Civil Procedure

Only study guide for CIV3701

Department of Criminal and Procedural Law

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CONTENTS

Orientation

Getting started

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

Module outcomes

Up to now, the greatest part of your law studies has centred on substantive law, which defines a person's legal rights, duties (or obligations) and remedies. Procedural law, however, concerns itself with the enforcement of these rights, duties and remedies. Procedural law can refer to either criminal procedure or civil procedure. Since this course focuses on civil procedure, we concern ourselves with the rules that regulate the general conduct of litigation, namely, those rules that are aimed at the enforcement of the above rights, duties and remedies in civil courts. Redress in court is achieved by instituting (and defending) legal proceedings, and obtaining a judicial order, which can be enforced ("executed").

In the first part of this module, you are taught that a court of law will not entertain legal proceedings unless it has the necessary jurisdiction to do so. In the procedural part of the module, you are taught that a judicial order will be neither granted nor enforced unless the proceedings have been instituted in the proper form and conducted in the proper manner. Therefore, in order to litigate successfully, various jurisdictional and procedural obstacles, such as determining the correct court, form of proceedings, the correct documents to be prepared and filed with the court, their method of service, the conduct of proceedings in court, whether an order is subject to an appeal or a review, and so on, have to be faced. This module seeks to prepare you to meet and overcome these obstacles in practice.

Once you have finished studying this module, you should

- know and understand the rules and principles of civil procedure
- be able to explain the choice of appropriate courts and procedures
- be able to demonstrate the ability to meet and overcome various jurisdictional and procedural obstacles in practice
- be able to demonstrate the ability to present solutions to problems through theoretically founded arguments

Structure of the study guide

The tutorial matter for CIVIL PROCEDURE (CIV3701) has been divided into Part 1: Introductory Studies; Part 2: Jurisdiction; Part 3: Court Procedure; and Part 4: Variation of judgments, review and appeal. Where necessary, the study units have been further subdivided into subunits and points. The study units form 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

To gain maximum benefit from the study guide, it is important that you understand how each study unit has been structured. Each study unit consists of

- an overview
- learning outcomes
- a reference to compulsory reading material
- the tutorial matter that comprises the study unit
- an activity
- the related feedback

Numbering of study units

Each study unit describes and analyses a particular jurisdictional principle, procedure or process, and a system of cross-referencing to other study units enables you to place that particular principle, procedure or process in the context of its jurisdictional or procedural relevance as a whole and, on the other hand, to determine the relevance of every principle, process and procedure within the framework of civil procedure. To facilitate cross-referencing, the study units have been numbered consecutively from the beginning to the end of the study guide.

LEARNING OUTCOMES

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

PRESCRIBED CASES

Please note that, save for cases contained in a tutorial letter as case studies, there is no prescribed case law for this module.

You are not required to memorise all the case names mentioned in the study guide. However, you are expected to acquaint yourself with the cases, and the principles of those cases, which have been set out in the study guide. Ensure that you acquaint yourself fully with these cases and principles, and you should present and/or apply them in your examination answers if appropriate.

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 matter and testing your insight and understanding of a particular study unit.

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

Practically speaking, each activity is, in effect, a mini 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 form an important part of your continuous self-assessment.

Please note that the feedback does not contain model answers but provides broad guidelines for answering questions.

PRESCRIBED TEXTBOOK AND STUDY MATERIAL

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

Pete S, Hulme D, Du Plessis M, Palmer R, Sibanda O and Palmer T *Civil procedure: a practical guide* 3ed (2017) (Oxford University Press)

You need to obtain the prescribed textbook and work through it in the manner outlined in this study guide. This study guide aims to elucidate complex and difficult concepts and principles to help you develop a holistic grasp and understanding of the subject matter. To this end the study guide also aims to guide you through the textbook in a manner that progresses logically. Working through the study guide systematically and consistently, in conjunction with the textbook, should enable you to pass the module and to take what you have learnt with you in the years to come.

Apart from this study guide, the study material also includes the tutorial letters for this module. Feedback from the assignments, as well as new developments that have taken place in areas of civil procedure relevant to your studies since the writing of this study guide, will appear in the tutorial letters.

