single court in the country has jurisdiction at first instance to hear any action arising anywhere in the country, and it is for this reason that care must be taken to ensure that the correct court is approached for relief.

In constitutional terms, South Africa is a unitary state. However, the organisation of the superior courts is closer to that of a federation, since various High Courts exist, each serving a specific geographical area. Each of these courts is largely independent of the other High Courts, and the decison of one court is not binding on other courts of a similar or lower status. This territorial independence of the various High Courts causes jurisdictional problems.

In other unitary states, jurisdictional issues usually deal with whether a superior or lower court may hear a matter, or, where different superior courts exist to hear differing types of litigation (eg constitutional, commercial or matrimonial actions), it has to be decided whether the correct court has been chosen in the light of the type of claim concerned. In South Africa, each High Court has original jurisdiction over all causes arising in its territorial area. Thus, once a decision has been taken on the issues mentioned above, and it has been determined that a High Court should hear a matter, the jurisdictional problem concerning which of the various courts is competent to hear it, must also be addressed. It is for this reason that jurisdictional issues are so important in South African civil procedure. This topic will be dealt with more fully in the next study unit, which explains the structure of the superior court system.

8.3 DEFINITION OF JURISDICTION

8.3.1 As regards civil procedure

A definition of the term "jurisdiction" in the context of civil procedure is given in Halsbury's *Laws of England* (4 ed, vol 10, 323):

> By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision.

In the decision of *Ewing McDonald & Co Ltd v M & M Products Co* 1991 (1) SA 252 (A), the court defined jurisdiction as follows:

> Jurisdiction ... means the power vested in a court to adjudicate upon, determine and dispose of a matter.

In both definitions, the following two requirements are emphasised:

(1) the court must have the authority to hear the matter
(2) the court must have the power to enforce its judgment

No court will exercise jurisdiction unless both these requirements are met. The first, namely the authority to hear a matter, requires the presence of some link or jurisdictional connecting factor *(nexus)* between the court and the parties or the cause of action. The Latin term for this is *ratio jurisdictionis* and you must refer to study unit 10.1 on terminology for a brief discussion of what constitutes a *ratio jurisdictionis*.

The second requirement, namely the power to enforce a judgment is derived from the doctrine of effectiveness. Refer to study unit 10.2 for a discussion of this concept.

8.3.2 As regards other branches of the law (read only)

The above definitions are acceptable in so far as civil procedural law is concerned. However, the term "jurisdiction" also has a technical meaning in the field of public international law. More specifically, the term "state jurisdiction" is used in this respect. In this context, "jurisdiction" refers to the competence of a state to legislate within the confines of its internationally recognised boundaries.

ACTIVITY

Read the set of facts at the beginning of this study unit and answer the questions which follow.

(1) What is one of the first matters you should consider before instituting a divorce on behalf of Anna?

_____
_____
_____
_____
_____

(2) Name a few problems that you foresee if this matter is not taken into account.

_____
_____
_____
_____

FEEDBACK

(1) An important consideration before instituting any action, is which court will have jurisdiction to hear the divorce. This entails determining not only the type of court in which such proceedings may be instituted (for example Constitutional Court, High Court, family court or magistrate's court), but also determining the specific court (for example Witwatersrand High Court or Natal High Court) within that type that is the most appropriate to hear the matter.

(2) (This answer does not appear in the study unit, but you should reach the same conclusion by merely thinking about the facts.) If you institute divorce proceedings in the wrong court, you will cause delay and additional expense. Usually, only one particular court will have jurisdiction to hear a matter, and should you institute proceedings in another court, it will refuse to hear the matter and require you to withdraw the proceedings and institute them in the correct court. You must be cautious if you are approached by a client who lives outside the jurisdictional area of the court in which you practise; it is then frequently the case that this court does not have jurisdiction to deal with this matter.

STUDY UNIT

9

THE STRUCTURE OF THE SUPERIOR COURT SYSTEM

Two law students, Jan and Susan, are studying the 1996 Constitution and argue about what matters the Constitutional Court may hear. Jan interprets section 167 as allowing persons to approach this court directly, while Susan says that section 167 means that this is a court of appeal, not of first instance.

OVERVIEW

LEARNING OUTCOMES

After you have finished studying this study unit, you should

- know what courts exist
- understand the function of each court
- understand the jurisdictional scope of each court

COMPULSORY READING

Sections 167(3)–(7), 168, 169 and 173, Constitution of the Republic of South Africa, 1996
Sections 6(2), 19, 21(1), Supreme Court Act 59 of 1959

9.1 THE VARIOUS COURTS

(1) **The Constitutional Court** — This court is the highest court of appeal in constitutional cases. It also acts as a court of first instance in respect of certain constitutional issues.
(2) **The Supreme Court of Appeal** — This used to be known as the Appellate Division of the Supreme Court.
(3) **High Courts** — These comprise the former provincial and local divisions of the Supreme Court and the various courts of the former states of Transkei, Bophuthatswana, Venda and Ciskei.

9.2 THE FUNCTIONS OF THE VARIOUS COURTS

9.2.1 The Constitutional Court

The Constitutional Court is situated in Johannesburg. A matter which comes before the Constitutional Court must be heard by at least eight judges. Its jurisdiction is set out in section 167(3)–(7) of the 1996 Constitution.

This Court has four functions:

(1) It is the highest court of **appeal** in respect of constitutional matters (s 167(3)).
(2) It is the only court which may hear disputes between organs of state at national or provincial level; hear certain applications by the legislature over the constitutionality of parliamentary and provincial bills and Acts; take decisions on whether parliament or the President has failed to comply with a constitutional duty, and certify provincial constitutions (s167(4)). As regards these matters, the Constitutional Court has **exclusive** jurisdiction.
(3) This court may, in **exceptional** circumstances, grant anyone **direct access** when it is in the interests of justice to do so (s 167(6)(a)).
(4) The final function of the Constitutional Court is to confirm orders made by other courts in which parliamentary or provincial legislation is declared invalid. Until the Constitutional Court confirms an order of invalidity, it has no force (s 167(5)).

This court can therefore function as either a court of first instance or as a court of appeal.

9.2.2 The Supreme Court of Appeal

The Supreme Court of Appeal is situated in Bloemfontein.

It functions only as a court of appeal and may never be approached directly. It hears appeals from the various High Courts.

This court may hear appeals on both constitutional and non-constitutional matters. As regards non-constitutional matters, it is the highest court of appeal and its decision is final. As regards appeals which it hears on constitutional matters, a further appeal may lie to the Constitutional Court.

9.2.3 High Courts

High Courts are situated in various major centres in South Africa.

They function as courts of first instance in respect of litigation where the amount concerned or the nature of the claim places the matter outside the jurisdiction of the magistrates' courts. They function as courts of appeal or review in respect of magistrates' courts decisions.

A full bench of a High Court is also a court of appeal in respect of the decision of a single judge of that court. (The Durban High Court and the South-East Cape High Court do not have appeal jurisdiction.)

A High Court may hear any matter which it is not prohibited from hearing by the Constitution or other legislation.

9.3 THE JURISDICTION OF THE VARIOUS COURTS

9.3.1 The Constitutional Court

The Constitutional Court is concerned only with constitutional matters. Its jurisdiction is set out in section 167 of the 1996 Constitution, which must be carefully studied.

Note the following:

Section 167(3): The Constitutional Court hears **only** constitutional matters. It has the final say on whether a matter is a constitutional matter or not.

Section 167(4): This section sets out the matters in respect of which the Constitutional Court has **exclusive** jurisdiction, that is which only the Constitutional Court may decide.

Section 167(5): Under the interim Constitution of 1993, only the Constitutional Court could decide on the constitutionality of legislation. Section 167(5) of the 1996 Constitution authorises the Supreme Court of Appeal and High Courts to make such decisions. However, if a superior court makes such a decision, it is of no force until it is confirmed by the Constitutional Court.

9.3.2 The Supreme Court of Appeal

The jurisdiction of this Court is set out in section 168(3). Study this section and also section 167(5) of the Constitution and section 21(1) of the Supreme Court Act 59 of 1959. Bear in mind that this Court may hear appeals in respect of both constitutional and non-constitutional matters, but is the **final** court of appeal in respect of non-constitutional matters. Leave to approach this Court is always required.

9.3.3 High Courts

The jurisdiction of these courts is set out in the following legislation, which must be studied carefully:

- Section 169 of the 1996 Constitution — this deals with the constitutional jurisdiction of these courts.
- Section 19(1)(a) of the Supreme Court Act 59 of 1959 — this section provides that every High Court may adjudicate on any cause arising within its territorial area of jurisdiction, except where exclusive jurisdiction has been vested in another court or tribunal. (The phrase "causes arising" has been interpreted by our courts to mean "legal proceedings duly arising", that is, proceedings in which the court has jurisdiction under common law. See also unit 11.2.) High Courts also have jurisdiction over all persons residing in their territorial area. (In terms of common law, a court also has jurisdiction over a person who is domiciled in its territorial area, even if that person is temporarily residing elsewhere.)
- Section 173 of the 1996 Constitution — this section refers to the jurisdiction that derives from common law and from the unwritten powers that the court possesses to exercise its judicial functions.
- Appeal jurisdiction in terms of section 19(1)(i)–(ii) and 20(1) of the Supreme Court Act 59 of 1959.

The result of the above legislation is that the High Courts are limited territorially only, that is their jurisdiction is confined to matters which arise within their area of jurisdiction and persons resident within that area. Within these limits, jurisdiction is exercised in accordance with common-law principles, except where statute provides otherwise.

ACTIVITY

Read the set of facts at the beginning of the study unit and answer the questions which follow.

(1) Are the statements of either Jan or Susan correct? Refer to the relevant legislation when giving an answer.

_____
_____
_____
_____

(2) What constitutional matters may the High Courts hear?

_____
_____
_____
_____

(3) What constitutional matters may the Supreme Court of Appeal hear?

_____
_____
_____
_____

FEEDBACK

(1) Both students (or neither) are correct. The Constitutional Court is a court of appeal as well as a court of first instance, depending on the type of matter it is hearing. Section 167(4) sets out the instances of exclusive jurisdiction, when the Constitutional Court will act as a court of first instance. Section 167(3) provides that it is the highest court of appeal in all constitutional matters. In addition, section 167(6)(a) provides that the Constitutional Court may be approached directly in exceptional circumstances, that is in instances other than those in which it has exclusive jurisdiction.

(2) You cannot answer this question without referring to the Constitution. High Courts may hear all constitutional matters except those detailed in section 167(4) which fall within the exclusive jurisdiction of the Constitutional Court, or those assigned to another court in terms of section 169(a)(ii).

(3) The Supreme Court of Appeal may hear appeals on constitutional matters from High Courts. However, it is possible to appeal against a decision of this court on a constitutional issue, to the Constitutional Court, although no further appeal is available on a non-constitutional issue.

STUDY UNIT

10

TERMINOLOGY

OVERVIEW

LEARNING OUTCOMES

After you have finished studying this study unit, you should

- understand the terms and phrases you will come across during your study of this course

COMPULSORY READING

Sections 1–3 Domicile Act 3 of 1992

10.1 LATIN TERMS

Actor sequitur forum rei

This Roman-law rule 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. Such rule is merely one of the accepted *rationes jurisdictionis* and, if another link with a court exists, need not be followed. If the *actor sequitur*

forum rei rule is followed to give jurisdiction to a court, such court is said to have jurisdiction *ratione domicilii.*

Dominus litis

More than one court may be able to exercise jurisdiction in the same action, if various *rationes jurisdictionis* exist in respect of different courts. In such an instance, the plaintiff may, as *dominus litis* (literally, "master of the suit"), choose in which of these courts which are vested with jurisdiction he wishes to institute the action.

Incola and peregrinus

Both these terms have come down to us from Roman law and will be encountered whenever jurisdiction is discussed. Originally, *peregrinus* meant a foreigner — that is, someone who was not Roman citizen. An *incola*, on the other hand, was a resident of a particular city or province of the Empire.

In South African law, however, they have special meanings:

(1) An *incola* is a person who is either domiciled or resident within a specific court's area of jurisdiction.
(2) A *peregrinus* is a person who is neither domiciled nor resident within that court's area of jurisdiction.

Note

(1) These two terms apply to each High Court as a separate entity, and not to South Africa as a whole. Thus, a person domiciled or resident in the area of the Durban High Court is regarded as a *peregrinus* of the Pretoria High Court.
(2) Citizenship of a country is not relevant when determining whether someone is an *incola* or a *peregrinus.* A person may be a citizen of a particular country without ever having been domiciled or resident there. Citizenship is therefore irrelevant for the purposes of jurisdiction.
(3) When dealing with the term *peregrinus,* a distinction is drawn between a person who does not live within the jurisdictional area of a specific court, but elsewhere in South Africa — a **local** peregrinus — and a person who lives outside South Africa — a **foreign** *peregrinus.* Different jurisdictional rules apply, depending on whether the defendant is a local or a foreign *peregrinus.*

Nexus

Nexus literally means link. In a jurisdictional context, it is the link or connection which gives a specific court jurisdiction over a particular person or cause of action.

Rationes jurisdictionis

The rules of jurisdiction provide that there must be some link *(nexus)* between the court's jurisdictional area and the defendant, or the facts from which the dispute arose. These links are called "jurisdictional connecting factors", or *rationes jurisdictionis.* The links accepted by our courts include domicile or residence of the defendant, commission of a delict, conclusion or breach of contract, submission (in certain instances), and the location of property where such property is the subject of the dispute.

One of these links, which exists only in respect of monetary claims, is discussed below.

Ratione rei gestae

Under common law, a court will be vested with jurisdiction in respect of monetary claims in the following instances:

(1) If the contract which is the subject of the litigation, was concluded, was to be performed or was breached within the court's area of jurisdiction, any of these grounds will be sufficient to vest a court with jurisdiction. A court is then said to be vested with jurisdiction *ratione contractus.*
(2) If the delict on which the claim is based was committed within a court's area of jurisdiction, a court is vested with jurisdiction *ratione delicti commissi.*

Collectively, the abovementioned two grounds are termed *ratione rei gestae.* Remember that a court is not limited to these two grounds — it may also be vested with jurisdiction on some other ground, for example *ratione domicilii.*

Ratione domicilii

Under common law, the court where the **defendant** is either domiciled or resident always has jurisdiction to hear a claim sounding in money.

Ratione rei sitae

This connecting factor is relevant only in respect of **property** claims. Under common law, the court where the property is situated is the only court which has jurisdiction to hear claims relating to such property.

10.2 LEGAL PHRASES

Attachment to found or confirm jurisdiction

The word "attachment" does not refer to the attachment of property for the purposes of safekeeping or of execution of a judgment. The word "attachment", in a jurisdictional context, refers to one of the grounds upon which a court justifies its exercise of jurisdiction in respect of monetary claims.

This term is relevant only when dealing with jurisdiction in respect of money claims where the defendant is a foreign *peregrinus.*

Note: Arrest to found or confirm jurisdiction has been held to be unconstitutional, see *Bid Industrial Holdings (Pty) Ltd v Strang* [2007] SCA 144 (RSA), unreported decision.

Claim sounding in money

This is a rather clumsy expression. It is, nevertheless, the standard term used to describe an action based upon a claim which seeks either the payment of money or the payment of money as an alternative to some other order, for example an order for specific performance.

If in doubt, consider the relief which the plaintiff seeks: if it is payment of money, the claim is one which sounds in money.

Doctrine of effectiveness

This is one of the common-law principles on which the exercise of jurisdiction is based. A court will not exercise jurisdiction unless it is able to give an effective judgment, in other words unless compliance with the judgment can be expected. Where a defendant resides in South Africa,

compliance can be enforced (if a party does not comply with a court order) by execution or contempt proceedings. Where a defendant resides outside South Africa, arrest or attachment to found or confirm jurisdiction is necessary in order to give the court some control over the defendant or his property. However, bear in mind that no court can ensure that a particular defendant will be in a position to comply fully with a court order — he may be financially incapable of doing so. The purpose of the doctrine of effectiveness is therefore merely to ensure that court proceedings are not completely futile from the start; it does not guarantee compliance with all judgments. This doctrine must not be seen in isolation, and it is frequently not followed because of other considerations.

Domicile

Domicile is acquired by lawful presence at a particular place with the intention of settling there for an indefinite period.

If the defendant is domiciled in the court's area, the court has jurisdiction **even if the defendant is not present in person in the area at that time.**

Reside

"Reside" has never been satisfactorily defined by our courts or in legislation. It is clear, however, that it amounts to more than mere physical presence in a place, while being less than domicile, in that there must be some element of intention to prolong the stay beyond the limit of a mere casual or temporary visit. In the old case of *Beedle & Co v Bowley* (1895) 12 SC 401 at 403 De Villiers CJ defined a person's residence as "his home, his place of abode, the place where he generally sleeps after the work of the day is done". This is as good a definition as any.

In *Ex parte Minister of Native Affairs* 1941 AD 53, the following principles were laid down:

(1) A distinction should be drawn between **place of residence** and *domicilium*. A person may be domiciled in one place and reside in another.
(2) A person may have more than one place of residence, in which case he or she should be sued in the jurisdictional area of the court in which he or she is residing **at the time of service of summons.**
(3) A person does not reside in a place which he or she visits only temporarily.

ACTIVITY

(1) Circle the correct word or words in the following sentences.

   (a) A **foreign/local** *peregrinus* is a person who is neither domiciled nor resident in South Africa.
   (b) The jurisdictional connecting factor *(nexus) ratione rei sitae* is relevant only in respect of **property/money** claims.
   (c) The jurisdictional connecting factor *(nexus) ratione domicilii* is relevant in respect of defendants who are **domiciled in/citizens of** South Africa.
   (d) A person may have **only one/more than one** place of residence.

(2) In your own words, describe briefly the doctrine of effectiveness.

_____

_____

_____
_____
_____

FEEDBACK

(1) The correct word or words in each sentence is/are as follows:

(a) A **foreign** *peregrinus* is a person who is neither domiciled nor resident in South Africa.
(b) The connecting factor *ratione rei sitae* is relevant only in respect of **property** claims.
(c) The connecting factor *ratione domicilii* is relevant in respect of defendants who are **domiciled in** South Africa.
(d) A person may have **more than one** place of residence.

(2) The doctrine of effectiveness is founded on the idea that a court should ensure that any judgment it gives is not merely theoretical but can be implemented against the unsuccessful party. A court must have some control over the person or property of a defendant before it can implement a judgment given against him. It is for this reason that a court requires a jurisdictional connecting factor between it and a defendant before it will assume jurisdiction.

STUDY UNIT

11

GENERAL OVERVIEW OF JURISDICTIONAL PRINCIPLES

Peter, who lives in Pretoria, owns a valuable stud bull, which is kept on his farm in Bloemfontein. He sells the bull to Tsepo, for an amount of R150 000. Tsepo pays the purchase price, but Peter refuses to deliver the bull.

OVERVIEW

LEARNING OUTCOMES

After you have finished studying this study unit, you should

- understand the different common-law principles described in the study unit
- understand how they are applied in current legal practice
- understand the interrelationship of the remaining study units in Part III

COMPULSORY READING

None

11.1 TYPES OF CLAIMS

In the following study units, we shall deal with claims sounding in money, property claims, matrimonial claims and claims based on constitutional matters.

It is essential, when studying these study units, to remember that different jurisdictional principles apply in respect of each type of claim, and that the principles which are relevant in respect of one type of claim cannot be applied when another type of claim is considered. Although the methods for determining the nature of claims for jurisdictional purposes have been the subject of legal debate since Roman times, for purposes of this course, we have classified claims as those dealing with money, property, status and constitutional matters.