COMPULSORY READING MATERIAL

You will find it difficult to understand the tutorial matter without simultaneously referring to the compulsory reading material. Remember, the study guide merely supplements and/or elucidates the information in the textbook.

It is essential that, whenever directed to do so, you consult the relevant legislation and court rules when you are working through the study guide. The section, ''Compulsory reading material'', contains the exact references to the various Rules of Court or legislation that relate to a particular study unit, apart from the pages to be studied in the textbook.

However, this does not mean that you need to memorise the court rules and sections or even the rule and section numbers. The content is what is important, and a good summary of the content will generally suffice. You should be guided by the instructions in the study guide and in the activity questions: for example, sometimes you will be required to note the procedure as prescribed by the rules, and, at other times, you will simply need to write down the types of claims that could give rise to the use of a particular procedure. However, what is important is that you integrate the reading material with the study guide contents.

Unless expressly stated to the contrary, references to "Rule" or "Rules" constitute references to the Uniform Rules of Court, whereas references to "rule" or "rules" (followed by a number) constitute references to the magistrates' courts rules.

PART

1

Introductory studies

STUDY UNIT 1

Introduction to civil procedure

Scenario 1

Peter is a mechanical engineer. He lives in Johannesburg. He designs a specialised machine for Thandi's company, Price Clothing (Pty) Ltd, which has its registered office in Pretoria. The contract is concluded in Pretoria. The machine malfunctions in breach of the guarantees given by Peter. Price Clothing suffers damages in the amount of R310 000.

Scenario 2

X and Y are involved in a motor vehicle collision. Y drives through a red traffic light under the influence of alcohol. X sustains damages in the amount of R160 000 in respect of his motor vehicle, and his medical costs amount to 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

1.1 CLASSIFICATION OF CIVIL PROCEDURE AND ITS PLACE WITHIN THE LEGAL SYSTEM
1.2 ENFORCING THE LAW
1.2.1 Function of the courts
1.2.2 Subject matter
1.2.3 Parties
1.2.4 Onus of proof

LEARNING OUTCOMES

After studying this study unit you should be able to

- discuss the classification of civil procedure within the legal system as a whole
- explain the basic difference between substantive and adjective law
- distinguish broadly between civil and criminal proceedings
- explain the function of the courts

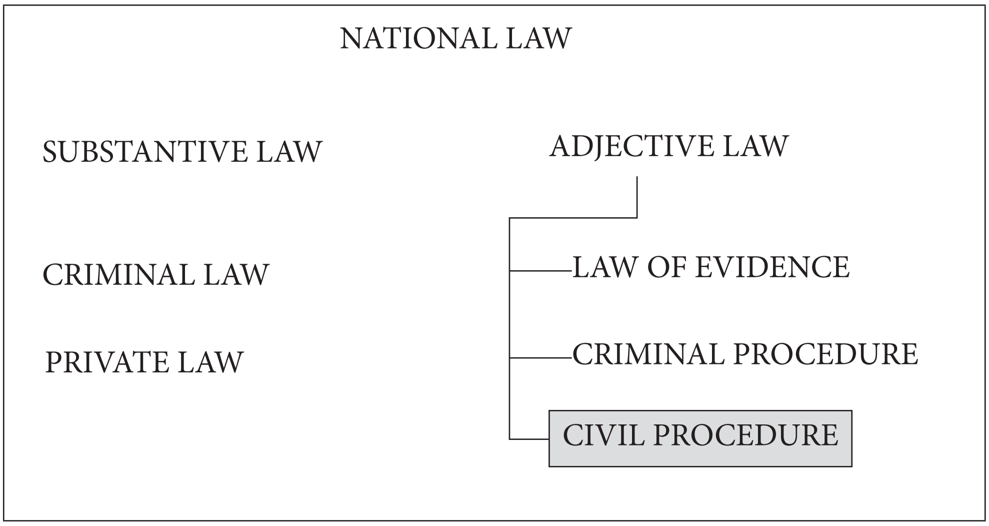
COMPULSORY READING MATERIAL

Pete *et al Civil Procedure* 3ed (2017) 1–2

1.1 CLASSIFICATION OF CIVIL PROCEDURE AND ITS PLACE WITHIN THE LEGAL SYSTEM

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.



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.