11.2 RELATIONSHIP BETWEEN COMMON-LAW PRINCIPLES AND LEGISLATION

In study unit 9 above, in which the jurisdiction of the High Courts was dealt with, section 19(1) of the Supreme Court Act was discussed. Bear in mind what was said there: section 19(1)(a) has been interpreted as providing that common law still applies — unless specifically altered by legislation — when determining jurisdiction in the High Courts. It is for this reason that we often refer to common law when deciding whether or not a court has jurisdiction to hear a matter.

11.2.1 Claims sounding in money

Traditionally, the common-law principle which applied in respect of such claims was *actor sequitur forum rei.* Even in Roman times, however, this principle was not always followed. The principle of *ratione rei gestae* and the problems of litigating abroad have resulted in the situation where courts other than the court in which area the defendant is domiciled or resident, may also exercise jurisdiction.

11.2.2 Claims relating to property

Here the principle that the *forum rei sitae* is the only court which may exercise jurisdiction has remained relatively unchanged.

11.2.3 Matrimonial actions

In terms of the common-law principle which applied to divorce actions, the only competent court was that where the parties were domiciled. This principle has now been altered by statute.

11.2.4 Constitutional actions

Section 167(3) of the 1996 Constitution defines a constitutional matter as including any issue involving the interpretation, protection or enforcement of the Constitution, and provides that the final decision on whether or not a matter is a constitutional matter rests with the Constitutional Court.

ACTIVITY

Read the set of facts at the beginning of this study unit and answer the questions which follow.

(1) What type of claim is a claim for delivery of the bull?
(2) Which court will have jurisdiction if Tsepo institutes action for delivery of the bull?
(3) What type of claim is a claim for return of the purchase price?
(4) Which court will have jurisdiction if Tsepo institutes action for return of the purchase price?
(5) Write out the provisions of section 167(3)(c) of the Constitution of the Republic of South Africa, 1996.

_____
_____
_____
_____

(6) Write out the provisions of section 167(7) of the Constitution of the Republic of South Africa, 1996.

_____
_____
_____
_____

FEEDBACK

(1) A claim for return of the bull is a claim for the delivery of specific movable property.
(2) The *forum rei sitae*, which is the High Court in Bloemfontein, has jurisdiction.
(3) A claim for return of the purchase price is a claim sounding in money.
(4) The *forum domicilii*, which is the High Court in Pretoria, will have jurisdiction.
(5) & (6) Refer to the Constitution of 1996 to obtain the words of these sections.

STUDY UNIT

12

GENERAL PRINCIPLES OF JURISDICTION: CLAIMS SOUNDING IN MONEY

OVERVIEW

LEARNING OUTCOMES

After you have finished studying this study unit, you should

- understand how the next three study units are structured
- understand how they interrelate

COMPULSORY READING

None

12.1 GENERAL PRINCIPLES

In this study unit we shall deal with the basic principles which govern monetary claims. Study unit 11 gave you an overview of what we will deal with in study units 13 to 15, that is the specific details which determine jurisdiction in respect of money claims. You should refer back to study unit 11 when studying what follows in study units 13 to 15.

The essential question when determining jurisdiction in respect of monetary claims is: WHERE DOES THE DEFENDANT LIVE? Different rules apply, depending on whether a defendant lives in South Africa or outside the country.

In study unit 13 the principles which govern a defendant's domiciled or resident somewhere in

South Africa are discussed. Here you must bear in mind that the court(s) where such a defendant is resident or is domiciled, or where the cause of action arose, will all have jurisdiction to hear the action and no other requirement needs to be met. Also remember that section 28(1) provides that no defendant who is an *incola* of a South African court may have his property attached for jurisdictional purposes.

Study unit 14 sets out the principles which govern the situation where the defendant is domiciled or resident **outside** South Africa. Two courts may have jurisdiction; the court where the plaintiff is domiciled or resident, or the court where the cause of action arose. However, both courts will only be vested with jurisdiction if, **in addition**, attachment takes place within the borders of South Africa, that is, the defendant must be found and arrested, or his or her property attached, within the borders of South Africa.

Submission as a ground for jurisdiction is dealt with in study unit 15. Note, here, that court decisions have limited the scope of this basis for jurisdiction, and submission will only be accepted as a basis for jurisdiction where the defendant is a foreign *peregrinus* and the cause of action arose in the court's jurisdictional area. Submission then renders arrest or attachment unnecessary.

When studying study units 13–15, you must also refer back to study unit 10 on terminology for the meanings of the Latin terms and legal phrases.

ACTIVITY

Prepare a very brief schematic outline of the jurisdictional principles governing claims sounding in money, based on the information given in this study unit.

_____

_____

_____

_____

FEEDBACK

Any kind of schematic outline is suitable. What follows is a layout, in columns, of the contents of the study units dealing with money claims. Keep your own scheme handy for reference while working through study units 13 to 15.

DEFENDANT *INCOLA* OF COURT	DEFENDANT *PEREGRINUS* OF COURT BUT NOT OF SOUTH AFRICA	DEFENDANT *PEREGRINUS* OF SOUTH AFRICA
Court where defendant *incola* *or* Court where cause of action arose	Court where cause of action arose	Court where plaintiff *incola* + attachment *or* Court where cause of action arose + attachment *or* Court where cause of action arose + submission

STUDY UNIT

13

WHERE THE DEFENDANT IS AN *INCOLA* OF SOME SOUTH AFRICAN COURT

John lives in Durban. He comes to Johannesburg for a holiday. He does not know the city and while he is driving around looking for accommodation, he drives the wrong way up a one-way street. He hits Elias, a pedestrian, causing Elias serious bodily injuries. Elias wants to sue John for R250 000.

OVERVIEW

LEARNING OUTCOMES

After you have finished studying this study unit, you should

- understand that the court where the defendant is domiciled or resident will have jurisdiction over that defendant in respect of money claims
- understand that the court where the cause of action arose will have jurisdiction in respect of money claims provided that the defendant is an *incola* of some South African court
- understand the effect of section 28(1) of the Supreme Court Act 59 of 1959

COMPULSORY READING

Sections 19(1), 28(1) Supreme Court Act 59 of 1959

13.1 WHERE THE DEFENDANT IS AN *INCOLA* OF THE COURT CONCERNED

This ground of jurisdiction is known as *ratione domicilii*, and is based on the Roman-law maxim *actor sequitur forum rei*. A court has jurisdiction over a defendant who is an *incola* of its area at the time when the action is instituted. It is irrelevant whether the plaintiff is an *incola* or a *peregrinus*, or where the cause of action arose.

The only problems encountered with regard to this jurisdictional connecting factor are procedural ones. The rule states that a defendant must be domiciled or resident within the court's area of jurisdiction at the time the action is instituted. But when is the action instituted?

Pollak states that the action is instituted when the summons is issued and served. This view was confirmed in *Mills v Starwell Finance (Pty) Ltd* 1981 (3) SA 84 (N).

It is also important to bear in mind that, from a jurisdictional point of view, the defendant need not be physically present in the court's area of jurisdiction at the time when action is instituted. A person may be domiciled at a place where he is not currently resident, and such a court will still have jurisdiction *ratione domicilii*. It is also possible that a person will be working or on holiday outside the court's jurisdictional area at the time when action is instituted.

If a defendant is domiciled in the area of one court and resident in the area of another, both courts may exercise jurisdiction on the ground *ratione domicilii*.

13.2 WHERE THE DEFENDANT IS A *PEREGRINUS* OF THE COURT CONCERNED, BUT AN *INCOLA* OF ANOTHER COURT IN SOUTH AFRICA

When a defendant is a local *peregrinus* of the relevant court, this court may exercise jurisdiction only if the cause of action arose within its jurisdictional area. A "cause of action" comprises the facts which give rise to an enforceable claim. This ground of jurisdiction also derives from Roman-law principles and is known as *ratione rei gestae*. It is irrelevant whether the plaintiff is an *incola* or a local or foreign *peregrinus*. It is, however, essential that the defendant must be a **local**, not a **foreign**, *peregrinus*.

When does a cause of action arise within a court's jurisdictional area? All claims which are instituted are based on some cause of action. A cause of action usually arises either from a contract *(ex contractu)* or a delict *(ex delictu).*

In the following instances a court will be vested with jurisdiction because the cause of action arose within its jurisdictional area:

(1) Where the contract which is the subject of the litigation was concluded or breached within the court's area of jurisdiction, or where performance of the contract was intended to be effected within the court's area of jurisdiction. Any of these grounds will be sufficient to vest a court with jurisdiction. The court is then said to be vested with jurisdiction *ratione contractus.*
(2) Where the delict on which the claim is based was committed within a court's area of jurisdiction. In this instance, the court is vested with jurisdiction *ratione delicti commissi.*

No other requirement need be met before the court in whose area the cause of action arose may

exercise jurisdiction. In particular, it is not possible for jurisdiction to be confirmed or extended by attachment of the defendant, in contrast to the position of foreign *peregrini* defendants. This is because section 28(1) prohibits attachment, for jurisdictional purposes, of persons domiciled or resident anywhere in South Africa. The effect of section 28(1) is that, as regards local *peregrini*, attachment for the purpose of founding or confirming jurisdiction, is not only unnecessary but is prohibited. This has had both a broadening and a diminishing effect on the basis of a court's exercise of jurisdiction. It has broadened the basis of jurisdiction in that attachment has been rendered unnecessary, and jurisdiction can be assumed merely on the ground that the cause of action arose in the court's area of jurisdiction. On the other hand, the power of a court to exercise jurisdiction has been diminished because attachment is prohibited, and therefore a court cannot exercise jurisdiction on the ground of an attachment *ad fundandam jurisdictionem,* that is, attachment alone will not vest a court with jurisdiction.

ACTIVITY

Read the set of facts at the begnning of this study unit and answer the following questions:

(1) May Elias institute action against John in the Durban High Court? Give reasons for your answer.
(2) May Elias institute action against John in the Johannesburg High Court? Give reasons for your answer.
(3) Is it necessary, in the given set of facts, to know where Elias is domiciled or resident? Give reasons for your answer.
(4) If Elias institutes action in the Johannesburg High Court, what prevents him from having John's property attached to ensure that the court has jurisdiction?

FEEDBACK

(1) Elias may institute action against John in the Durban High Court because John is an *incola* of Durban and so this court has jurisdiction *ratione domicilii*.
(2) Elias may institute action against John in the Johannesburg High Court because the collision that caused Elias bodily injury (a delictual claim), took place in Johannesburg. For this reason the court has jurisdiction *ratione rei gestae*, because the cause of action arose in the court's jurisdictional area.
(3) It is not necessary to know where Elias is domiciled or resident because the plaintiff's situation is irrelevant for purposes of determining which court has jurisdiction, so long as the defendant is an *incola* of some South African court.
(4) Elias may not attach John's property because section 28(1) of the Supreme Court Act 59 of 1959 provides that, for the purposes of jurisdiction, the attachment of property of persons domiciled or resident in South Africa is prohibited. In other words, the property of a local *peregrinus* is not subject to attachment.

STUDY UNIT

14

WHERE THE DEFENDANT IS A *PEREGRINUS* OF ALL SOUTH AFRICAN COURTS

John, an American tourist, comes to Johannesburg for a holiday. He does not know the city and while he is driving around looking for accommodation, he drives the wrong way up a one-way street. He hits Elias, a pedestrian, causing Elias serious bodily injuries. Elias, who lives in Bloemfontein but is doing contract work in Johannesburg for two months, wants to sue John for R250 000.

OVERVIEW

LEARNING OUTCOMES

After you have finished studying this study unit, you should

- understand the concept of founding jurisdiction by attachment
- understand the concept of confirming jurisdiction by attachment
- understand the effect of sections 19(1)(c) and 26(1) of the Supreme Court Act 59 of 1959 regarding the place where attachment can take place
- be able to describe the procedure by which attachment takes place
- be in a position to determine yourself whether a court may exercise jurisdiction over a foreign *peregrinus*

COMPULSORY READING

Sections 19(1), 26(1) Supreme Court Act 59 of 1959

14.1 WHERE THE DEFENDANT IS A FOREIGN *PEREGRINUS* AND THE PLAINTIFF IS AN *INCOLA* OF THE COURT CONCERNED

In an instance where the defendant is a *peregrinus* of the whole of the Republic, a court will assume jurisdiction if the plaintiff is an *incola* of the court, and if attachment of the defendant's property has taken place. This is known as attachment *ad fundandam jurisdictionem*.

What is of cardinal importance in this respect, is that the order for attachment founds jurisdiction. It is not necessary that **the cause of action should have arisen within the court's area of jurisdiction**; attachment *ad fundandam jurisdictionem* **alone** founds jurisdiction and constitutes the ground on which the assumption of jurisdiction is justified. However, an order for 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 1887, in *Einwald v German West African Co* 1887(5) SC 86, the Cape Supreme Court held that attachment *ad fundandam jurisdictionem* was not permissible, and that the cause of action must have arisen in a court's area before it could adjudicate the matter. It was only in 1931 that the Cape Provincial Division, in *Halse v Warwick* 1931 CPD 233, reversed the decision in the *Einwald* case. In *Halse v Warwick,* the court approved of, 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 attachment *ad fundandam jurisdictionem* even though the cause of action arose outside the court's area of jurisdiction. However, the decision in the *Einwald* case still holds true in the following respect: attachment *ad fundandam jurisdictionem* is not permissible if the plaintiff is a *peregrinus.* This consideration of policy was again expressed by Watermeyer J in *Halse v. Warwick* as follows:

> In suits between *peregrini,* there may be very good reasons why our South African courts should not seek to extend their jurisdiction by an attachment, but in a suit by an *incola* against a *peregrinus* why should South African courts not come to the assistance of South African subjects and enable them to litigate at home ... ?

Seen in this perspective, our courts will not adjudicate an action between *peregrini* unless there is a sufficient *nexus* (connection) with the area of the court. Thus, the rule evolved that, in the case of attachment *ad fundandam jurisdictionem,* the plaintiff must be an *incola* of the court as well.

To summarise: Attachment to found jurisdiction is permissible where

- the defendant is a *peregrinus* of the whole Republic
- attachment of the defendant's property has taken place
- the plaintiff is an *incola* of the court concerned,

in an instance where the cause of action has arisen outside the court's area of jurisdiction.

NOTE: In order to avoid confusion, it should be noted that jurisdiction is not conferred on the ground that the plaintiff is an *incola* of the court. This is merely a requirement that developed as a matter of policy in order to assist a local plaintiff. This requirement should not be equated with the *ratione domicilii* (see study unit 13.1) in terms of which a court is vested with jurisdiction on account of the defendant being an *incola* of that court. In the case of attachment *ad fundandam jurisdictionem,* it is the attachment itself that vests jurisdiction and not the status of the plaintiff. The plaintiff's status is merely an additional requirement.

14.2 WHERE THE DEFENDANT IS A FOREIGN *PEREGRINUS* AND THE CAUSE OF ACTION AROSE WITHIN THE AREA OF THE COURT CONCERNED

Where a defendant is a *peregrinus* of the whole of the Republic, a court will be competent to exercise jurisdiction **if** the cause of action arose within its area of jurisdiction, **and if** attachment of the defendant's property has taken place within South Africa. This is known as attachment *ad confirmandam jurisdictionem;* in other words, the attachment **confirms** or strengthens the partial or imperfect jurisdiction which a court has by reason of the fact that the cause of action arose within its area of jurisdiction.

Stated differently: although a court has partial jurisdiction based on the fact that the cause of action arose within its area of jurisdiction (also referred to as *ratione rei gestae*), it will not be competent to exercise this jurisdiction unless attachment *ad confirmandam jurisdictionem* has taken place, because the defendant is a foreign *peregrinus*.

Where a court exercises jurisdiction based on attachment *ad confirmandam jurisdictionem,* the nature of the proceedings is irrelevant, provided that money is claimed (eg a debt or damages). The most common grounds are the *ratione contractus* and the *ratione delicti.*

It makes no difference to the above rules whether the plaintiff is an *incola* or *peregrinus* of the court concerned.

All the grounds for the cause of action based on the *ratione contractus* (see study unit 10.2) need not arise wholly within a court's jurisdictional area for that court to be vested with jurisdiction. It follows, therefore, that more than one court could exercise jurisdiction on this ground, provided that the necessary attachment can be effected.

14.3 ATTACHMENT UNDER THE PROVISIONS OF SECTION 19(1)(c) OF THE SUPREME COURT ACT 59 OF 1959

Please study section 19(1)(c).

Reduced to a single and clear statement, section 19(1)(c) provides that **attachment to found or to confirm jurisdiction may take place anywhere in the Republic.**

Stated differently: Attachment of a peregrine defendant's property need not take place within the

jurisdiction area of the court in which the action is instituted but may be affected within the jurisdictional area of any other court within the Republic in which the property is situated.

The significance of section 19(1)(c) can only be understood against its historical background. Until 1999, when section 19(1)(c) was inserted into the Supreme Court Act of 1959, at common law attachment of the property of a peregrine of the whole Republic had to take place within the jurisdictional area of the court in which the plaintiff instituted the action. If the property was situated in the Republic but in the jurisdictional area of a court other than the court in which the plaintiff wished to institute the action, then the plaintiff could not proceed with the action. In order to overcome this problem, section 19(1)(c) was enacted so as to waive the common law and enable a plaintiff to proceed with the action wherever the peregrine defendant's property was situated in the Republic, but outside the jurisdictional area of the court concerned.

14.4 PROCEDURAL ISSUES CONCERNING ATTACHMENT

It is important to determine the procedural stage at which an order for attachment may be sought. The attachment of the defendant's property precedes the commencement of the main action; in other words, before the main action, an application on notice of motion (see Module 2, study unit 5) is brought, requesting the attachment of the defendant's property. The **onus** is on the applicant (the plaintiff in the main action) to show that, *prima facie,* he or she has a cause of action. Because the application for an order for attachment is a separate issue which precedes the principal claim, it is decided separately and so the court will not go into the merits of the main action. If attachment is ordered, the defendant's property will be subject to attachment until judgment has been given in the main action — unless such defendant furnishes security for the value of the claim in order to obtain the release of his or her property.

ACTIVITY

Read the set of facts at the beginning of this study unit and answer the questions that follow:

(1) Can Elias institute action against John in the Bloemfontein High Court?

_____

_____

_____

(2) Can Elias institute action against John in the Johannesburg High Court?

_____

_____

_____

(3) Describe the manner in which Elias must proceed in order to obtain an order for attachment.

_____

_____

_____

(4) May the Bloemfontein or Johannesburg High Courts issue an order for the attachment of John's property if this property is situated in the jurisdictional area of the Durban High Court?

_____

_____

_____

FEEDBACK

(1) An analysis of the given facts indicate that

- Elias is an *incola* of the Bloemfontein High Court since he is domiciled in the area of jurisdiction of that court
- John is a *peregrinus* of the whole Republic
- the cause of action arose outside the area of jurisdiction of the Bloemfontein High Court

Whenever the cause of action arises outside a court's area of jurisdiction and the plaintiff is an *incola* and the defendant is a *peregrinus* of the court concerned, the court may exercise jurisdiction *ad fundandam jurisdictionem* on the basis of the attachment of the defendant's property.

Elias can institute action in the Bloemfontein High Court if he can attach some of John's property *ad fundandam jurisdictionem*. This is because Elias is an *incola* of Bloemfontein and John is a *peregrinus* of the whole Republic.

(2) In terms of the given facts

- the cause of action occurred in Johannesburg, and
- the defendant is a *peregrinus* of the whole of the Republic

In an instance where the defendant is a *peregrinus* of the Republic and the cause of action occurred within the jurisdictional area of the court concerned, a court may assume jurisdiction on the basis of the attachment of the defendant's property *ad confirmandam jurisdictionem*. In these circumstances, it is irrelevant whether the plaintiff is an *incola* or *peregrinus* of the court concerned.