Example: If X owns a motor vehicle, substantive law determines what is meant by ownership; how it arises; the rights and duties of the owner; 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 that X must follow 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.

1.2 ENFORCING THE LAW

1.2.1 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 (i.e.

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.

The state has no direct interest in civil proceedings – it merely provides the infrastructure (the court buildings) 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.

1.2.2 Subject matter

The subject matter of court proceedings can be of either 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.

Example: 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 for, 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 It is clearly evident 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 cause of action.

Example: 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.

1.2.3 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**.

In civil proceedings, the terminology differs according to the type of procedure involved. In matters commenced by a 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 opposing 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**.

1.2.4 Onus of proof

In civil proceedings, the burden of proof is on a **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 forward 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 can be reached, other than that the accused committed the offence as charged.

ACTIVITY

Read the scenarios at the beginning of this study unit. Now answer the following questions.

(1) Thandi issues a summons against Peter 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.
(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 would be 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 …………….

FEEDBACK

(1) 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.
(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 would be 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**.

STUDY UNIT 2

Sources of civil procedural law

OVERVIEW

LEARNING OUTCOMES

After studying this study unit, you should be able to

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

COMPULSORY READING MATERIAL

Pete *et al Civil Procedure* 3ed (2017) 12–13
Sections 2, 3 and 6 of the Rules Board for Courts of Law Act 107 of 1985

2.1 INTRODUCTION

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.

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.

2.2 STATUTORY LAW

Much of the law relating to civil procedure is derived from various Acts, the rules of court and the jurisprudence that has been built up around their interpretation.

The following statutes are the main statutory sources for purposes of civil procedure:

- The Superior Courts Act 10 of 2013 (which replaced the Supreme Court Act 59 of 1959)
- The Magistrates' Courts Act 32 of 1944
- The Constitution of the Republic of South Africa, 1996

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, which is discussed later, in study unit 10.

Apart from the Acts mentioned above (also referred to as "primary legislation"), court rules that regulate the conduct of proceedings in the various courts have also been promulgated (so-called subordinate legislation). These rules must, therefore, be read in conjunction with their particular Act.

2.3 RULES OF COURT

2.3.1 Competence to make the rules

Until 1965, the various divisions of the then Supreme Court had different Rules of Court for different divisions. In that same year, with effect from 15 January 1965, under the provisions of section 43(2)(a) of the Supreme Court Act of 1959, the Uniform Rules of Court were promulgated to regulate 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. Consequently, since 1965, **proceedings have been conducted uniformly** in all the divisions of the then Supreme Court – now the High Courts – **under a common set of Rules, which are 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' courts 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 of Law Act 107 of 1985. This also applied in respect of the rules for magistrates' courts.

The Rules Board was established in 1985. 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 (aka the lower courts). As far as the Constitutional Court is concerned, the President of the Constitutional Court, in consultation with the Chief Justice, may make rules relating to the manner in which this 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.

For the sake of completeness, it should be mentioned that the rules of court for both courts 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, as well as to maintain uniformity and consistency.

2.3.2 Nature of the rules

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

However, the rules exist for the sake of a court and not the other way around. 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, 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 Part 2 below) 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.

2.4 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*), the appropriate rules are found in the common law, with the rules of court themselves affecting only a small part of *namptissement*.

SELF-ASSESSMENT

(1) Explain the difference between primary and subordinate legislation for purposes of civil procedure.
(2) Explain the purpose of court rules.
(3) Briefly explain whether a court is strictly bound by the wording of court rules where, for example, there was non-compliance with the provisions of a particular rule by a party.

STUDY UNIT 3

Civil procedure in context

You decide to visit the Division of the High Court for your area in order to better understand the civil procedural system. (What you learn could have been equally relevant to 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. The latter sit behind a counter and accept documents (referred to by all as processes and pleadings) lodged by the representatives of various legal firms. You notice that the clerks also issue summonses and notices of motion on behalf of attorneys.

You then sit in on a civil trial. The atmosphere is very formal, and you notice that the judge does not interfere with the trial, except to ask questions occasionally. The proceedings in court are conducted by counsel on behalf of the litigants. Counsel on both sides is very assertive, and sometimes even aggressive towards each other or the witnesses for the opposing side, while testing the oral evidence presented by the opposing side. Your impression is that of a legal contest between counsel on behalf of their clients. At the end of the trial the judge considers the presentations in court, and then hands down judgment. You notice that one of the parties appears to be satisfied with the outcome, but that the other seems less so.

As you ponder the situation, you wonder whether there is not a different way in which disputes could be resolved so that one party is not left the loser and feeling unhappy about it.

OVERVIEW

LEARNING OUTCOMES

After studying this study unit, you should be able to

- discuss the adversarial system of procedure
- differentiate between the Anglo-American and Continental systems of civil procedure
- identify the underlying principles of bilaterality, party prosecution and party presentation
- explain the role of the court
- critically appraise the adversarial system, as well as methods of civil procedural reform
- discuss the common characteristics of ADR processes
- evaluate litigation and ADR with relation to their respective strengths and weaknesses
- identify and explain the dispute resolution mechanisms in African customary law

COMPULSORY READING MATERIAL

Pete *et al Civil Procedure* 3ed (2017) 503

3.1 THE ADVERSARIAL SYSTEM OF CIVIL PROCEDURE

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 comparing the application of adversarial litigation with Continental procedure.

Continental civil procedure is characterised as being inquisitorial, or assuming the nature of an inquiry, which is controlled and conducted by a judicial officer. The inquisitorial system is common in many countries with a civil law system in Continental Europe, such as France, Germany and Switzerland.

Characteristics of the Continental system: 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 notices 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. In summary, in the Continental system, a judicial officer is the trier of both fact and law. Unlike the Anglo-American system, which 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. In the Continental system, 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 is 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, such as the United States of America, the United Kingdom, Canada, Australia and South Africa.

Characteristics of the Anglo-American system: 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 (even when written, always read aloud) immediately, unless judgment is reserved.

What is evident is that the proceedings are marked by distinct pre-trial and trial stages. **Two distinctive activities occur during the pre-trial stage**. Firstly, the pre-trial stage opens with the exchange of pleadings between the litigants 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 pre-trial and 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.

It is important not to generalise 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.

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

- bilaterality (in the present context, "bilateral" means between two parties)

  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 their own biased view of the issues in dispute.

- 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 do nothing about the matter. Likewise, if a person commences proceedings as a plaintiff or applicant, then the person against whom proceedings have been commenced (i.e. the defendant or respondent) may also make certain choices.

- 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 or defence, as the case may be. Litigants are competent to determine the scope of the controversy (i.e. the issues in dispute) and 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. For instance, a defendant may consent to judgment, defend the action or simply ignore the summons. Another option that is frequently used is that both litigants may negotiate what is called an "out-of-court settlement".

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

3.2 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 below).

Often the passive role of the judicial official is likened 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 forward by each litigant. Unlike the judge in a Continental system of civil procedure, the judicial official is not burdened with the official duty of judicial investigation.

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

3.3 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 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.

3.4 CRITICAL APPRAISAL

3.4.1 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 that 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 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.

3.4.2 Competitive representation

Owing to the technical nature of procedure and the competitiveness of proceedings, the system itself forces the lawyer to reshape the litigant's human problem into legal and procedural categories that meet the demands of the adversarial system, but very often fail to represent the litigant's actual human needs. An example is the trauma involved in a divorce, which is just heightened by the adversarial nature of the related proceedings.

3.4.3 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.

3.4.4 Delay

"Justice delayed is justice denied." This statement 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.

3.4.5 Costs of litigation

In principle, access to the courts is free. Court administration and court time is provided free of charge by the state. The problem lies in the 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.

3.4.6 Adjudicatory process

The judicial officer decides (adjudicates) the matter impersonally, playing 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 from 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, or in the business environment.

3.4.7 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, which will hopefully sharpen your critical perspective.

The first way in which to reform civil procedure is by means of the continual revision of the rules of court. Another method is to increase the jurisdictional limits of the lower courts to give more people access to court, but at a lower cost than would be the case of access to a High Court.

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 that does this is the Labour Relations Act 66 of 1995, which both prescribes dispute resolution procedures and establishes courts that deal with labour matters only.

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.

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 to encourage the settlement of disputes by means of arbitration or mediation, thus saving costs, avoiding delays or making allowances for the personal interests of the litigants.