Elias can institute action in the Johannesburg High Court if he can attach some of John's property *ad confirmandam jurisdictionem*. This is because the cause of action, namely the vehicle collision in which Elias was injured, took place in Johannesburg.

(3) Before Elias may proceed with the main action, he must bring an application on notice of motion to the court in which he wishes to institute the principal action for an order for the the attachment of John's property. In order to succeed in this application, Elias must show that *prima facie* he has a cause of action.

(4) In terms of section 19(1)(c), a court may issue an order of attachment *ad confirmandam* or *ad fundandam jurisdictionem* for the attachment of the property of the defendant who is a

peregrinus of the whole Republic. This order may be executed in any part of the Republic, and not necessarily only within the area of the court concerned.

The order for attachment must be issued by the court in which the main action is to be instituted, and not in the court where the property of the peregrine defendant is situated.

In terms of the given facts, either the Bloemfontein or Johannesburg High Courts may issue an order for attachment, despite the fact that the attachable property is situated in the area of jurisdiction of the Durban High Court.

STUDY UNIT

15

WHEN SUBMISSION WILL VEST A COURT WITH JURISDICTION

John, an American tourist, comes to Johannesburg for a holiday. He does not know the city and while he is driving around looking for accommodation, he drives the wrong way up a one-way street. He hits Elias, a pedestrian, causing Elias serious bodily injuries. Elias, who lives in Bloemfontein but is doing contract work in Johannesburg for two months, wants to sue John for R250 000.

OVERVIEW

LEARNING OUTCOMES

After you have finished studying this study unit, you should

- know the circumstances in which a foreign *peregrinus* may submit to the jurisdiction of a court
- know at what procedural stage submission will be accepted by the court concerned

COMPULSORY READING

None

15.1 INTRODUCTION

Submission to jurisdiction, although viewed as one of the general principles of our law of jurisdiction, is relevant only where monetary claims are concerned, since, in claims relating to property or status, a particular court usually has exclusive jurisdiction.

In Roman and Roman-Dutch law, a very limited form of submission was available to parties. In South African case law, submission developed until it was viewed as a further ground on which a court could exercise jurisdiction. However, there has always been dispute concerning the circumstances in which submission will be sufficient to vest a court with jurisdiction — and the position is still not entirely clear.

15.2 THE PERSONS WHO MAY SUBMIT TO JURISDICTION

15.2.1 Where the defendant is an *incola* of the court

Submission to jurisdiction by an *incola* defendant will never occur, since the court is already vested with jurisdiction *ratione domicilii.*

15.2.2 Where the defendant is a *peregrinus* of the court concerned but an *incola* of some other South African court.

Previously, it was assumed that such defendants could submit to the jurisdiction of some court other than the court where the cause of action arose. However, in *Veneta Mineraria Spa v Carolina Collieries (Pty) Ltd* 1987 (4) SA 883 (A), the court held that, despite submission to jurisdiction, one of the traditional grounds of jurisdiction, or *rationes jurisdictionis,* still had to be present. The defendant in this matter was a local *peregrinus* and the court refused to accept that submission vested it with jurisdiction, since the cause of action had not arisen within its area of jurisdiction.

It therefore appears that a local *peregrinus* cannot submit to the jurisdiction of a court but that action must be instituted against him or her in the court within whose area the cause of action arose (or, alternatively, of course, in the court in whose area he or she is an *incola*).

15.2.3 Where the defendant is a *peregrinus* of South Africa and the plaintiff an *incola* of the court concerned

Until recently, it was accepted that a foreign *peregrinus* could submit to the jurisdiction of the *incola* plaintiff's court, and various decisions pertinently supported this view. However, in the *Veneta* case (which dealt with the position where both parties were *peregrini*) the court stated that, in addition to submission, one of the traditional grounds of jurisdiction also had to be present. The fact that a court may exercise jurisdiction if the plaintiff is an *incola,* the defendant a foreign *peregrinus,* and attachment to found jurisdiction has taken place, was not viewed as a traditional ground of jurisdiction, but as a development to assist *incolae* to litigate at home. Although this statement in the *Veneta* case is *obiter* as far as *incolae* plaintiffs are concerned, the subsequent case of *Briscoe v Marais* 1992 (2) SA 413 (W) held that this meant that submission could not take place unless the cause of action arose within the court's jurisdictional area, irrespective of whether the plaintiff was an *incola* or a *peregrinus.* The current position is thus that a *peregrinus* defendant cannot avoid an attachment to found jurisdiction by submitting to the court's jurisdiction.

15.2.4 Where the defendant is a *peregrinus* of South Africa and the plaintiff a local or foreign *peregrinus*

For a court to be vested with jurisdiction in respect of such parties, the cause of action must have arisen within its jurisdictional area, and attachment to confirm jurisdiction must have taken place. If a foreign defendant submits to a court's jurisdiction in such circumstances, and does so prior to the attachment order being made, submission will render attachment unnecessary.

In the light of recent case law, it thus appears that this is the only instance in which submission to jurisdiction can take place. In addition, rather than being an independent ground on which jurisdiction can be exercised, submission is merely a substitute for the confirmation of jurisdiction by attachment.

15.3 WHEN DOES SUBMISSION OCCUR?

Submission can occur either by way of the mutual consent of both parties or as a result of the defendant's unilateral action. Mutual consent is usually embodied in a contract or other documentary proof. However, submission by a defendant can take place in a number of ways. If a dispute arises about whether the actions of the defendant are consistent with a submission to jurisdiction, the onus rests on the plaintiff to prove that the defendant's behaviour has given rise to a clear inference that he or she submitted to the jurisdiction of the court. It has been held that the filing of a plea on the merits, a request for security in respect of costs, or a request for a postponement will be deemed to be submission. The failure to object timeously to the jurisdiction of the court is also viewed as submission. However, the mere noting of an appearance to defend a matter is not regarded as submission.

A further question is whether a *peregrinus* defendant can submit to the jurisdiction of a court after attachment has occurred so as to obtain the release of his or her property. In *Bettencourt v Kom* 1994 (2) SA 513 (T) the court held that submission after attachment is too late and cannot be set aside by the court.

Bear in mind that, irrespective of whether submission took place unilaterally or by mutual

consent, the court concerned will not accept that it is vested with jurisdiction unless the cause of action has arisen in the area of the court concerned.

ACTIVITY

Read the set of facts at the beginning of this study unit, and then answer the questions which follow:

(1) If Elias decides to institute action in the Bloemfontein High Court, and John wants to avoid having his property attached, can John submit to the jurisdiction of this court?
(2) If Elias decides to institute action in the Johannesburg High Court, and John wants to avoid having his property attached, can John submit to the jurisdiction of this court?

FEEDBACK

(1) No. John cannot submit to the jurisdiction of this court in the light of the *Briscoe v Marais* decision, as the cause of action did not arise within the jurisdiction of this court.
(2) Yes. John can submit to the jurisdiction of this court, as the cause of action arose within the court's area and John is a foreign *peregrinus*.

STUDY UNIT

16

JURISDICTION IN RESPECT OF CLAIMS RELATING TO PROPERTY

Lebong lives in Pretoria. Samuel lives in Johannesburg, but also owns a farm in Bloemfontein. He sells the farm to Lebong for R300 000. Lebong pays the purchase price, but Samuel will not sign the transfer documents.

OVERVIEW

LEARNING OUTCOMES

After you have finished studying this study unit, you should

- understand that the jurisdictional principles relating to property are governed solely by common law
- understand the concept *forum rei sitae*
- be in a position to determine when the *forum domicilii* also has jurisdiction

COMPULSORY READING

None

16.1 GENERAL PRINCIPLES

The general principles which relate to two forms of property are discussed in this study unit. These two forms of property are immovable or fixed property such as land, and movable property such as a piece of jewellery.

Many claims sounding in money are based on disputes over property; one example is a claim for damages (ie financial compensation) for the breach of a contract concerning property. However, a claim relating to property is one in which the court is asked to make an order which directly affects specifically identifiable property, for instance the delivery of a specific item of jewellery, or an order that a particular erf is subject to a servitude. Bear this in mind when determining whether a particular claim sounds in money or relates to property.

The general common-law principle is that the *forum rei sitae* (court in whose area the property is situated) has jurisdiction to hear claims relating to such property. Frequently, the jurisdiction of such a court is exclusive which mean that no other court may hear this claim.

16.2 WHERE THE OBJECT OF RELIEF IS IMMOVABLE PROPERTY

Where the object of relief is immovable property, the court in whose territorial area the immovable thing is situated, has **exclusive** jurisdiction in actions

- to determine the title to immovable property
- for the transfer of immovable property (however, see *Hugo v Wessels* 1987 (3) SA 837 (A) for an exception to this general rule)
- for the partition of immovable property
- where a real right is in dispute
- where possession of immovable property is claimed
- where rescission of a contract for the transfer of immovable property is claimed

It does not matter whether the defendant is an *incola* or a *peregrinus*.

16.3 WHERE THE OBJECT OF RELIEF IS MOVABLE PROPERTY

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

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

Whether the jurisdiction of the *forum rei sitae* is exclusive as far as movable property is concerned, is open to debate. Unlike immovable property, movables can be removed from the jurisdictional area of a court, while remaining under the control of their owner or possessor. It would therefore appear that a court which has power over the owner or possessor, that is, the *forum domicilii* of such person, should also be able to exercise jurisdiction. This is so because, once judgment has been given, and provided that the property is somewhere in South Africa,

such judgment can be enforced anywhere in the country in terms of section 26(1) of the Supreme Court Act. Our courts have not pertinently decided this question, and the current position is therefore that, while the *forum rei sitae* will always have jurisdiction, it is unclear whether the *forum domicilii* of the defendant will also be able to exercise jurisdiction. Where the *forum rei sitae* is approached for relief, it is irrelevant whether the defendant is a *peregrinus* or an *incola*.

ACTIVITY

Read the set of facts at the beginning of the study unit and answer the questions which follow:

(1) Can Lebong institute an action against Samuel in the Johannesburg High Court in which she asks the court to declare that she is the owner of the farm?

(2) Can Lebong institute an action against Samuel in the Bloemfontein High Court in which she asks the court to declare that she is owner of the farm?

(3) If a horse, not a farm, had been sold to Lebong by Samuel, which possible courts would have jurisdiction to determine ownership?

FEEDBACK

(1) No, the *forum domicilii* of the defendant does not have jurisdiction in claims relating to immovable property.

(2) Yes, the *forum rei sitae* always has jurisdiction to determine ownership of immovable property.

(3) The *forum rei sitae*, the Bloemfontein High Court, will have jurisdiction. It is also possible that the *forum domicilii* of the defendant, the Johannesburg High Court, will also have jurisdiction.

Note: If the cheque which Lebong has given to Samuel as payment of the purchase price is dishonoured by the bank, the Bloemfontein High Court will have jurisdiction to hear an action instituted by Samuel for payment of the purchase price only if the cause of action arose, either in full or in part, within the court's area of jurisdiction. However, in that instance, the claim is one sounding in money, **and not a claim relating to property** as in the present instance. The difference between these two jurisdictional situations must be distinguished clearly.

STUDY UNIT

17

MATRIMONIAL JURISDICTION

Peter and Mary are married to each other and are domiciled in Swaziland. Mary lives in Swaziland but Peter works in Pretoria and returns home to Swaziland for a short holiday once or twice a year. Peter meets another woman in Pretoria and wants to divorce Mary.

OVERVIEW

LEARNING OUTCOMES

After you have finished studying this study unit, you should

- understand the common-law principles governing divorce jurisdiction
- understand the concept of domicile in the context of divorce jurisdiction
- be able to explain the concept of ordinary residence
- know the changes that legislation has made to common law
- be in a position, when given a set of facts, to determine what court(s) has jurisdiction to hear a divorce
- be in a position to determine what court(s) may annul a marriage

COMPULSORY READING

Section 2 Divorce Act 70 of 1979
Section 1 definitions of "court" and "divorce action", Divorce Act 70 of 1979
Sections 1-3 Domicile Act 3 of 1992

17.1 GENERAL PRINCIPLES

Unlike the position regarding money claims, the jurisdictional principles which govern issues of status are not based on the concept of effectiveness. They are based on the degree of recognition which will be given to the judgment by courts in other countries. A money judgment is seldom enforced outside the country where it was granted; in contrast, a judgment which changes status often requires foreign recognition. If the court which gave the judgment is not generally viewed as competent to give such a judgment in respect of the parties concerned, its judgment might not be recognised elsewhere and the status of the parties would be in doubt.

The basic common-law principle regarding divorce jurisdiction is that the court of the common domicile of the parties has jurisdiction to hear an action for divorce. This makes sense, as the court where the parties have their home is the court which has the greatest interest in their status and future arrangements. Private international law determines this to be the most appropriate court to make such an order and so its order is generally recognised and accepted.

Although, in the past, the common domicile rule was generally appropriate, it did cause severe hardship to the wife in certain circumstances. First, the "common domicile" of the parties was viewed as that of the husband (see the discussion in 17.2 below). Secondly, in South Africa the structure of the High Courts meant that a party who wished to obtain a divorce was not able to rely on a countrywide jurisdiction but had to prove jurisdiction within the area of a particular court. The result of these factors was that a deserted wife, whose husband had moved elsewhere, often found it difficult or impossible to institute divorce proceedings.

The problems experienced by deserted wives led to the introduction of a series of legislative changes, culminating in the changes to the Divorce Act 70 of 1979 and the introduction of the Domicile Act 3 of 1992.

17.2 THE CONCEPTS OF DOMICILE AND RESIDENCE IN THE CONTEXT OF DIVORCE JURISDICTION

In terms of common law, a woman, upon entering into marriage, automatically adopted and followed the domicile of her husband, retaining it throughout the subsistence of the marriage. She therefore lost the domicile which she had prior to her marriage, and also forfeited her competence to acquire a domicile of choice during the subsistence of the marriage. Therefore, any reference to the common domicile of the parties (or to the wife's domicile) was, in fact, a reference to the domicile of the husband.

The wife's domicile of dependence was abolished by the provisions of the Domicile Act 3 of 1992. An **independent domicile for married women** is now conferred under section 1(1) of the Act, in the following terms:

> Every person who is of or over the age of 18 years, and every person under the age of 18 years who by law has the status of a major, ... shall be competent to acquire a domicile of choice, regardless of such person's sex or **marital status** (our emphasis).

The Domicile Act application changed the concept of domicile in the context of divorce jurisdiction. The Divorce Act 70 of 1979 established both domicile and residence as separate grounds for the exercise of divorce jurisdiction. Accordingly, the current legislative position is that the domicile or ordinary residence of **either spouse** (see study unit 17.3) within the area of a particular High Court is enough to confer jurisdiction on that court.

The word "domicile" when used in the context of divorce jurisdiction, must be interpreted in accordance with the definition contained in section 1(1) of the Domicile Act and not in accordance with its common-law definition.

Unfortunately, the phrase "ordinarily resident" is not defined in the Act. It is therefore necessary to refer to judicial interpretation in order to determine the meaning of this phrase, and how it differs from the concept of reside *simpliciter*. The then Appellate Division described it as "his usual or principal residence ... his real home" (*Cohen v CIR* 1946 AD 174). It appears that ordinary residence does not require the party to be continuously present in the area and that a person can be temporarily resident in one area and ordinarily resident in another.

17.3 CURRENT LEGISLATION REGULATING DIVORCE JURISDICTION

The question whether a particular High Court has jurisdiction to hear a divorce, is determined by the Divorce Act 70 of 1979. The most important principle is that **a court may exercise jurisdiction on the basis of the independent domicile or residence of either the husband or the wife.** Domicile and residence are established as **independent** and **alternative** jurisdictional grounds.

The ordinary meaning of section 2(1) is clear. A court may exercise divorce jurisdiction if both or either of the parties are/is **domiciled** in its area of jurisdiction on the date on which the action is instituted (s 2(1)(a)).

Alternatively, a court may also exercise jurisdiction if both or either of the parties are/is ordinarily **resident** in its area of jurisdiction on the date on which the action is instituted, **and** have/has been **ordinarily resident in the Republic** for a period of not less than one year immediately prior to the institution of the action (s 2(1)(b)).

It is important to remember that a court may exercise jurisdiction in the case of a divorce **if only one of the parties** is either domiciled or resident in its area of jurisdiction. This has a number of implications.

The first is that the domicile or residence of one spouse alone, is sufficient to confer the competence to exercise divorce jurisdiction over the other spouse.

Secondly, the domicile or residence of the one spouse is sufficient to confer jurisdiction **even if the other spouse is domiciled or resident outside the Republic.** In other words, a spouse who is domiciled or resident outside the Republic and who has never had any personal links with the Republic, may, as plaintiff, institute divorce proceedings in South Africa in a particular High Court on the grounds that the other spouse is domiciled or resident within that court's jurisdiction.

The time which must elapse before domicile or residence in terms of the Act has been established, is unclear. Section 2(1)(a) provides that, if both or either of the parties are/is domiciled within the area of a court, such court will be competent to exercise divorce jurisdiction, irrespective of the period of domicile. Theoretically, a spouse's domicile of one month, or even one day, within the area of a court would confer jurisdiction on such court.

This contrasts with the provisions of section 2(1)(b), which require a period of residence of one year within the Republic immediately prior to the institution of the action. The period of residence for one year in the Republic is not clearly defined. Seemingly, the period of one year's

residence includes any antenuptial period of residence (ie the period of residence before the conclusion of the marriage). For instance, a spouse who institutes divorce proceedings could have been resident in the Republic for a period exceeding one year, but only have been married for a month immediately prior to the institution of the proceedings.

Section 2(2) provides that a court which has jurisdiction to adjudicate a claim for divorce in terms of section 2(1), also has jurisdiction in respect of a claim in reconvention or an application in the divorce action concerned. Section 2(3) deals with choice of law. It determines that, in the circumstances stated therein, a "court" must apply its own law when adjudicating a "divorce action". It is important that you refer to the definition of "court" and "divorce action" when studying this subsection.

17.4 JURISDICTION IN RESPECT OF NULLITY AND ANNULMENT

Both the annulment and the declaration of nullity of marriages fall outside the scope of the definition of "divorce action" as contained in section 1 of the Divorce Act 70 of 1979, and therefore the provisions of section 2 as discussed above do not apply in respect thereof.

Our law distinguishes between void and voidable marriages.

An action for the declaration of nullity of a (void) marriage does not alter the status of the parties, because, in reality it is merely of a declaratory nature. In such a case no valid marriage in fact existed and the parties are only seeking legal confirmation of this fact before, for instance, marrying other persons.

In accordance with our common law, as interpreted by our courts, the following courts have jurisdiction:

- the *forum loci celebrationis*: (ie the court of the place where the "marriage" was entered into)
- the court where the plaintiff or the defendant, (or both) is domiciled at the time nullity proceedings are instituted

In an action for the **annulment or dissolution** of a marriage which is not void, but simply voidable, a change of status does take place. Until such time as the marriage is set aside, it is in all respect a valid marriage. As soon as it is set aside, however, the status of the parties changes, and, for all practical purposes, the parties are placed in the position in which they were at the time the marriage was entered into.

Since the provisions of the Divorce Act of 1979 do not apply to actions to set aside voidable marriages, common law is applied. Originally, this meant that the only court which had jurisdiction was that of the parties' common domicile at the time of the institution of the action, that is the court within whose area the husband was domiciled. However, the Domicile Act of 1992 now provides that a woman can acquire her own domicile of choice during a marriage. It can therefore be argued that the current position is that the domicile of either the husband or the wife — if they have different domiciles — will be sufficient to vest a court with jurisdiction to hear such matters.

ACTIVITY

Read the set of facts at the beginning of this study unit and answer the questions that follow:

(1) State the provisions of section 1(1) of the Domicile Act 3 of 1992.

_____

_____

_____

(2) If Peter were domiciled in Pretoria before 1992, where would Mary have been domiciled?

_____

_____

_____

(3) Set out the keywords contained in section 2(1) of the Divorce Act of 1979.

_____

_____

_____

(4) If Peter wishes to divorce Mary, may he institute the action for divorce in the Pretoria High Court?

_____

_____

_____

(5) If Mary wishes to divorce Peter, may she institute the action for divorce in the Pretoria High Court although she has never been to Pretoria?

_____

_____

_____

(6) If it appears that Peter and Mary's marriage was voidable because Mary was a minor when she married and her parents did not consent to the marriage, what court may set aside the marriage?

_____

_____

_____

FEEDBACK

(1) Summarise the provision of section 1(1) of the Domicile Act 3 of 1992 as set out in the *Student handbook*.

(2) At common law, upon the conclusion of the marriage the wife loses her domicile and follows the domicile of her husband, which she retains throughout the marriage. This is known as the common domicile of the parties. As a result, a married woman cannot acquire an independent domicile and *nolens volens* follows the domicile of her husband during the subsistence of the marriage.

In 1992, section 1(1) of the Domicile Act 3 of 1992 set aside the common-law rule and conferred an independent domicile on women, irrespective of "marital status".

Therefore, before 1992, the common law would have governed Mary's domiciliary status. Because Peter was at that stage domiciled in Pretoria, Mary would also have been domiciled in Pretoria in accordance with the common- domicile principle, which obliged a wife to have the same domicile as that of her husband.

(3) The keywords contained in section 2(1) of the Divorce Act of 1979 are as follows

- both or either of the parties
- is or are domiciled
- area of court
- time of the institution of the action
- **OR (introducing residence as the alternative ground)**
- ordinarily resident
- in the area of court (local residence requirement)
- at time of institution of the action
- **AND (an additional residence requirement)**
- ordinarily resident
- in the Republic (national residence requirement)
- not less than one year prior to the institution of the action

(4) In term of the given facts, Peter is resident in Pretoria and it is presumed that he has been so resident for a period longer than one year.

Section 2(1)(b) provides that a court is competent to exercise divorce jurisdiction if one of the parties to a marriage is resident in its area of jurisdiction at the time of the institution of the action and has been resident in the Republic for one year prior to the institution of the action.

Accordingly, the Pretoria High Court is competent to exercise jurisdiction in terms of section 2(1)(b) to hear Peter's action.

(5) In terms of the given facts, Mary is neither domiciled nor resident in the jurisdiction area of the Pretoria High Court, but nevertheless wishes to institute divorce proceedings in the jurisdictional area of that court.

Section 2(1) contains the words "if the parties are or either of the parties is". This means that either one or both of the parties may fulfil the further requirements of section 2(1). Consequently, a court is competent to exercise divorce jurisdiction if only one of the spouses complies with the domicile or residence requirements. If this is the case, the

domicile or residence of the one spouse is sufficient to endow a court with jurisdiction, even if the other spouse is domiciled or resident outside the Republic.

Accordingly, because Peter complies with the provisions of section 2(1)(b), Mary may institute divorce proceedings in the Pretoria High Court even though she is domiciled in Swaziland and has never been to Pretoria.

(6) In terms of the given facts, Peter and Mary are domiciled in Swaziland. Presumably, they were married in Swaziland, but the facts are not clear on this point.

The declaration of the nullity of a marriage is still determined at common law. At common law, the court of the domicile of both parties or where the plaintiff or defendant is domiciled at the time of the nullity proceedings is competent to exercise jurisdiction. Similarly, jurisdiction is also conferred on the *forum loci celebrationis*.

Since both the parties are domiciled in Swaziland, the High Court of Swaziland is competent to entertain proceedings for the nullity of the marriage. If the parties were married in Swaziland, then the *forum loci celebrationis*, being the High Court of Swaziland, may exercise jurisdiction in the matter.

STUDY UNIT

18

CONSTITUTIONAL JURISDICTION

Sipho is the father of an illegitimate child. The child is adopted without Sipho's knowledge or consent. This is possible because the legislation dealing with adoptions provides that only the mother of an illegitimate child need consent to adoption. By chance, Sipho hears about the adoption and also hears that the adoptive parents plan to emigrate to America with the child.

OVERVIEW

LEARNING OUTCOMES

After you have finished studying this study unit, you should

- be able to identify the matters in respect of which the Constitutional Court has exclusive jurisdiction
- understand when the Constitutional Court may be approached directly
- understand when to appeal direct to the Constitutional Court
- understand what constitutional jurisdiction the Supreme Court of Appeal exercises
- understand what constitutional issues are decided by the High Courts

COMPULSORY READING

Sections 167(3)-(7), 168(3), 169 and 172(2) Constitution of the Republic of South Africa, 1996

18.1 JURISDICTION OF THE CONSTITUTIONAL COURT

As its name implies, the Constitutional Court hears only constitutional matters. What is a constitutional matter? It is defined in the Constitution as "any issue involving the interpretation, protection or enforcement of the Constitution". The Constitutional Court may decide only such matters, and issues connected with decisions on such matters. However, this court has the final decision on whether or not a matter is a constitutional one and so will itself determine what matters it is prepared to hear.

The Constitutional Court is the only court which may hear certain constitutional matters (then it has exclusive jurisdiction) while as regards other matters, it exercises concurrent jurisdiction with the High Courts and either court may hear the matter, depending on the circumstances.

The matters in repect of which it has exclusive jurisdiction are listed in section 167(4). They include disputes between organs of state at national or provincial level concerning their constitutional status, powers or function; the constitutionality of parliamentary or provincial bills; whether or not Parliament or the President has failed to comply with a constitutional duty; and the certification of provincial constitutions. It is clear from this list that the majority of constitutional issues will not fall within this exclusive jurisdiction and that the Constitutional Court will seldom be approached direct on the basis that it is the only court which may hear a matter.

The Constitutional Court exercises concurrent jurisdiction with the High Courts in respect of all other constitutional matters. This means that the usual way of dealing with a constitutional matter is to approach the relevant High Court for a decision. This decision may then be taken on appeal, when the Constitutional Court is the court of final instance, and no further appeal is possible.

Unlike the position under the interim Constitution, the Constitutional Court no longer has the exclusive jurisdiction to determine whether an Act of parliament is invalid, and a High Court or the Supreme Court of Appeal may also make such a finding. However, it remains necessary for the Constitutional Court to confirm such a finding made by any other court before the order has any force. This is in effect a limitation on the concurrent jurisdiction exercised by the other courts.

It is possible, in exceptional circumstances, to approach the Constitutional Court direct or to appeal to this court direct despite the fact that the matter concerned falls within the concurrent jurisdiction of the Constitutional Court, and so should first be heard by a High Court or the Supreme Court of Appeal. The Constitutional Court must give leave for an approach to it and the applicant must show that it is "in the interests of justice" that this Court be approached direct.

18.2 JURISDICTION OF THE SUPREME COURT OF APPEAL

This court may decide appeals "in any matter", which clearly includes appeals in constitutional matters. However, unlike the position as far as non-constitutional matters are concerned, when no further appeal is possible, a decision by the Supreme Court of Appeal on a constitutional matter may be taken on further appeal to the Constitutional Court.

The question arises: when must an appeal from the decision of a High Court be directed to the Supreme Court of Appeal, and when to the Constitutional Court? The first point to bear in mind here is that no appeal from any High Court decision is possible without the leave of the court concerned. So although the parties may wish to have an appeal heard by a particular court, it is in fact the courts themselves which decide what appeals they are prepared to hear. If an appeal deals with both constitutional and non-constitutional issues, appeal must always be noted first to the Supreme Court of Appeal, as the Constitution provides that the Constitutional Court may decide only constitutional matters. If an appeal concerns a purely constitutional matter, appeal would be noted to the Supreme Court of Appeal in the normal course of events. However, it is also possible to ask the Constitutional Court for leave to approach it direct, when it is in the "interests of justice" ' to do so.

18.3 JURISDICTION OF THE HIGH COURTS

A High Court may now hear all constitutional matters apart from those listed in 18.1 above which fall into the exclusive jurisdiction of the Constitutional Court, and those which have been assigned to another court by national legislation.

The only other limitation on the constitutional jurisdiction of the High Courts is that if such a court makes a finding that parliamentary or provincial legislation or the conduct of the President is unconstitutional, this must be confirmed by the Constitutional Court. Any order made by a High Court or the Supreme Court of Appeal on constitutional invalidity is without effect until confirmed by the Constitutional Court. For this reason, the High Courts and the Supreme Court of Appeal may grant temporary relief in order to assist the party requiring relief until such time as the Constitutional Court has confirmed the final order

18.4 CONSTITUTIONAL JURISDICTION OF MAGISTRATES' COURTS

Section 170 of the 1996 Constitution does not confer any constitutional jurisdiction on magistrates' courts, but provides that legislation may confer constitutional jurisdiction on these courts, provided that it does not confer jurisdiction to determine the validity of "any legislation or any conduct of the President".

Section 110(1) of the Magistrates' Courts Act provides that these courts may not pronounce on the validity of "any law". Constitutional-law authors suggest that "law" includes original and delegated legislation, as well as common law, because the word "law" rather than the word "legislation" is used here, unlike section 170 of the 1996 Constitution. Section 110 also provides that these courts may not pronounce on the validity of any conduct of the President. It has been argued that this includes inquiries as to the validity of laws or of the President's conduct on both constitutional-law and administrative-law grounds.

Section 110(2) provides that if it is alleged during proceedings that any law or conduct of the President is invalid, whether on constitutional- or administrative-law grounds, the court must continue the proceedings on the assumption that the law or conduct is valid. Any constitutional issue may then be raised on appeal to the High Court.

ACTIVITY

Read the set of facts at the beginning of this study unit and answer the questions which follow.

(1) Is a constitutional issue involved in this set of facts?
(2) Which court is competent to hear such a matter?
(3) If the court in question 2 above refused the application, to which court would an appeal be noted?
(4) If the court in question 2 above granted the application and declared the relevant legislation invalid, what would happen next?
(5) In what circumstances would the Constitutional Court hear this matter?

FEEDBACK

(1) Yes. The right to equal treatment in terms of the Bill of Rights is infringed by the relevant legislation.
(2) This is not a matter which falls within the exclusive jurisdiction of the Constitutional Court and so a High Court should be approached.
(3) The Supreme Court of Appeal would usually be the court to approach. (The question of when a full bench of the High Court will be approached, will not be considered.)
(4) The High Court would have to grant a temporary interdict suspending the adoption order and preventing the child from leaving South Africa while the Constitutional Court is being approached to confirm the order of legislative invalidity.
(5) The Constitutional Court may be approached after an appeal has been heard by the Supreme Court of Appeal. It is also possible to appeal directly to the Constitutional Court, if it can be shown to be in the "interests of justice". In all instances, leave to appeal is necessary.

PART IV

Jurisdiction of the magistrates' courts

STUDY UNIT

19

GENERAL INTRODUCTION

You are a candidate attorney in Pretoria. Thandi, who lives in Rustenburg, arrives at your office with a problem.

Thandi signed an agreement with Rashid to buy a piece of land from him for R80 000. Rashid lives in Johannesburg and the piece of land is situated in Kempton Park. She then signed a contract with Thomas, a builder from Pietersburg. In terms of this contract Thomas will build a house for her on this land. She contractually undertook to pay Thomas R90 000 for the building work.

Thandi paid Rashid the purchase price of R80 000 but Rashid then refused to sign the transfer documents. Thomas started to dig the foundations but then told Thandi that he had found a better job and no longer intended to build her house.

She thinks that the value of the house alone, when finished, will be about R150 000, the value of the house together with the land, about R240 000 and the expense of finding another builder to complete the building work about R120 000.

OVERVIEW

LEARNING OUTCOMES

After you have finished studying this study unit, you should

- understand the different foundations for the exercise of jurisdiction in the High Courts and the magistrates' courts
- understand what the implications of the term "creature of statute" are
- know that there are three separate kinds of limitation on the jurisdiction of magistrates' courts
- know which sections of the Magistrates' Courts Act are of major importance when determining whether a magistrate's court has jurisdiction
- know to what aspects of jurisdiction the other relevant sections of the Magistrates' Courts Act relate
- understand and appreciate the statutory and common-law principles applicable in the Magistrates' Courts

COMPULSORY READING

None

19.1 DISTINCTION BETWEEN JURISDICTION IN THE HIGH COURTS AND JURISDICTION IN THE MAGISTRATES' COURTS

19.1.1 High Courts: inherent jurisdiction

When you studied the principles governing jurisdiction in the High Courts, we constantly referred you to common law. Most of the common-law principles which determine which of the various High Courts in the country are competent to hear a matter, date from Roman or Roman-Dutch times. (It is for this reason that so much of the terminology used when dealing with High Court jurisdiction is in Latin.)

The jurisdiction of the High Courts is based on these common-law principles because of what is termed the "inherent jurisdiction" of the High Courts. The result of this inherent jurisdiction is that a High Court may hear any matter which it could hear at common law, unless this has been expressly excluded by statute. To phrase the same concept differently — the High Courts may do anything which statute law does not forbid them to do. See, further, 3.2 above.

19.1.2 Magistrates' courts: creatures of statute

The position in the magistrates' courts is completely different. Magistrates' courts are termed "creatures of statute". This means not only that they have been created by statute, but also that they can only do what some statute permits them to do. See further, 3.3 above.

Because the magistrates' courts may exercise only statutory jurisdiction, the common-law principles which you applied when determining jurisdiction in the High Courts, are not relevant when determining jurisdiction in magistrates' courts. You will sometimes find that a statutory provision dealing with the jurisdiction of magistrates' courts is based on, or is similar to, some common-law principle. However, this does not mean that the common-law principle applies — it merely shows that the statutory principle was derived from the common-law principle. You will find, when you compare the two principles, that they are seldom identical.

19.1.3 Example

A good example is the principle of *forum domicilii:* the High Court of which a defendant is an *incola* may exercise jurisdiction in respect of money claims. The Magistrates' Courts Act 32 of 1944 contains a similar provision in section 28(1)(a), which provides that the magistrate's court where a defendant **resides, carries on business or is employed,** has jurisdiction. A person is an *incola* where he is **domiciled or resident;** a person can be domiciled at a completely different place to that where he works or is employed, and so you could find that completely different courts have jurisdiction depending on whether you have referred to common law or what is often incorrectly viewed as its statutory equivalent.

19.2 LIMITATIONS ON THE JURISDICTION OF MAGISTRATES' COURTS

19.2.1 High Courts: geographical limitation

The only general limitation placed on the exercise of jurisdiction by a High Court is geographical: in other words the only question that arises concerns which one of the various High Courts in the country may hear the matter. There is no general prohibition on the type of matter which may or may not be heard by a High Court, or on the amount of money which a High Court may award to a successful party.

19.2.2 Magistrates' courts: nature and amount of claim plus geographical limitation

The first question to be asked when dealing with jurisdiction is:

"Can action be instituted in a magistrate's court?"

This question has two parts:

"Can this type of action ever be heard in a magistrate's court?" (section 46)

and if this question is answered affirmatively, you then ask:

"Is the amount claimed so large that a magistrate's court cannot hear the matter?" (section 29)

Only after these questions have been answered can one ask:

In which magistrate's court may action be instituted? (section 28)

So we can say that whereas a High Court is limited by geographical considerations only, a

magistrate's court is limited by considerations regarding the nature of the claim, the amount of the claim, and then in addition, by geographical considerations.

19.3 PROVISIONS GOVERNING JURISDICTION

19.3.1 Primary provisions

In the following study units, we will deal with the limitations on the jurisdiction of magistrates' courts, mentioned above. We will start with the question:

Can a magistrate's court hear the matter?

The answer to this question is found primarily in sections 46 and 29 of the Magistrates' Courts Act. Section 46 deals with the types of claim which no magistrate's court whatsoever may hear. Section 29 then sets out the maximum amount which may be claimed in a magistrate's court action.

Once it has been determined that a magistrate's court may hear the action, the correct magistrate's court must be identified. Here, section 28 is of most importance, as it deals with jurisdiction in respect of persons.

Sections **46, 29** and **28** are the most important sections of the Magistrates' Courts Act for jurisdictional purposes.

19.3.2 Other provisions dealing with jurisdiction

There are a number of other provisions in the Act which also deal with jurisdiction. When analysed, you will discover that they all deal either with the question of whether any magistrate's court at all is competent to hear the matter, or with the question of how to deal with claims falling outside the jurisdictional limit of the court.

The following sections deal with the question of whether **any** magistrate's court is competent to hear the action:

- section **30** which provides that magistrates' courts may grant interdicts
- sections **31** and **32,** which deal with forms of interdict peculiar to the magistrate's court
- section **37,** which provides that, to determine a matter which a magistrate's court may hear, the court may decide on matters outside its jurisdiction
- section **50** which deals with how a defendant can transfer a matter to the High Court if the defendant is unhappy about the fact that the matter is being heard by a magistrate's court
- section **110** which deals with the question of whether a magistrate's court can pronounce on the validity of any form of legislation

The following sections concern instances of claims which fall outside the jurisdictional **limit** of magistrates' courts:

- sections **38** and **39** which set out how to reduce the amount claimed in a magistrate's court so that it falls within the jurisdictional limit of these courts
- section **40,** which provides that one claim cannot be split into different smaller claims to make the claim fall inside the financial limits of the magistrates' courts
- section **43,** the opposite of section 40, which deals with how to institute an action where

more than one amount is claimed but each claim is less than the limit of the magistrates' courts

- section **45** which sets out how the parties can consent to the jurisdiction of a magistrate's court if the amount claimed is higher than the limit of the magistrates' courts
- section **47** which deals with the situation in which a counterclaim which falls outside the jurisdiction of the magistrates' courts, is filed in response to a claim

ACTIVITY

Read the set of facts at the beginning of this study unit and answer the questions which follow:

(1) What is the first matter you must consider if you decide to institute legal proceedings against Thomas?
(2) If Thandi asks you to institute action in the magistrate's court, what is the first question you must consider?
(3) What is the second question?
(4) What is the third question?
(5) Can you answer this third question by relying on High Court principles?

FEEDBACK

(1) The first matter to consider is whether you should try to institute action in the High Court or in the magistrate's court. Here, issues of convenience, complexity and expense are taken into account. Remember that, even if a magistrate's court has jurisdiction to hear an action, you may still approach the High Court. However, you then run the risk of the judge's awarding you costs on the scale of the magistrates' courts, which is lower than that of the High Courts. So, even if your action is successful, your legal costs will not be reimbursed fully.
(2) If you would like the action to be heard by a magistrate's court, the first matter to consider is whether the action is the type that may be heard by any magistrate's court. If Thandi wants the court to make an order forcing Thomas to complete the work, you cannot institute action in the magistrates' courts, as section **46** provides that magistrates' courts cannot make an order for specific performance without an alternative order for damages. (This is discussed in detail in study unit 20.)
(3) The second question is whether the claim falls within the financial limits of the magistrates' courts. Section **29** provides that the current limit is R100 000. If a claim for damages is instituted, Thandi will have to be prepared to limit her claim to R100 000. (This is discussed in detail in study unit 21.)
(4) The third question can only be considered once the other two are answered in the affirmative. To decide which particular magistrate's court must be approached, you will have to study the provisions of section **28.** (This is discussed in detail in study unit 22.)
(5) No. This third question namely the determination of which particular magistrate's court may exercise jurisdiction, cannot be answered by reference to common-law principles, as they frequently differ from the statutory equivalents.

STUDY UNIT

20

SECTION 46: LIMITATIONS ON THE NATURE OF THE CLAIM

You are a candidate attorney in Pretoria. Thandi, who lives in Rustenburg, arrives at your office with a problem.

Thandi signed an agreement with Rashid to buy a piece of land from him for R80 000. Rashid lives in Johannesburg and the piece of land is situated in Kempton Park. She then signed a contract with Thomas, a builder from Pietersburg. In terms of this contract Thomas will build a house for her on this land. She contractually undertook to pay Thomas R90 000 for the building work.

Thandi paid Rashid the purchase price of R80 000 but Rashid then refused to sign the transfer documents. Thomas started to dig the foundations but then told Thandi that he had found a better job and no longer intended to build her house.

She thinks that the value of the house alone, when finished, will be about R150 000, the value of the house together with the land, about R240 000 and the expense of finding another builder to complete the building work about R120 000.

OVERVIEW

LEARNING OUTCOMES

After you have finished studying this study unit, you should

- understand what actions may never be instituted in magistrates' courts
- understand the meaning of the terms used in section 46
- be able to solve problem-type questions based on the provisions of section 46

COMPULSORY READING

Section 46 of the Magistrates' Courts Act 32 of 1944

20.1 GENERAL

In contrast to the High Courts, which have virtually unlimited jurisdiction in respect of causes of action, the magistrates' courts are not permitted to hear all kinds of actions. In other words, they are restricted as regards the **nature of the cause of action.** When determining whether action should be instituted in the High Court or in a magistrate's court, the nature of the cause of action is the first matter that must be investigated.

You must remember that, when a magistrate's court is prohibited by section 46 from hearing a certain type of action, the parties **cannot by consent confer jurisdiction** on the court, and action must be instituted in a High Court.

Please have a copy of section 46 available when reading the commentary that follows.

20.2 THE PROVISIONS OF SECTION 46

20.2.1 Section 46(1): matrimonial matters

Section 46(1) refers to two outdated matters: the Indian Immigration Law and the concept of "separation from bed and board". The Indian Immigration Law was repealed in 1963 and so is no longer relevant. A judicial separation, or separation "from bed and board" was abolished by the Divorce Act 70 of 1979 and is also irrelevant.

Section 46(1) provides firstly that a magistrate's court cannot grant a divorce. The reason for this provision is that a divorce affects the status of the parties and in principle matters of status must be decided by the High Court.

The section also states that a magistrate's court will not have jurisdiction in matters in which the "separation ... of goods of married persons ..." is sought. This has been interpreted as meaning the goods of persons married in community of property, in other words the parties' joint estate. However, the court will have jurisdiction (provided the financial restrictions are complied with) to hear an action by one party against the other, if they are married out of community of property, for the return of goods claimed as his or hers.

Note: In spite of the provisions of section 46(1), a magistrate's court may sometimes determine matrimonial matters because authorised to do so by some other statute. One example is section 16(1) of the Matrimonial Property Act 88 of 1984, which gives the magistrates' courts jurisdiction to make an order granting a spouse the necessary consent to perform a legal act in respect of which the consent of the other spouse is also necessary, but is being unreasonably withheld. Once again, the court must also have jurisdiction in terms of section 29.

20.2.2 Section 46(2)(a): validity of wills

Although magistrates' courts do not have jurisdiction to hear disputes regarding the validity of wills or how they should be interpreted, these courts do have jurisdiction to hear an action resulting from the provisions of a will, for example payment of an amount bequeathed in a will. There must be a genuine dispute about the validity or interpretation of the will. If a defendant merely raises a question regarding validity with the clear intention of preventing a magistrate's court from exercising jurisdiction, the court will not easily find that it may not exercise jurisdiction.

20.2.3 Section 46(2)(b): status as regards mental capacity

A magistrate's court is not empowered to declare a person insane, or to declare a person incapable of managing his or her own affairs.

Note, however, that, in terms of section 33, a magistrate is authorised to appoint a *curator ad litem* for a person who has already been declared insane or incapable of managing his or her own affairs. The *curator ad litem* then manages this person's affairs during a trial in the magistrate's court in which the person is involved.

20.2.4 Section 46(2)(c): specific performance

The traditional meaning of the phrase "specific performance" is that of specific performance of a contractual obligation, in other words the performance of an act that a person has contractually undertaken to perform. Such orders were traditionally granted only by the superior courts, as they require someone to perform a particular action, and the superior courts were the only courts deemed competent to make such orders.

Section 46(2)(c) and its predecessors were introduced to confirm the traditional position by preventing magistrates' courts from making such orders. However, there has been some confusion on what is meant by the phrase "specific performance" in this subsection.

Two main questions have arisen:

(1) Was the phrase "specific performance" limited to performance in terms of a contract or performance in general?
(2) Could payment of money in terms of a contractual debt *(ad pecuniam solvendam)* ever amount to specific performance or was specific performance limited to performance of a particular action *(ad factum praestandum)?*

- The first question was decided in *Maisel v Camberleigh Court (Pty) Ltd* 1953 (4) SA 371(C) where the court held that the words were limited to the traditional meaning of specific performance in terms of a contract, and could not be widened to include any order to perform a particular action (for instance in terms of an interdict).

- The second question was finally decided in *Tuckers Land and Development Corporation (Edms) Bpk v Van Zyl* 1977 (3) SA 1041 (T) where the court held that a claim for payment of a purchase price in terms of a contract, although strictly speaking a claim for specific performance, was not a claim for specific performance in terms of this section, and that a claim sounding in money, whether the debt arose from a contract or not, could never be a claim for specific performance.

The final result of these cases is that this subsection applies only where there is a claim for specific performance of a contract, that is where the defendant has to perform a particular act because he contractually undertook to do so. This restrictive approach appears to be what the legislature intended when passing the subsection.

EXAMPLE: Please refer to the set of facts at the start of this study unit so that the effect of section 46(2)(c) can be illustrated.

> If Thomas decides to complete the building work, but Thandi commits a breach of contract by refusing to pay Thomas after the house has been built, Thomas is able to sue Thandi in the magistrate's court for payment of the contract price, because payment of the contract price is not seen as specific performance. (If the extensive interpretation suggested in (2) above had been placed on section 46(2)(c), Thomas could not have sued Thandi in the magistrate's court because non-payment of the purchase price would be non-performance in terms of a contract.)
>
> However, if Thomas refuses to build the house and Thandi has paid him to do so, Thandi cannot ask a magistrate's court to force Thomas to build the house. She can do this only in the High Court, as this is a true claim for specific performance. The magistrate's court can make such an order only if Thandi includes a claim for damages as an alternative, when it will order Thomas to build the house, or alternatively to pay Thandi damages.

It should, however, be borne in mind that the courts (and this includes the High Courts) are reluctant to grant orders for specific performance. This is particularly true where

- specific performance is impossible or *contra bonos mores*
- the court will have difficulty in enforcing the order
- damages provide an adequate and convenient remedy
- the same result could be achieved by means of an interdict

You must note that section 30 gives the court the power to grant interdicts, and that this can sometimes appear to contradict section 46(2)(c). The court held, in *Zinman v Millar* 1956 (3) SA 8 (A), that a *mandament van spolie* is not an order for specific performance and that section 30 is not qualified by section 46(2)(c).

20.2.4.1 Section 46(2)(c)(i): "rendering of an account"

What does this phrase mean? The phrase has a specific technical meaning: it does not mean the furnishing of a shop or bank account to an accountholder. The phrase was described in *Victor Products (SA) Ltd v Lateulere Manufacturing Ltd* 1975 (1) SA 961 at 963, as follows:

> The right at common law to claim a statement of account is, of course, recognised in our law, provided the allegations in support thereof make it clear that the said claim is founded upon a fiduciary relationship between the parties or upon some statute or contract which has imposed upon the party sued the duty to give an account.

You will see, from this description, that it is only when one party is in a position of trust, or when it is provided by statute, that the "rendering of an account" can be requested.

20.2.4.2 Sections 46(2)(c)(ii) and (iii)

As regards section 46(2)(c)(ii) and (iii), it is important to note that the order which may be granted is limited to the delivery or transfer of movable or immovable property, and no more. See in this regard *Hardwood Timber Co v Stainless Steel and Barnett* 1928 TPD 60, where the court refused to order that an accepted promissory note (which constitutes movable property) be delivered to the plaintiff, since this would have meant that the defendant would have had to accept the promissory note before delivery.

20.2.5 Section 46(2)(d): perpetual silence

A decree of perpetual silence is a court order instructing someone who has threatened to institute litigation to do so within a set period. If action is not instituted within this period, the person is barred from ever instituting action on those facts. In *Garber NO V Witwatersrand Jewish Old Age Home* 1985 (3) SA 460 (W) (a decision on the granting of such a decree) the court held that it would consider the following factors:

(1) the nature and subject-matter of the claim
(2) prejudice to the parties
(3) the balance of convenience
(4) the period of delay since the threat of litigation had commenced
(5) whether the threats of litigation constituted a disturbance of the applicant's rights

when deciding whether to make such an order. A magistrate's court is prevented from making such an order presumably because it limits the right of access to legal assistance.

ACTIVITY

Read the set of facts at the beginning of this study unit and answer the questions which follow:

(1) Why can Thomas institute action against Thandi in a magistrate's court for payment for building work in terms of the contract, if he finishes this work?
(2) Why can Thandi not institute action in the magistrate's court against Thomas to force him to finish the building work in terms of the contract?
(3) Can Thandi institute action against Rashid in a magistrate's court to force him to transfer the property to her?
(4) Write out the provisions of section 46(2)(c)(i)–(iii).

(i) _____
_____
_____

(ii) _____
_____
_____

(iii) _____
_____
_____

(5) State briefly, in point form, the four main matters which no magistrate's court may hear.

(i) _____
_____
_____

(ii) _____
_____
_____

(iii) _____
_____
_____

(iv) _____
_____
_____

FEEDBACK

(1) Such an action has been held not to be a claim for specific performance in terms of section 46(2)(c), as a claim for the payment of money, whether in terms of a contract or not, is never "specific performance".
(2) This is a true claim for specific performance, as Thomas is forced to perform a particular action. Thandi can only institute such an action against Thomas in a magistrate's court if she includes a claim for damages as an alternative; otherwise she must sue him in a High Court.
(3) Yes. She may institute action against Rashid in the magistrate's court because this claim can be classified as one of the exceptions listed in section 46(2)(c)(ii).
(4) Please consult your copy of the Act for the wording of this subsection.
(5) Please consult your copy of the Act to enable you to compile this summary.

STUDY UNIT

21

SECTION 29: LIMITATIONS ON THE AMOUNT OF THE CLAIM

You are a candidate attorney in Pretoria. Thandi, who lives in Rustenburg, arrives at your office with a problem.

Thandi signed an agreement with Rashid to buy a piece of land from him for R80 000. Rashid lives in Johannesburg and the piece of land is situated in Kempton Park. She then signed a contract with Thomas, a builder from Pietersburg. In terms of this contract Thomas will build a house for her on this land. She contractually undertook to pay Thomas R90 000 for the building work.

Thandi paid Rashid the purchase price of R80 000 but Rashid then refused to sign the transfer documents. Thomas started to dig the foundations but then told Thandi that he had found a better job and no longer intended to build her house.

She thinks that the value of the house alone, when finished, willl be about R150 000, the value of the house together with the land, about R240 000 and the expense of finding another builder to complete the building work about R120 000.

OVERVIEW

LEARNING OUTCOMES

After you have finished studying this study unit, you should

- know what financial limitations are placed on actions instituted in magistrates' courts
- understand the meaning of the terms used in section 29
- be able to solve problem-type questions based on the provisions of section 29

COMPULSORY READING

Section 29 Magistrates' Courts Act 32 of 1944

21.1 GENERAL

The previous study unit set out the types of action which no magistrate's court could ever hear. In this study unit, we will discuss the financial limitations placed on magistrates' courts. These financial limitations mean that, even if a plaintiff has an action of a type which a magistrate's court may hear, he cannot institute it in a magistrate's court if the amount claimed exceeds the financial limits imposed by section 29.

NOTE: The parties can, by consent, confer jurisdiction on a magistrate's court to hear a claim in an amount greater than the financial limits set in section 29. The position is different in respect of section 46, where the parties cannot consent to the exercise of jurisdiction by a magistrate's court.

Please have a copy of section 29 available when studying the discussion which follows. You will see, when reading this section, that no amounts are given in the Act and the section merely reads: "the amount determined by the Minister from time to time in the Gazette". The reason for this is to avoid the necessity of changing the Act every time the financial limits are altered; all that needs to be done is publish a proclamation in the Gazette.

21.2 THE PROVISIONS OF SECTION 29

21.2.1 Section 29(1): Subject to the provisions of this Act ...

This refers to other sections of the Act dealing with jurisdiction. In particular, remember section 45 which sets out how to consent to a claim which exceeds the limits of section 29.

21.2.2 Section 29(1): ... causes of action ... action ...

Throughout section 29 reference is made to "cause of action" and "action". The word "action" must be interpreted broadly and must not be restricted to mean proceedings instituted by way of summons only. The word refers to all proceedings in the magistrates' courts, and includes all applications. More particularly, it includes all proceedings in terms of section 30 (ie arrest *tanquam suspectus de fuga*, attachments and interdicts). This means that proceedings in terms

of section 30 are also subject to the restrictions imposed by section 29, with regard to the financial limits.

21.2.3 Section 29(1)(a): ... delivery or transfer of any property ...

"Value" in this section means the actual market value of the property concerned, in other words the amount of money which would be paid for the property in an open sale.The plaintiff need not state what the value of the property is in his particulars of claim; it is up to the defendant to allege that the jurisdictional limit is exceeded. Remember that, although this seems to be a claim for specific performance and as such prohibited, in terms of section 46(2)(c), from being heard in a magistrate's court, it is one of the exceptions for which provision is made in section 46(2)(c)(ii).

21.2.4 Section 29(1)(b): ... actions of ejectment ... where the right of occupation is in dispute between the parties ...

First, it should be noted that an action for eviction is not a claim for specific performance. Therefore, the provisions of section 29(1)(b) should not be considered an exception with regard to section 46(2)(c).

It is extremely difficult to lay down general rules for determining whether the "right of occupation exceeds R100 000 in clear value to the occupier", but note the following:

(1) The rental for the premises is not always the correct criterion for calculating the value of the right of occupation, since the rental value is really the value to the landlord, and, in certain cases, the rental value may be far below the true value of occupation to the occupier.
(2) The capital value of the premises is also not necessarily an indication of the value of occupant, except where the defendant claims ownership of the premises.
(3) Where premises are occupied for residential purposes, the value of the right of occupation is probably equal to the rental of other premises similar to the one in dispute, calculated over the same period of occupation.
(4) If, however, the premises are being occupied for business purposes, the value of the right of occupation is probably equal to either

    (a) the cost of renting other premises on which the occupier has a reasonable expectancy of making the same profit as on the premises in dispute, or
    (b) the amount of the profit which the occupier is reasonably expected to make on the premises in dispute

21.2.5 Section 29(1)(c): actions for the determination of a right of way, notwithstanding the provisions of section 46 ...

It is not necessary to wonder whether a right of way is an order for specific performance, as the provisions of section 46 are excluded here. It is also not necessary to determine the value of the

right of way, as no limit is placed on the value thereof, and so it seems that magistrates' courts may create or confirm any right of way, irrespective of its value to the parties.

21.2.6 Section 29(1)(d): ... liquid document or mortgage bond ...

A liquid document is a document in which a debtor, above his signature or that of his agent, admits that he is liable for a fixed or ascertainable sum of money. This concept is discussed in more detail in Module 2 study unit 7.2.2.1. Note that the financial limitation relates to the amount that may be claimed in the summons, not to the amount of the liquid document or bond. A magistrate's court will have jurisdiction in a claim for payment of R70 000 even if the amount of the bond is for R500 000.

21.2.7 Section 29(1)(e): ... credit agreement as defined in section 1 of the Credit Agreements Act 75 of 1980 ...

A credit agreement is an agreement for an instalment sale or for a lease transaction. It is commonly found when large items such as furniture or motor vehicles are purchased, and the purchaser cannot pay the full amount immediately, but receives the gooods concerned and pays the amount due in payments over a period of time.

The plaintiff in such an action, who will be the person or institution who granted credit, can seek one of two things: recovery of the property he sold by hire-purchase or lease, or payment of money owing in terms of the agreement. If he seeks recovery of the property, the **value of the property** at the time of the claim must not exceed the financial limit. If the defendant bought a car on hire-purchase for R300 000, but only stopped payments three years later when the car was worth R80 000 on the open market, then the person or institution who gave the credit could sue for recovery of the car, as its value at the time action is instituted is below the financial limit.

If the plaintiff's **claim** is for payment of one or more outstanding payments, each payment must not exceed the financial limit. The total amount of the various payments can exceed the limit, as each payment constitutes a separate claim. (See in this regard the provisions of s 43, which are dealt with in study unit 24.5 below.)

21.2.8 Section 29(1)(f): ... actions in terms of section 16(1) of the Matrimonial Property Act 88 of 1984 ...

See the comments regarding the interpretation of "claim of value of property in dispute" which are dealt with under section 29(1)(e) above.

It was pointed out in the discussion of section 46(1) in study unit 20.2.1 above, that section 16(1) of the Matrimonial Property Act 88 of 1984 is one of the exceptions to section 46(1). Section 29(1)(f) was introduced in 1984 when the Matrimonial Property Act came into operation. Section 16(1) of this Act provides that where a spouse refuses to, or cannot, give consent to various transactions relating to property belonging to the joint estate or the other spouse, and which require the consent of both parties, the other spouse may approach a magistrate's court

for assistance. The court is approached by way of application and may then authorise the transaction.

In all other instances, the Matrimonial Property Act provides that "court" means a High Court. This exception was presumably introduced to enable the spouse requiring consent to avoid the higher cost of launching an application in the High Court.

21.2.9 Section 29(1)(fA): actions, 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. The Insolvency Act 24 of 1936 provides that sequestrations and liquidations must be decided by the High Courts.

21.2.10 Section 29(1)(g): ... actions other than those already mentioned ...

This section is relevant when claims in the alternative are drafted. If for example delivery (alternatively, damages) is claimed, neither the value of the property nor the alternative claim for damages may exceed the financial limitation.

21.2.11 Section 29(2) ... "action" includes a claim in reconvention

A claim in reconvention is a counterclaim which the defendant may institute against the plaintiff when he or she defends the plaintiff's claim. This subsection merely confirms that these claims are also subject to the same financial limitations.

ACTIVITY

Read the set of facts at the beginning of this study unit and answer the questions which follow:

(1) What is the current financial limitation in the magistrates' courts?
(2) Thandi wants to institute action against Thomas for specific performance alternatively damages. Does this claim fall within the jurisdiction of the magistrates' courts?
(3) ESCOM approaches the magistrate's court to obtain a right of way over Thandi's property. The value of the right of way, to ESCOM, is about R500 000 and it will diminish the value of Thandi's property by about R150 000. May the magistrate's court exercise jurisdiction?
(4) Thandi has bought furniture from Buyrite for her new house for R300 000. She must make monthly payments of R50 000. She falls in arrears and owes Buyrite three payments. Buyrite institutes action in the magistrate's court for recovery of the furniture, which is now damaged and worth R90 000, or alternatively for payment of the three payments which are due. May the magistrate's court exercise jurisdiction?

FEEDBACK

(1) R100 000.

(2) Thandi need not place a value on her claim for specific performance. The alternative claim may not exceed R100 000, so, provided she is prepared to limit her claim for damages to R100 000, the magistrate's court will have jurisdiction.

(3) Yes. Section 29(1)(c) provides that a magistrate's court may grant a right of way, and does not impose any financial restriction on the value thereof.

(4) Yes, the magistrate's court may exercise jurisdiction. The value of the property in dispute does not exceed R100 000. The total value of the claim for payment exceeds R100 000 but each individual claim for a monthly payment falls under the financial limit, and so the court will also have jurisdiction to hear the alternative claim.

STUDY UNIT

22

SECTIONS 28 AND 30*bis*: JURISDICTION IN RESPECT OF PERSONS

You are a candidate attorney in Pretoria. Thandi, who lives in Rustenburg, arrives in your office with a problem.

Thandi signed an agreement with Rashid to buy a piece of land from him for R80 000. Rashid lives in Johannesburg and the piece of land is situated in Kempton Park. She then signed a contract with Thomas, a builder from Pietersburg. In terms of this contract Thomas will build a house for her on this land. She contractually undertook to pay Thomas R90 000 for the building work.

Thandi paid Rashid the purchase price of R80 000 but Rashid then refused to sign the transfer documents. Thomas started to dig the foundations but then told Thandi that he had found a better job and no longer intended to build her house.

She thinks that the value of only the house, when finished, will be about R150 000, the value of the house and land about R240 000 and the expense of finding another builder to complete the building work about R120 000.

OVERVIEW

22.2.8 Section 28(2): The state as defendant
22.3 The provisions of section 30*bis*
22.4 The procedure for obtaining an order for arrest or attachment

LEARNING OUTCOMES

After you have finished studying this study unit you should

- know when a particular court will have jurisdiction
- understand the provision of sections 28 and 30*bis*
- be able to solve problem-style questions based on the provisions of sections 28 and 30*bis*

COMPULSORY READING

Sections 28, 30 *bis* Magistrates' Courts Act 32 of 1944
Rule 57(1)–(3), (5) and (7) of the magistrates' courts rules

22.1 GENERAL

The question whether an action should be instituted in the magistrate's court (in contradistinction to the High Court) is covered by the provisions of sections 29 and 46.

Section 28 does not deal with the question whether **any** magistrate's court has jurisdiction in respect of certain categories of persons. Section 28 answers the question: "In **which** magistrate's court should this action, in which these parties are involved, be instituted?" This section deals with the link that should exist between the jurisdictional area of a **specific magistrate's court** and the person in respect of whom the court's jurisdiction is being exercised.

The importance of litigating in the correct magistrate's court cannot be overemphasised. A legal practitioner who at plea stage discovers — after receipt of the opponent's special plea raising lack of jurisdiction — that his or her client is in the wrong court, will have considerable difficulty in explaining to his or her client why the action should be instituted *de novo* in another magisterial district, not to mention the waste of money!

For a court to exercise jurisdiction over a person, some *nexus* or link must exist between the jurisdictional area of the court and the defendant, cause of action or property concerned. While this holds true for both the High Courts and the magistrates' courts, the jurisdiction in respect of persons, exercised by the magistrates' courts, is more limited because it is statutorily prescribed.

Section 28 sets out the links which will give a particular magistrate's court jurisdiction in respect of a specific set of facts.

Note the following:

(1) Every paragraph in section 28 begins with words relating to persons. In all instances, **"person" means the defendant** only, not either of the parties. In other words, the situation of the defendant, not the plaintiff, will give a court jurisdiction. Where relevant, a person can be a juristic person such as a company, close corporation or municipality.
(2) It is important to note that the persons referred to in section 28 are the **only** persons in respect of whom a magistrate's court has jurisdiction, as is apparent from the imperative wording of the introductory sentence of section 28(1): "... **shall be** the following and **no other** ..." (own emphasis). In *Van Heerden v Muir* 1955 (2) SA 376 (A) at 379, the Appellate Division (now the Supreme Court of Appeal) held that the words "the following and no other", in section 28, "show that the Legislature plainly intended to alter the common law except in the case of a defendant who appears and takes no objection to the jurisdiction (section 28(1)(f)). To that extent, and that extent alone, has the Legislature preserved the common law."

The introductory sentence to section 28 makes it clear that a magistrate's court may also be given jurisdiction by some other Act. Examples of such Acts are the Close Corporations Act 69 of 1984 and the Maintenance Act 23 of 1963.

22.2 THE PROVISIONS OF SECTION 28

Please ensure that you have a copy of this section available when reading the commentory that follows.

22.2.1 Section 28(1)(a): any person who resides, carries on business or is employed within the district

22.2.1.1 Reside

This concept was dealt with in study unit 10.2 which explains terminology used in the High Court. The meaning of the concept is unchanged in both courts. Please see study unit 10.2 for a description of this term.

22.2.1.2 Carries on business

The question whether a person "carries on business" within the court's area of jurisdiction is one of fact, and is similar to the question whether a person "resides" in a particular place. However, the phrase connotes regularity, and all the facts must be examined. Note that the business carried on must be one's **own business**. An artificial person, such as a corporation or company, carries on business in the place where its head office is situated, although a large company may clearly carry on business in a number of places simultaneously. Here the company may be sued where its local head office is situated.

22.2.1.3 Is employed

A person who "is employed" does not "carry on business"; hence the words "is employed" cover

an employee who falls outside the ambit of the latter phrase. A degree of permanent employment is required. A defendant who usually works in an office in district X, but who is sent to district Y to finalise a matter there (which will take only a few days), does not then become subject to the jurisdiction of the court of district Y.

22.2.1.4 Time at which position is determined

In *Mills v Starwell Finance (Pty) Ltd* 1981 (3) SA 84 (N), section 28(1)(a) was interpreted as follows: The date of service of the summons and not its date of issue is the determining factor in establishing whether a defendant was "employed within the district" of the magistrate's court concerned. Although a defendant may have been "employed within the district" when the summons was issued, the court concerned has no jurisdiction over him or her in terms of section 28(1)(a) if he or she was not still employed there when the summons was served. To summarise: it is not the issue of summons, but the service thereof which brings the defendant into the action.

22.2.2 Section 28(1)(b): any partnership ... within the district

A partnership is not a juristic entity and, if sued in terms of common law, all the partners have to be sued jointly. This was extremely inconvenient if the partners lived in different districts and as a result, section 28(1)(b) was introduced for the sake of convenience. It provides that a partnership can be sued in any area where it has business premises or where any one of the partners resides. A notice in terms of rule 54 is usually served together with the summons. This notice requires the partnership to state who all of the partners were at the time the cause of action arose.

22.2.3 Section 28(1)(c): any person ... in respect of any proceedings incidental to any action ...

At common law, a plaintiff is deemed to submit himself or herself to the jurisdiction of any court where he or she institutes action in respect of any counterclaim. A plaintiff in a High Court action is therefore always subject to the jurisdiction of that court if the defendant institutes a counterclaim. Common law does not apply in respect of the jurisdiction of magistrates' courts and so this assumption was not valid for magistrates' courts.

The legislature introduced section 28(1)(c) to deal with the problem, but was not completely successful, because of the use of the word "incidental". Different kinds of proceedings are incidental to the main action. Interlocutory and preliminary applications are two examples.

A counterclaim, which is a claim by the defendant against the plaintiff and is filed with the plea, would appear to qualify as a proceeding which is incidental to the main claim.This is however not the position. Many, but not all, counterclaims are incidental to the main action, in other words arise out of the same facts as the main action. In our example at the start of this study unit, if Thandi claims damages from Thomas for non-performance of the building contract, a counterclaim by Thomas for delivery of his tools that he left on the property will be incidental to the main action, but a counterclaim that Thandi owes him money that he lent her to pay the deposit on furniture she purchased, will not be incidental.

So it is possible that a defendant will not be able to file a counterclaim in answer to an action instituted against him or her in a magistrate's court, as the court lacks jurisdiction because the counterclaim is not "incidental" to the main action. However, if the court does not have jurisdiction to hear the counterclaim but the plaintiff does not object to the jurisdiction of the court, the court will have jurisdiction in terms of section 28(1)(f).

22.2.4 Section 28(1)(d): ... cause of action arose wholly within the district

The heading of this study unit states that jurisdiction in respect of persons is dealt with in section 28. You will note that this is not quite correct — section 28(1)(d) provides that a magistrate's court may exercise jurisdiction if the "whole cause of action" arose in the district. So, jurisdiction is determined by where the cause of action arose, not where the defendant is found.

In terms of common law jurisdiction may be exercised *ratione rei gestae* in the High Courts, in other words where the cause of action arose. However, in the High Court, the cause of action need only have arisen **partially** for a court to be vested with jurisdiction. In contrast, in magistrates' courts the Act provides that the cause of action must arise **wholly** in the relevant area before a court will be vested with jurisdiction.

In the High Court, for example, it is sufficient to show, in an action based on a contract, that the contract was concluded, or was to be performed, within a particular jurisdictional area. In the magistrate's court, however, it must be shown not only that the contract was concluded within the district concerned, but also that the breach occurred there as well; in other words, the cause of action must have arisen "wholly" within the district.

What does the word "wholly" mean in the context of the Act? The concept "whole cause of action" has been considered in a number of court decisions. It has been described (*Abrahamse & Sons v SAR & H* 1933 CPD 626) as the

> ... entire set of facts which gives rise to an enforceable claim and includes every fact which is material to be proved to entitle a plaintiff to succeed in his claim. It includes all that a plaintiff must set out in his declaration in order to disclose a cause of action.

The concept was analysed further in *King's Transport v Viljoen* 1954 (1) SA 133 (C) where the court drew a distinction between *facta probanda* (facts at issue) and *facta probantia* (facts relevant to the facts at issue, and which are used to prove the facts at issue). The *facta probanda* must all have occurred within the jurisdictional area concerned, but not the *facta probantia*.

The following example will illustrate this point: A collision takes place in the magisterial district of Pretoria, involving the car of Khamran, a resident of Pretoria, and the car of Benny, who resides in Johannesburg. Khamran the plaintiff, decides to institute action for damages in the Pretoria magistrate's court. The *facta probanda* which Khamran must prove are

(1) that his car was damaged in the collision
(2) that the collision was caused by Benny's negligence
(3) that Khamran suffered damages as a result of the accident in the amount of (say) R43 500

The *facta probantia* which Khamran would possibly adduce to prove the *facta probanda*, are

(1) that he is, in fact, the owner of the damaged car, because he bought it in Brakpan one year prior to the accident
(2) that he, in fact, suffered damages in the amount of R43 500, being the reasonable cost which was incurred to have his vehicle repaired at the garage in Brakpan where he originally bought his car

The *facta probanda* stated above all occurred within the magisterial district of Pretoria, while the *facta probantia* occurred in Brakpan. The cause of action arose wholly within the Pretoria area of jurisdiction. Consequently, the Pretoria magistrate's court will have jurisdiction in terms of section 28(1)(d).

The purpose of this subsection is to make matters more convenient for the plaintiff and witnesses in certain types of cases. For example, it frequently happens that a person is involved in a transaction which occurs in a district other than that in which he or she resides or carries on business. Thus a visitor from Pretoria is involved in a motor-vehicle collision while on holiday in Cape Town, and a local resident is injured. Were it not for section 28(1)(d), the local resident would have to sue in Pretoria, and he or she and his or her witnesses would have to travel all the way there to give evidence.

Where there is doubt as to the area of jurisdiction in which the cause of action arose, it would be wise to proceed in the magistrate's court which has jurisdiction over the matter in terms of one of the other subsections. An example of such a case would be that where two vehicles collide on a bridge over a river which constitutes the boundary between two districts. Uncertainty may exist about the precise point of impact, and one or two metres would then make all the difference with regard to area of jurisdiction. In such a case, it would be safer to issue summons in the court in whose area of jurisdiction the defendant is resident or is employed.

Note the following:

(1) Rule 6(5)(f) provides that, should the plaintiff sue in terms of a capacity conferred by section 28(1)(d), the summons must state that the cause of action arose wholly within the district. Further details or proof in support of such a claim need not be given in the summons, although the defendant is entitled to request further particulars in this regard.
(2) This subsection cannot be used to establish jurisdiction in respect of claims based on credit agreements. In such instances, jurisdiction must be founded on one of the other subsections of section 28. The only instance in which jurisdiction may be established in terms of section 28(1)(d) in respect of claims based on credit agreements, is when the credit receiver no longer resides in the Republic (see s 21 of the Credit Agreements Act 75 of 1980).

22.2.5 Section 28(1)(e): any party to interpleader proceedings ...

Interpleader is a form of procedure by which a person in possession of property which is not his or her own property, and which is claimed from him or her by two or more other persons, is able to call upon the rival claimants to such property to appear before the court in order that the right to such property may be determined.

This procedure is followed in cases where either the sheriff of the magistrate's court has attached property, and more than one person claims a right to the property, or where a person other than

the sheriff of the magistrate's court is in possession of the property and conflicting claims are made in respect thereof.

22.2.6 Section 28(1)(f): any defendant who appears and makes no objection ...

This paragraph is a legislative restatement of common law, namely that, if a person not subject to a court's jurisdiction submits thereto, such court will be vested with jurisdiction by virtue of such submission. Note, however, that this subsection is subject to the same limitations as the common-law doctrine: thus, a defendant cannot confer jurisdiction upon a court in matters which it is not empowered to hear, for example a divorce in terms of section 46.

In study unit 24.4, consent to jurisdiction in terms of section 45 is discussed. Subsection 28(1)(f) may be distinguished from the situation envisaged in section 45, in the sense that, in the case of section 45, the defendant positively **consents** to the jurisdiction of the magistrate's court. In terms of section 28(1)(f), we are dealing with a failure to **object** to the court's jurisdiction.

This distinction perhaps explains why a defendant may consent to jurisdiction in terms of section 45 in respect of claims quantitatively exceeding the limits imposed by section 29, but why such defendant cannot confer jurisdiction upon the court on the ground of submission (in terms of s 28(1)(f), in these matters where the amount claimed exceeds s 29 limitations).

As a general proposition, one may therefore state that the defendant, by his or her failure to object, "consents" to the court's jurisdiction only in respect of his or her person. This means that submission in terms of section 28(1)(f) is valid only when a court lacks jurisdiction in terms of section 28. Submission cannot be used when a court lacks jurisdiction in terms of section 29 — then actual consent in terms of section 45 is necessary.

How must a defendant indicate that he or she objects to the jurisdiction of the court? The entry of appearance in order to defend the action is not an indication that the defendant accepts the court's jurisdiction, as the defendant must enter appearance within a certain time to ensure that the plaintiff does not obtain a default judgment against him. The correct procedure for raising an objection to the jurisdiction of the court is to file a special plea together with the plea on the merits. It appears that in exceptional circumstances a defendant may even object to the court's jurisdiction at a later stage.

22.2.7 Section 28(1)(g): any person who owns immovable property ...

The effect of this section is to extend jurisdiction to persons who (for instance) own immovable property within the area of jurisdiction of a court, but who are otherwise not subject to such court's jurisdiction in terms of any other provisions of section 28(1).

Note the wording of the section. The mere fact that immovable property is situated within the area of a particular court does not automatically confer jurisdiction upon that court — the action must be **in respect of** that particular property or it must be **in respect of** a mortgage bond registered over such property. The person who owns the property must be the defendant in the action. It must be stated in the summons that the property concerned is situated within the district (rule 6(5)(g)).

22.2.8 Section 28(2): The state as defendant

The words "person" and "defendant" also include the state.

In *Minister of Law and Order v Patterson* 1984 (2) 739 (A), the then Appellate Division had to decide which magistrate's court was competent to entertain an action against the State. The court held that the question whether the respondent was entitled to sue the appellant in the Cape Town magistrate's court had to be determined by reference to the provisions of section 28 of the Act. The court ruled that on the grounds of convenience and in the interests of certainty, one should adopt a similar rule to that which the courts apply when determining the forum in which a trading corporation or other artificial person is sued in terms of section 28(1)(a). The court noted that the "residence" or "place of business" of a trading corporation is interpreted as being the place where the central management of such corporation is exercised. A similar interpretation can be applied to the State which has vast and country-wide activities. The court held that Pretoria is regarded as "the seat of the Government of the Republic" in terms of section 23 of the Republic of South Africa Constitution Act 32 of 1961 (as it then applied). Thus the "place of business" of the State in terms of section 28(1) is Pretoria. The special plea as to lack of jurisdiction was therefore upheld.

22.3 THE PROVISIONS OF SECTION 30*bis*

Please ensure that you have a copy of this section available when reading the commentary that follows. Please also read study unit 14.1 and 14.2 to know what the equivalent position is in the High Courts.

You will note that this section provides for arrest or attachment against anyone not **resident** in South Africa. The equivalent common-law position in the High Courts is that a *peregrinus* of the whole of South Africa, in other words someone neither **domiciled** nor **resident** in the country, may be subject to arrest or attachment. Whether this implies that a person who is domiciled in South Africa but not currently resident here may be subject to arrest or attachment in the magistrates' courts has not been decided.

The section makes provision for arrest and attachment to either found or confirm jurisdiction. However, the section is worded very widely and no limits are set on the court's ability to order arrest or attachment to found or confirm jurisdiction. Does this mean that a magistrate's court has wider jurisdiction than the High Court, so that it may order arrest or attachment without requiring some other jurisdictional link between itself and the parties?

It is generally held that it is improbable that legislation would grant the magistrates' courts greater jurisdictional powers than those exercised by the High Courts, and that the section must be interpreted in the light of the equivalent common-law position in the High Courts. This means that if a plaintiff wishes to arrest someone or attach his or her property in order to found jurisdiction, the plaintiff must be resident in the district of the magistrate's court concerned. Similarly, if a person wishes the court to grant arrest or attachment in order to confirm jurisdiction, the whole cause of action must have arisen in the court's jurisdictional district in terms of section 28(1)(d).

The amount of R40 referred to in section 30 *bis* seems extremely small — this section has not been amended since it was drafted in 1964, when the amount was worth a lot more and the financial limit to the jurisdiction of the magistrates' courts was much less than today.

22.4 THE PROCEDURE FOR OBTAINING AN ORDER FOR ARREST OR ATTACHMENT

Magistrates' courts rule 57 gives detailed instructions on how to obtain an order for arrest or attachment. The application is made *ex parte*, in other words the respondent is not given notice of the application. This is because, if he or she were aware that a court was about to order his or her arrest or the attachment of his or her property, it is possible that he or she would try to prevent this from taking place. The rule provides that, once arrest or attachment has been ordered, the respondent is given an opportunity to approach the court to discharge or alter the order, if it should not have been granted. The rule also provides that the court may require the applicant to give security for any damages that may be caused to the respondent by the order, if it later appears that the order should not have been granted.

Rule 57(2) contains a list of the information that must be included in the affidavit supporting the application, and you must study this carefully.

ACTIVITY

Read the set of facts at the beginning of the study unit and answer the questions which follow:

(1) Thandi wants to institute action against Rashid for damages, for R90 000, because he failed to give transfer of the property. In which court or courts may she do so?
(2) Thandi want to institute action against Rashid for transfer of the property. In which court or courts may she do this?
(3) If Thandi signed the contract with Thomas in Pretoria, in which court or courts may she institute action against Thomas for damages in an amount of R100 000, for breach of the contract?
(4) If Thomas was a resident of Zimbabwe, not of Pietersburg, in which court could Thandi institute action against him for damages for breach of contract?
(5) What would Thandi have to do before she could institute an action against Thomas as set out in question (4)?
(6) If Thandi wanted to institute action against Thomas as set out in question (4), give the eight allegations that she would have to make in her affidavit supporting the application for arrest.

FEEDBACK

(1) Thandi may institute action against Rashid in the Johannesburg magistrate's court in terms of section 28(1)(a) because Rashid resides in Johannesburg. You cannot determine whether another court might also have jurisdiction in terms of section 28(1)(d) because you do not know where the agreement was signed or breached.
(2) Thandi may institute action against Rashid in the Johannesburg magistrate's court in terms of section 28(1)(a). She may also institute action against Rashid in the Kempton Park magistrate's court in terms of section 28(1)(g) because the property is situated there and the action is in respect of the property.

Note: Unlike the position in the High Courts in terms of common law, the court where property is situated does not have exclusive jurisdiction in actions concerning the property.

(3) Thandi may institute action against Thomas in the Pietersburg magistrate's court in terms of

section 28(1)(a) because Thomas resides in Pietersburg. Thandi cannot institute action against Thomas in either of the courts (Pretoria or Kempton Park) where a part of the cause of action arose, in terms of section 28(1)(d), because the whole cause of action must arise in **one** court. The contract was signed in Pretoria but the breach occurred where the work was to be performed, in Kempton Park.

(4) A foreign *peregrinus* may be sued in the magistrates' courts in terms of section 30 *bis* but it is then necessary for some other link to exist between the court and either the plaintiff or the cause of action. As the cause of action did not arise wholly in one court, this cannot serve as the link to enable arrest or attachment to confirm jurisdiction to take place. The only possible link is the residence of the plaintiff, Thandi. Thandi can institute action against Thomas in Rustenburg provided that she can arrest Thomas or attach some of his property to found jurisdiction, because she is a resident of Rustenburg.

(5) Thandi will have to bring an application in terms of magistrates' courts rule 57, for leave to arrest Thomas or to attach his property in order to found jurisdiction. This application must be brought in the Rustenburg magistrate's court.

(6) Refer to rule 57(2)(a) and write out the eight allegations that must be made.

STUDY UNIT

23

OTHER PROVISIONS THAT DETERMINE WHETHER A MAGISTRATE'S COURT MAY EXERCISE JURISDICTION

You are a candidate attorney in Pretoria. Thandi, who lives in Rustenburg, arrives at your office with a problem.

She signed an agreement with Rashid to buy a piece of land from him for R80 000. Rashid lives in Johannesburg and the piece of land is situated in Kempton Park. She then signed a contract with Thomas, a builder from Pietersburg. In terms of this contract Thomas willl build a house for her on this land. She contractually undertook to pay Thomas R90 000 for the building work.

Thandi paid Rashid the purchase price of R80 000 but Rashid then refused to sign the transfer documents. Thomas started to dig the foundations but then told Thandi that he had found a better job and no longer intended to build her house.

She hears that Rashid is proposing to leave South Africa to avoid refunding her the money she paid him. He is booked to leave from Johannesburg International Airport in two days time.

Buildrite, a supplier of building materials, has delivered goods to the value of R70 000 to Thandi's premises. She has not yet paid for these goods. Thomas, the builder, removes the goods belonging to Buildrite from Thandi's premises. He plans to use them at another building site.

Thandi also owns property in Johannesburg which she has rented to tenants. The tenants are three months in arrears and she suspects that they plan to leave the property to avoid paying the arrear rental.

OVERVIEW

LEARNING OUTCOMES

After you have finished studying this study unit, you should

- understand how the sections of the Act dealt with in this study unit give to magistrates' courts a jurisdiction to make orders they would otherwise not have
- be in a position to describe each form of order
- be able to describe the procedure to be followed when each form of order is sought

COMPULSORY READING

Section 170 of the Constitution of the Republic of South Africa, 1996
Sections 30–32, 37, 50 and 110 of the Magistrates' Courts Act 32 of 1944

23.1 GENERAL

Study unit 20 dealt with section 46, the most important section of the Magistrates' Courts Act when determining the jurisdictional limits placed on magistrates' courts. Numerous other sections also influence the authority of a magistrate's court to hear specific types of actions and grant the necessary form of order. The following sections all deal, to some extent, with the question of whether **any** magistrate's court is competent to hear an action and make the required order:

- section **30,** which provides that magistrates' courts may grant interdicts
- sections **31** and **32**, which deal with forms of interdict peculiar to the magistrate's court
- section **37**, which provides that, to determine a matter which a magistrate's court may hear, the court may decide on matters outside its jurisdiction

- section **50,** which deals with how a defendant can transfer a matter to the High Court if he or she is not happy with the fact that the matter is being heard by a magistrate's court

The reasons for stating that these sections determine the competence of a magistrate's court to hear a matter will become clear from the discussion on each section.

When you study the various sections, please ensure that you have a copy of the relevant section available.

23.2 THE PROVISIONS OF SECTION 30: INTERDICTS

23.2.1 Introduction

Section 30 provides that magistrates' courts have jurisdiction to grant various types of orders which might otherwise be excluded in terms of section 46(2)(c), which prohibits magistrates' courts from granting orders for specific performance without an alternative claim for damages. In terms of section 30, magistrates' courts may grant interdicts, attachment orders, *mandamenten van spolie*, and arrests *tanquam suspectus de fuga*. In all instances, the provisions of sections 28 and 29 must still be complied with. This means that, for example, while section 30 authorises a magistrate's court to grant an interdict, the amount concerned must still fall within the monetary limits imposed by section 29, and the court must have jurisdiction over the person of the defendant in terms of section 28.

23.2.2 Interdicts

An interdict is a court order in terms of which a person is ordered either to perform or not to perform a specific act. An order that someone must not perform an act is a prohibitory interdict, while an order that someone must perform an act is a mandatory interdict. Such orders may be final or temporary: a final interdict is an order that remains permanently valid; a temporary interdict is granted either for a particular period of time or as an interim measure while the outcome of the main case is awaited.

It is clear that a mandatory interdict could be viewed as a form of specific performance and so prohibited by section 46(2)(c), because an order to perform an act is frequently a very similar order to one for specific performance. However, it was held, in *Badenhorst v Theophanous* 1988 (1) SA 793 (C) that magistrates' courts may nevertheless grant mandatory interdicts, provided that such orders do not amount to "orders *ad factum praestandum* in terms of a contractual obligation".

Magistrates' courts may grant both final and temporary interdicts.

It is frequently difficult to determine the financial value which must be placed on an interdict, to decide whether it falls within the limits set by section 29. How, for instance, does one assess the value of an order preventing an employee from giving confidential information to another employer? It seems that, if nothing appears to the contrary in the pleadings or in evidence, or if the defendant does not dispute the plaintiff's allegation that the matter falls within the limits set by section 29, the court will have jurisdiction.

However, if it is impossible to determine the value of the interdict and the plaintiff decides to

institute action in the High Court, this court will not penalise the plaintiff by making an order for costs on the lower magistrates' courts scale but will grant him costs on the High Court scale.

NOTE: The procedure for obtaining an interdict in terms of section 30, read with rule 56, is dealt with in Module 2 of Civil Procedure (CIP301K).

23.2.3 *Mandamenten van spolie*

A *mandamenten van spolie* is a form of interdict. It is also known as a restitutionary interdict, because it is an order forcing someone to return property that he or she has taken unlawfully from another. The person applying for such an order need not be owner of the property or have any claim to the property; in fact, he or she need not even be in lawful possession of the property. The object of a *mandamenten* is to prevent people from taking the law into their own hands, and for this reason the court does not go into the merits of the matter until the person whose possession was disturbed is placed in possession of the item.

Once again, this form of order appears to contravene section 46(2)(c). However, the order, is usually not "in terms of a contractual obligation" and it has been held that a *mandamenten van spolie* does not contravene the provisions of section 46, because section 46 is not concerned with "extraordinary remedies of a temporary nature" (*Zinman v Miller* 1965 (3) SA 8 (T)).

The value of the property which must be returned will determine whether a magistrate's court is prohibited by section 29 from exercising jurisdiction.

NOTE: The procedure for obtaining a *mandament van spolie* as set out in rule 56 is dealt with in Module 2 of Civil Procedure (CIP301K).

23.2.4 Arrests *"tanquam suspectus de fuga"*

If a debtor owes money to a creditor, the creditor cannot enforce payment until a court has given judgment against the debtor. For this reason a debtor sometimes attempts to leave South Africa before the granting of a court judgment against him or her because, once the creditor has such a judgment, it can be enforced in most countries of the world. The arrest *tanquam suspectus de fuga* procedure was available at common law, but has now been included in both the Uniform Rules of the High Court and in the Magistrates' Courts Act and rules. Its purpose is to stop a debtor from fleeing South Africa to evade a judgment — its purpose is not to force him or her to pay the debt.

In terms of this procedure a debtor who attempts to flee South Africa to evade the court may be arrested and compelled to give security for the expected judgment in the case that the creditor has instituted or proposes to institute. This has a twofold advantage — either the debtor pays an amount so that the creditor is reasonably certain of recovering the debt, or the debtor remains under arrest until the court gives judgment, when the creditor can attempt to have the judgment debt paid in terms of one of the debt collecting procedures available.

NOTE: The procedure for obtaining an order of arrest *"suspectus de fuga"* in terms of rule 56 is dealt with in Module 2 of Civil Procedure (CIP301K).

23.2.5 Attachments

In actions where the payment of money or relief in regard to property is sought, it is sometimes possible to attach property in the possession of the defendant in order to obtain security for the claim. Attachment of property in terms of section 30 is not available in all instances — a person applying for an attachment must show that it is likely that the respondent will dispose of the property in order to frustrate his creditors, or plans to abscond with his assets.

The other instance when such attachments are granted is when a person does not keep up his payments in terms of a credit agreement, and the creditor wants to protect his position by attaching the goods which he sold to the debtor, to safeguard them.

NOTE: The procedure to obtain attachments in terms of section 30, read with rule 56, is dealt with in Module 2 of Civil Procedure (CIP301K).

23.3 THE PROVISIONS OF SECTIONS 31 AND 32: RENT INTERDICTS

23.3.1 Introduction

As soon as a lessor falls behind with his rental, the landlord acquires a tacit hypothec over all the household effects (*invecta et illata*) which are on the leased property, for the rent which is due.

However, the moment the household effects are removed from the leased premises, the tacit hypothec falls away. The landlord must therefore ensure that the household goods remain on the premises, in order to maintain the hypothec. He or she does this by obtaining a special form of interdict and attachment order which prohibits removal of the goods from the leased premises.

Please ensure that you have a copy of sections 31 and 32 of the Act handy when reading what follows.

23.3.2 The automatic rent interdict

Although an ordinary interdict may be used to prohibit the removal of household effects, the Magistrates' Courts' Act has created a simpler and less expensive procedure in section 31. This provides that, when summons is issued for arrear rental, the plaintiff may include in the summons a notice prohibiting anyone from removing from the leased premises, any of the household effects which are subject to the hypothec, until an order dealing with such goods has been made by the court. The notice in the summons serves automatically as an interdict, forbidding anyone with knowledge thereof to remove goods from the premises, and no court application or other formalities are required. The lessee or anyone else who is affected by the notice may apply to court to have it set aside.

Note that the notice is addressed not only to the defendant but also to all other persons, and anyone who is aware of the notice may not remove items from the premises.

The summons in which rental is claimed takes the usual form, with the addition of the following paragraph which contains the automatic rent interdict:

> And further take notice that you, the defendant, and all other persons are herby interdicted from removing or causing or suffering to be removed any of the furniture or effects in or on the premises described in the particulars of claim endorsed hereon which are subject to the plaintiff's hypothec for rent until an order relative thereto shall have been made by the court.

23.3.3 Attachment of property in security of rent

The automatic rent interdict created by section 31 is effective only against persons who have knowledge of it. Persons who are not aware of the contents of the summons will not be in breach of the interdict if they remove property from the premises. To protect the household goods against removal by anyone at all, section 32 provides for an attachment order to supplement the effect of the interdict and to secure the goods effectively. Section 32 provides that the court may authorise the sheriff to attach enough of the movable property on the premises which is subject to the landlord's hypothec, to satisfy the amount owed as rental.

The landlord must apply to court and, in his or her supporting affidavit, state the following:

- the amount of rent due and in arrears
- that the rent has been demanded in writing for at least 7 days or, if this is not so, that he or she believes that the lessee is about to remove the movable property on the premises to avoid paying rent

The landlord must also provide security for all costs, damages and expenses which may be a result of this order, should it be set aside at a later stage.

The lessee may apply to have the order set aside. He or she may also consent to the attached property being sold in execution in order to pay the rent. If neither of these options is chosen, the defendant must plead to the summons and the usual trial procedure will follow.

23.4 THE PROVISIONS OF SECTION 37: INCIDENTAL JURISDICTION

It sometimes happens that a question arises during the proceedings of magistrates' courts, which falls outside the jurisdiction of these courts. The question can be one that no magistrate's court may hear in terms of section 46, or it can be one that exceeds the jurisdictional limits of the courts as imposed by section 29. Section 37 provides that, while a magistrate's court may not make an **order** on matters falling outside its jurisdiction, it may make a **finding** on such matters. The test to decide whether a court may decide a matter in terms of section 37 is to look at the relief that the court is asked to grant: if that relief falls within the jurisdictional limits of section 46 and section 29, the court may grant such relief even if this means that it has to consider, and make a finding on, matters outside its jurisdiction.

Section 37(1) deals with one specific matter where the jurisdictional limits of section 29 are exceeded. In this instance it will, for example, make no difference if the total account is far in

excess of the jurisdictional limit, provided that the value of the plaintiff's claim falls within the limit.

Section 37(2) deals with matters in which the court has no jurisdiction in terms of either section 46 or section 29. Here, a court may, for example, inquire into the ownership of fixed property in order to determine a claim for rates, or consider the validity of a divorce agreement in order to make an order for the payment of maintenance.

23.5 THE PROVISIONS OF SECTION 50: REMOVAL TO HIGH COURT

It sometimes happens that, despite the fact that the matter falls within the jurisdictional limits of sections 46 and 29, a party feels that a matter is too complex for him or her to wish it to be heard by a magistrate's court. If that party is the plaintiff, he or she is always free to institute action in the High Court. There is nothing to prevent a plaintiff from doing so — all that he or she need fear is a costs order against him or her on the greater High Court scale.

The defendant does not have this choice — he or she is served with a summons from the court chosen by the plaintiff. Section 50 gives a defendant the opportunity to have a matter moved from the magistrate's court to the High Court if he or she is not satisfied with having it heard by the lower court.

If a defendant wishes to exercise this option, an application must be made to the court where summons has been issued. The defendant must state that

- the amount of the claim exceeds R3 000
- the applicant objects to the matter being heard by any magistrate's court
- notice of intention to bring the application has been given to the plaintiff and other defendants, if any
- the applicant will furnish such security as the court determines, for payment of the amount claimed and costs

If the applicant complies with these requirements, the case must be stayed in the magistrate's court. The plaintiff may then elect to have the matter transferred to the relevant High Court having jurisdiction, or he may decide to issue a fresh summons in the High Court.

The only check on a defendant's freedom to require that a matter be heard before a High Court rather than a magistrate's court, is the costs order which the High Court may make. If the plaintiff is eventually successful, the court may grant him or her High Court costs on attorney-and-client scale, which is considerably higher than the usual party-and-party scale.

ACTIVITY

Read the set of facts at the beginning of this study unit and then answer the questions which follow:

(1) What can Buildrite do to stop Thomas removing the goods if it hears about his intention to do so before he removes the goods?
(2) Can Thandi do anything to recover the goods if they have already been removed from her premises?
(3) How can Thandi prevent Rashid from leaving the country?

(4) What should Rashid do if he feels that the whole matter of payment of the purchase price is too complicated to be decided by a magistrate's court?
(5) What procedure would you use to obtain payment of the arrear rental for Thandi?

FEEDBACK

(1) Buildrite may ask the court to grant a prohibitory interdict to prevent Thomas from removing the goods.
(2) Thandi may apply for a *mandamenten van spolie* against Thomas. Although she is not the owner of the goods, they have been removed from her possession unlawfully, and she is entitled to an order which requires Thomas to return the goods to her premises. The court will not go into the merits of the matter but will immediately order return of the goods.
(3) Thandi can apply to court *ex parte* for an order for arrest *suspectus de fuga*.
(4) Rashid must apply to the magistrate's court to have the matter transferred to the High Court. If he does this, he runs the risk that attorney-and-client costs will be awarded against him if Thandi is successful.
(5) You would issue summons against the tenant for the outstanding arrears. In the summons you would include a section 31 notice interdicting anyone from removing household effects from the premises. If you wanted to be even more sure that Thandi was protected, you would bring a section 32 application for attachment of enough household goods to cover the arrear rental.

STUDY UNIT

24

PROVISIONS AFFECTING CLAIMS WHICH FALL OUTSIDE THE JURISDICTIONAL LIMITS

You are a candidate attorney in Pretoria. Thandi, who lives in Rustenburg, arrives at your office with a problem.

Thandi signed an agreement with Rashid to buy a piece of land from him for R80 000. Rashid lives in Johannesburg and the piece of land is situated in Kempton Park. She then signed a contract with Thomas, a builder from Pietersburg. In terms of this contract Thomas will build a house for her on this land. She contractually undertook to pay Thomas R90 000 for the building work.

Thandi paid Rashid the purchase price of R80 000 but Rashid then refused to sign the transfer documents. Thomas started to dig the foundations but then told Thandi that he had found a better job and no longer intended to build her house.

She thinks that the value of the house alone, when finished, willl be about R150 000, the value of the house together with the land, about R240 000 and the expense of finding another builder to complete the building work about R120 000.

She owes Thomas an amount of R30 000 for the building work he has already done. She also wants damages from Rashid in an amount of R40 000. Thandi feels that these damages are due for *iniuria* because, when she went to ask Rashid to sign the documents, he swore at her in public and then hit her, breaking her spectacles. She tells you that Rashid alleged that she owed him an amount of R250 000 for previous property transactions they had been involved in, and that it is for this reason that he refuses to sign the transfer documents.

OVERVIEW

LEARNING OUTCOMES

After you have finished studying this study unit, you should

- understand when a magistrate's court may determine matters falling outside its financial limits
- be able to explain how and when the above sections can be used

COMPULSORY READING

Sections 38–40, 43, 45, 47 Magistrates' Courts Act 32 of 1944
Magistrates' courts rule 20(4)–(6)

24.1 GENERAL

Study unit 21 dealt with the provisions of section 29, which contain the financial limitations imposed on magistrates' courts. It is sometimes possible for parties to litigate about amounts in excess of these limits by virtue of other sections in the Act. The following sections all deal with instances where the jurisdictional limits imposed by section 29 affect the choice of court in which a plaintiff may institute action:

- sections **38** and **39,** which set out how to reduce a claim, so that it falls within the jurisdictional limit of a magistrate's court
- section **45,** which sets out how the parties can consent to the jurisdiction of a magistrate's court despite the fact that the amount claimed is higher than the limit or that the court does not have jurisdiction in terms of section 28

- section **40**, which provides that one claim cannot be split into many different smaller claims to bring the claim within the financial limits
- section **43**, the opposite of section 40, which deals with how to institute an action where more than one amount is claimed which in total exceeds the jurisdictional limit, although each amount is less than the limit
- section **47,** which deals with the situation in which a counterclaim which falls outside the jurisdiction of the magistrates' courts, is filed in response to a plaintiff's claim instituted in a magistrate's court

Students must have a copy of all these provisions at hand when reading what follows.

24.2 THE PROVISIONS OF SECTION 38: ABANDONMENT OF PART OF CLAIM

24.2.1 The effect of the provisions of section 38

A plaintiff may often have a claim that is higher than the jurisdictional limit imposed by section 29, but nevertheless wishes to institute action in a magistrate's court because the costs of litigation in these courts are lower than those in the High Courts. Section 38 provides that, in order to fall within the jurisdictional limit of the magistrates' courts, a plaintiff may abandon a part of the claim if it exceeds this limit, so as to fall within the jurisdiction of the court. Obviously, a plaintiff's decision to abandon part of a claim will depend on the type of claim: if he or she is fairly certain that a court will award the full amount of the claim, it would be foolish to abandon a portion, but if the claim is difficult to assess, abandonment would be a wise choice. For example, a plaintiff would be foolish to abandon R30 000 of a claim based on a cheque of R130 000, but might be well advised to abandon the same amount if it were based on a claim for unliquidated damages such as damages arising from a motor-vehicle collision.

Details of any abandonment must be set out explicitly in the summons, or subsequent document if abandonment occurs later in the proceedings. The court will consider and make a finding on the full amount due before abandonment, but can only order payment of the maximum amount permitted by section 29. If the court finds that the amount due exceeds its limits but is not the full amount claimed, the amount that the plaintiff was unable to prove is deducted first from the amount which was abandoned. **In effect, a plaintiff who abandons a portion of his or her claim will receive the amount proved or the maximum that the court can grant, whichever is the lesser amount**. This is because, if a plaintiff proves that he is owed more than the jurisdictional limit, the court can award only the maximum allowed. (Obviously, a plaintiff will not abandon more than is necessary to fall within the court's jurisdiction.) If a plaintiff cannot prove the maximum amount, he or she cannot be awarded more than is proved. If, however, a defendant institutes a counterclaim, any amount awarded as counterclaim is deducted from the amount actually awarded to the plaintiff, not from the amount that he or she claimed before abandonment.

24.2.2 Procedure

Rule 6(3)(b) requires that the particulars regarding any abandonment of part of a claim in terms of section 38 must appear in the summons.

The following is an example of such an abandonment of part of a claim in the plaintiff's particulars of claim:

> **... In terms of the above, Defendant is liable for payment of the amount of R103 000 to Plaintiff. In order to bring his claim within the jurisdiction of the magistrate's court, Plaintiff hereby abandons the amount of R3 000 in terms of section 38 of the Magistrates' Courts Act 32 of 1944.**
>
> **Therefore Plaintiff claims:**
>
> **(1) Judgment against the Defendant for payment of the amount of R100 000 ...., et cetera.**

Section 38 provides that the plaintiff may, in his or her summons, **or at any time thereafter,** abandon part of his or her claim. The plaintiff may, therefore, until the time of judgment, and even during the trial, abandon part of his or her claim *(Hahndick NO v Raath* 1977 (3) SA 947 (C)). After service of the summons, the plaintiff may abandon part of his or her claim by amending his or her particulars of claim in accordance with the procedure prescribed in sections 55A and 55.

24.3 THE PROVISIONS OF SECTION 39: DEDUCTION OF AN ADMITTED DEBT

24.3.1 The effect of the provisions of section 39

It is possible that a defendant also has a claim against a plaintiff. If a plaintiff issues summons against such a defendant, the defendant is then able to counterclaim for the amount owed by the plaintiff. (By instituting a counterclaim, two separate actions are combined and the defendant avoids the necessity of instituting a separate action against the plaintiff at a later stage. A separate summons need not be issued; such a defendant merely issues a claim in reconvention, which is a separate document, together with his or her plea. Should the defendant succeed in proving the counterclaim, the amount proved is deducted from the amount proved by the plaintiff.) If a plaintiff wishes to claim more than the jurisdictional limit of the court, and is aware of a possible counterclaim which the defendant might institute, section 39 creates the possibility that the plaintiff can admit the debt due to the defendant and deduct this amount from the amount claimed in the summons. In contrast to the position when section 38 is used, a plaintiff cannot expect an admitted debt to be deducted from the full amount claimed before deduction, if this full amount cannot be proved. **The effect is therefore that a plaintiff who uses the provisions of section 39 will always be awarded the amount proved in court, less the amount admitted as due to the defendant**.

A defendant who is owed money by a plaintiff, is always free to institute a counterclaim for a higher amount than that admitted as due by a plaintiff in terms of section 39. The defendant must then prove the amount claimed which exceeds the amount admitted by the plaintiff, but obviously need not prove the admitted amount, as the plaintiff has already conceded his or her indebtedness in this amount.

24.3.2 Procedure

As in the case of abandonment in terms of section 38, particulars of the deduction must be mentioned in the summons, although the deduction may be made at a later stage — but before judgment — by amending the summons in accordance with the procedure set out in sections 55A and 55.

The following is an example of what the particulars of the deduction of a claim in the plaintiff's particulars of claim will look like:

> ... In terms of the above, Defendant is liable to pay the amount of R101 500 to Plaintiff. Plaintiff admits that the amount of R1 500 is payable by him to Defendant for services rendered by Defendant to Plaintiff during the period ... in terms of an oral agreement between the parties.
>
> In order to bring his claim within the jurisdiction of the magistrate's court, Plaintiff admits, in terms of section 39 of the Magistrates' Courts Act 32 of 1944, that he owes the Defendant the amount of R1 500 and deducts the said amount of R1 500 from his said claim of R101 500 against the Defendant.
> Wherefore Plaintiff claims:
>
> (1) Judgment against the Defendant for payment of the amount of R100 000 ..., et cetera.

24.3.3 Comparison between the provisions of section 38 and section 39

It is clear that both sections only become relevant if the plaintiff has a claim which exceeds the jurisdictional limit of a magistrate's court, but nevertheless wishes to litigate in this court.

It is also clear that section 39 is only relevant if the above circumstances exist and in addition the plaintiff is indebted to the defendant.

If both these circumstances exist, section 39 is the more advantageous procedure, as the plaintiff does not run the risk of abandoning a portion of his or her claim in terms of section 38, and then seeing the award made by the court reduced by a successful counterclaim. So, if there is any likelihood of a successful counterclaim, it is wiser for a plaintiff to admit any amounts due to the defendant in order to bring his or her claim within the jurisdiction of the court, rather than to abandon an amount in terms of section 38.

If, however, the plaintiff does not owe money to the defendant and the possibility of a counterclaim does not exist, section 39 becomes irrelevant and a plaintiff must decide whether to abandon an amount in terms of section 38 or to litigate in the High Court.

In appropriate circumstances, a plaintiff may use both sections together to bring a claim within the jurisdiction of the court, by deducting whatever amount he or she owes to the defendant and then abandoning any remaining amount which exceeds the jurisdiction of the court.

It must always be borne in mind that, while a plaintiff will not lose the full amount he or she has **abandoned** if the total claim cannot be proved, as the shortfall is set-off first against the amount abandoned, he or she will always lose any amount **admitted** as due to the defendant, as this

amount will be deducted from the amount the plaintiff has proved, not the amount he or she has claimed.

24.4 THE PROVISIONS OF SECTION 45: CONSENT

24.4.1 The effect of the provisions of section 45

Section 45 gives parties the opportunity to consent that a magistrate's court may hear a matter between them, despite the fact that such a court does not have jurisdiction in terms of either section 28 or section 29. Note that this section pertinently provides that parties cannot consent to a court's hearing a matter that is excluded from jurisdiction by section 46. Note also that both parties must consent to jurisdiction — the defendant must agree to cooperate with the plaintiff before the provisions of section 45 can be used.

Section 45(1) deals with three possibilities:

(1) where the court has jurisdiction over the defendant in terms of section 28, but the amount of the claim exceeds the limitations imposed by section 29 (eg A wishes to sue B in district X [where B resides] for damages *ex delicto* amounting to R130 000)
(2) where the court has **no** jurisdiction over the defendant in terms of section 28, and the amount of the claim exceeds the limitations imposed by section 29 (eg A wishes to sue B in district Y for damages *ex delicto* amounting to R130 000, and the court in district Y does not have jurisdiction over B in terms of section 28)
(3) where the court has no jurisdiction over the person of the defendant, and the amount of the claim is within the limitation imposed by section 29 (eg A wishes to sue B in district Y for damages *ex delicto* amounting to R100 000, and the court in district Y does not have jurisdiction over B in terms of section 28)

These possibilities will be dealt with separately.

24.4.1.1 Jurisdiction in terms of section 28, but not in terms of section 29

Here, written consent may be given at **any time,** regardless of whether the action has already been instituted, or is about to be instituted. However, the consent **must be in writing** (*Truck & Car Co (Pty) Ltd v Ewart* 1949 (4) SA 295 (T)).

24.4.1.2 No jurisdiction in terms of section 28, and no jurisdiction in terms of section 29

In this case, the consent must be given "specifically with reference to particular proceedings already instituted or about to be instituted in such court" (*Truck & Car Co supra; Neale v Edenvale Plastic Products (Pty) Ltd* 1971 (3) SA 860 (T) at 863H to 866.)

The following is an example of consent to jurisdiction in this type of case:

> Whereas A intends to issue summons against B for payment of the amount of R130 000, the parties hereby agree that the summons will be issued from the magistrate's court for the district of Trustville and B consents to the jurisdiction of the said court.

24.4.1.3 No jurisdiction in terms of section 28, and jurisdiction in terms of section 29

For some time the view was also held that section 45(1) did not apply to cases where the court **had** jurisdiction in terms of section 29, but not in terms of section 28.

This view was expressly rejected in *Van Heerden v Muir* 1955 (2) SA 376 (A) where it was held that, even in such a case, the consent must be "specifically with reference to particular proceedings already instituted or about to be instituted in such court".

Section 45(2) deals with contractual agreements to institute action in a magistrate's court. It was held in *Truck & Car Co (Pty) (Ltd) v Ewart* 1949 (4) SA 295 (T), that this prohibition only relates to consent given when the court has no jurisdiction in terms of section 28. The prohibition is not relevant when the court has jurisdiction over the parties in terms of section 28, but lacks financial jurisdiction in terms of section 29.

It follows that a clause in a contract that reads as follows will be valid, provided the plaintiff institutes action in a magistrate's court which has jurisdiction in terms of section 28:

> The parties agree that any action that might result from this contract will be instituted in a magistrate's court, and the parties hereby agree to the jurisdiction of the said courts.

This clause is valid because consent has merely been given to the jurisdiction of **a** magistrate's court, not to the jurisdiction of a **particular** magistrate's court.

It is for this reason that a clause that reads as follows will not be valid, unless the court has jurisdiction in terms of section 28:

> The parties agree that any action that might result from this contract will be instituted in the magistrate's court of X and the parties hereby consent to the jurisdiction of the said court.

24.4.2 Procedure

Note that, in all cases, the consent has to be in writing, and has to be given by all the parties involved. Consent does not necessarily have to take the form of an agreement. There need merely be written proof that the parties have consented to the jurisdiction of a particular court. It would be acceptable, for instance, if the consent were contained in correspondence between the plaintiff's and defendant's attorneys. Neither does section 45 require that the written consent be signed by the parties.

The **onus** is on the plaintiff to prove that the defendant's consent has been obtained, if the plaintiff avers that the court has jurisdiction in terms of section 45.

24.5 THE PROVISIONS OF SECTION 43: CUMULATIVE JURISDICTION

Where more than one claim, each based on a different cause of action, is contained in one summons, the court has, in terms of section 43, the same jurisdiction in respect of each claim that it would have had if separate actions had been instituted regarding each claim.

Where, for example, a plaintiff has two claims for R98 000 and R97 000 respectively, each

based on its own cause of action, he or she may claim both in a single summons, although the total amount of the two claims exceeds the court's jurisdiction in terms of section 29.

Obviously, the claims that are mentioned here, must exist between the same parties.

A further point to note is that section 43(1) expressly requires that the two or more claims be founded on different causes of action. In a civil claim on the ground of injuries sustained during an assault, the plaintiff cannot, for instance, claim one amount for hospital expenses incurred during treatment and, in a separate claim, seek an amount for loss of the amenities of life, if the total amount of the claims exceeds the court's jurisdiction.

Section 43(2) provides for an exception to the restriction imposed by section 43(1). Because of this exception, a plaintiff can, for instance, in the same summons in which confirmation of an interdict is sought, claim damages from the defendant on the grounds of his or her unlawful occupation of the plaintiff's land, even though both claims result from the same cause of action, and even though the total value of the subject-matter of the dispute (with regard to the interdict) and of the amount claimed in damages exceeds the jurisdiction of the magistrate's court.

24.6 THE PROVISIONS OF SECTION 40: SPLITTING OF CLAIMS

Section 40 is the counterpart of section 43 in that the latter provides that the various claims embodied in one summons **must be based on different causes of action.** In section 40, the matter is merely approached from another angle. This section prevents one cause of action, which could possibly result in more than one claim, which would together exceed the court's jurisdiction, from being split in such a way that separate claims can be brought in separate actions, each of which falls within the court's jurisdiction.

The "substantive claim" referred to in section 40, indicates a claim arising from a single cause of action. In *McKenzie v Farmers Cooperative Meat Industries Ltd* 1922 AD 16 (at 23), we find the following definition of a cause of action, which is to be applied in determining whether a claim arises from a single cause of action:

> ... every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.

This definition is also used to determine if, contrary to section 40, a splitting of claims has taken place.

Mohamed & Son v Mohamed 1959 (2) SA 688 (T) clearly illustrates how this definition can be applied to a given set of facts. The case involved a plea based on section 40 of the Magistrates' Courts Act of 1944 by the defendant in defence of a suit brought by the plaintiff. The pertinent facts are that the plaintiff, a dealer, periodically sold goods to the defendant on credit. The credit sale was an arrangement of several years' standing. Upon failure of the defendant to pay the goods sold, the plaintiff instituted separate actions to recover the purchase price of the delivered goods in respect of the separate sales.

The defendant's plea was that the separate actions by the plaintiff amounted to a splitting of claims contrary to section 40 in order to circumvent the limitations on the financial jurisdiction

of the court. Section 40 prohibits the splitting of a "substantive claim" exceeding the jurisdiction of the court in order to recover the claim if the parties would be the same and the point at issue in all the split actions would be the same. The court *a quo* ruled in favour of the defendant.

On appeal, the court ruled in favour of the plaintiff (appellant). According to the court, the plaintiff's claim was based on separate causes of action, and therefore did not fall within the terms of section 40. Each sale was entered into on different occasions, sometimes months apart, and the points at issue in each sale were different. The defendant (respondent) failed to provide the court with evidence that there was splitting of claims and that the plaintiff's intention with the different actions was merely to recover the sum due to him in more than one action.

Mohamed & Son v Mohamed supra (above) may be summarised as follows:

- There is no splitting of claims where the claims are based on different causes of action.
- Claims which are not distinct and separate and which arise out of one and the same cause of action must be sued for as one claim in one action, and must not be split.
- In order to succeed with a defence based on section 40, the defendant had to prove, apart from the splitting of claims, that the objective of the plaintiff was to recover an amount owing to him in more than one action.

An objection that a substantive claim has been improperly split as contemplated in section 40 amounts to a defence in which the jurisdiction of the court is attacked. Such an objection will therefore be raised in a plea, which can be placed on the roll for a separate hearing in terms of rule 19(12).

24.7 THE PROVISIONS OF SECTION 47: COUNTERCLAIMS EXCEEDING JURISDICTION

The possibility of the institution of a counterclaim by a defendant was discussed in study unit 24.3 which dealt with the deduction of an admitted debt. It is of course possible that a defendant may have a counterclaim which exceeds the financial jurisdiction of magistrates' courts. A defendant has two alternatives in this situation. He or she may abandon part of the claim in terms of section 38 in order to bring the claim within the jurisdiction of the magistrates' courts. The other possibility created by section 47 allows the defendant to apply to have his or her counterclaim decided by a High Court before the plaintiff's claim is heard by a magistrate's court.

Section 47 read together with rule 20, sets out the procedure for applying for a counterclaim to be heard by the High Court. The defendant must ask the magistrate's court where the plaintiff has instituted action to decide whether or not the counterclaim exceeds its jurisdiction. The defendant must persuade the court that he or she appears to have a reasonable prospect of obtaining a judgment on the counterclaim that will exceed the jurisdiction of the magistrate's court. If the court does find this, it does not make an order relating to the **defendant's** counterclaim but orders that the **plaintiff's** claim must be stayed (suspended) for a reasonable period, so that the defendant can institute action in a competent court (a High Court with jurisdiction over the parties).

The defendant must then institute action within the period for which the plaintiff's action was stayed. The plaintiff may, in these circumstances, institute his or her original magistrate's court claim as a counterclaim to the defendant's High Court proceedings. If the defendant fails to institute

action within this time, the magistrate's court may stay the plaintiff's claim for a further period, or it may dismiss the defendant's counterclaim and proceed to determine the plaintiff's claim.

ACTIVITY

Read the set of facts at the beginning of the study unit and answer the questions which follow:

(1) Thandi wants to sue Thomas for an amount of R120 000 which she estimates to be the cost of finding another builder. How should she do this?
(2) Thandi wants to sue Rashid for R240 000 which is the value of the house and land, because she now risks losing both as the land has not been registered in her name. She also wants to sue him for R40 000 for *iniuria*. How should she do this?
(3) Thandi sues Rashid and he wishes to institute a counterclaim for the amount he says Thandi owes him. Discuss his options.
(4) The facts remain as in question 3. Rashid has no documents to prove his claim. How will this affect his position?
(5) The facts remain as in question 3. Thandi's action is stayed but Rashid decides that High Court litigation is too expensive for him to proceed in this court. What can Thandi now do?

FEEDBACK

(1) Thandi has two options. She may abandon an amount of R20 000 to bring the claim within the jurisdiction of the magistrate's court in terms of section 38. Alternatively, she may deduct the amount she owes Thomas, from her claim, in order to bring the claim within the jurisdiction in terms of section 39. As she owes Thomas R30 000 and he will be able to counterclaim for this money, it is clear that it is to her advantage to deduct the amount owed to Thomas from her claim. She will then claim an amount of R120 000 less R30 000. If she proves the full amount of R120 000 the court will award her an amount of R90 000. If she only proves an amount of R80 000 the court will award her an amount of R50 000 (R80 000–R30 000). If, in our example, she had abandoned R20 000 to fall within the jurisdiction and proved the full amount due, but Thomas had instituted a successful counterclaim, she would have received R70 000 (R120 000 claimed — R20 000 = R100 000 – R30 000 = R70 000). If she had only proved R90 000 she would have received R60 000 (R90 000 – R30 000).
(2) The first consideration is whether Thandi may split the claim of R240 000 into more than one claim so as to fall within the court's jurisdiction in terms of section 40. Section 40 provides that a claim cannot be split if the "point at issue" will be the same in all actions. It seems likely that a court would consider that this is the position and so Thandi cannot for example institute three magistrate's court actions against Rashid; one for R80 000 for the value of the land, one for R70 000 for the building costs, and one for R90 000 for the cost of building materials. However, Thandi could institute one claim against Rashid for R80 000 for the value of the land, together with a claim for *iniuria* for R40 000 in the same summons. This is in terms of section 43, which allows different claims based on different causes of action to be included in one summons.
(3) Rashid alleges that Thandi owes him an amount of R250 000. This amount clearly exceeds the court's financial jurisdiction. Rashid has two options in terms of section 47 — he may abandon part of his claim to bring it within the jurisdiction of the court, or he may try to have Thandi's action stayed to allow him to institute action in a High Court.

(4) If Rashid decides that he wishes to have Thandi's action stayed, he will have to persuade the magistrate's court that he has a reasonable prospect of obtaining a judgment on his counterclaim. If he has no documents to substantiate his counterclaim, and so cannot show the magistrate that he has a valid claim which exceeds the jurisdiction of the magistrate's court, it is unlikely that the court will stay Thandi's action.

(5) If Thandi's action has been stayed and Rashid fails to institute action in the High Court within the period prescribed by the court, Thandi may apply to the magistrate's court for the dismissal of Rashid's counterclaim. The court may then dismiss his counterclaim and proceed to decide Thandi's action.