3.5 ALTERNATIVE DISPUTE RESOLUTION (ADR)

Study Pete *et al* 503.

3.5.1 ADR explained

ADR is an abbreviation that stands for "alternative dispute resolution".

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 the court system.

Negotiation, mediation and arbitration are traditional processes. Within the context of ADR, these processes are also known as the **primary processes**.

Although there are differences between many of these processes, they all fall within the system of ADR because they share several common characteristics. ADR processes are

- **informal**: in comparison with the process of litigation, ADR processes are neither bound by strict rules of procedure, nor constrained by technicalities
- **flexible**: ADR processes can be adapted to suit the needs of particular kinds 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**: the disputants are not compelled to enter into the process (except when an ADR process is used within the court system)
- **consensual**: they function on the basis that the outcome (result/decision) of a process is reached through the **consent** of both disputants
- **interest-based**: the interests of disputants, rather than their rights in law, are allowed to predominate
- **relational**: ADR processes emphasise the relationship between the disputants and are, therefore, highly suited to disputes between persons who are in a continuing or long-term relationship (e.g. directors of a company)
- **future-oriented**: 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

It is evident 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 an alternative.

3.5.2 Formal litigation's response to ADR: court-annexed mediation

Mediation is a process in which parties who experience conflict require the assistance of an impartial third party (mediator) to help them reach agreement. The mediator acts only as a facilitator, and does not decide the outcome of the conflict – this remains in the hands of the parties. Because the process is voluntary and the parties remain in control of the process, mediation is generally viewed as empowering to both parties. Supporters of mediation claim a high success rate for mediated matters. These and other claimed benefits of mediation, together with a desire to give effect to section 34 of the Constitution (access to courts) and to increase access to justice, a form of mediation, namely, court-annexed mediation, was introduced as an alternative dispute resolution mechanism within the civil court system, and more specifically the magistrates' courts.

Consequently, Chapter 2 was inserted into the magistrates' courts rules under GN R 183 of 18 March 2014. The stated purpose of these rules is to provide the procedure for the "voluntary submission of civil disputes to mediation (r 72), thus making it clear that parties are not forced into mediation. Parties may refer a dispute to mediation either prior to the commencement of litigation or thereafter, but prior to judgment, and the court may also enquire into the possibility of mediation and afford parties the opportunity to refer the matter for mediation (r 75). The rules provide that clerks and registrars of the court must offer assistance to all parties (r 76), and also provide for the procedure to be followed (r 77–79), the role and functions of a mediator (r 80), and for the possibility of any settlement agreement to be made an order of court (r 82).

3.6 DISPUTE RESOLUTION MECHANISMS IN AFRICAN CUSTOMARY LAW

3.6.1 Introductory remarks

Dispute resolution mechanisms in African customary law have the following characteristics:

- They follow the oral tradition, although they are influenced by Western traditions.
- The participants comprise a collective group of people who are free to participate in the discussions.
- The processes are victim-oriented.
- The processes are informal and flexible.
- The outcome is restorative justice or the restoration of social harmony or peace.
- The use of state authorities is the exception rather than the norm.

Most disputes in African customary law are settled in a satisfactory manner without recourse to the courts. This is achieved by means of negotiations within and between groups of relatives. If a particular problem cannot be solved in this manner, then two more options are available to the disputants:

- The first option is to use the process of mediation before a formal appeal is made to the courts. Mediation involves a process whereby a party that is not involved in the dispute (that is, an impartial party) tries to help the people involved in the dispute to come to an agreement or find a solution regarding the problem.
- In the event of mediation's failing, the next option is to follow the court procedure.

3.6.2 Processes employed in African customary law

Two processes are usually used in African customary law to resolve disputes, namely, the processes of negotiation and mediation. Disputes can be resolved within family groups or between non-related family groups. We first examine the settlement of disputes within family groups.

3.6.2.1 The settlement of disputes within family groups

Family disputes are settled at the common ancestral home by the head of the family group, who is also responsible for the conduct of his or her family members. The following procedure is employed:

- The correct procedure is negotiation with a view to reconciliation or restoration of social harmony or peace.
- The head (senior figure) is assisted by adult members of the family.
- Family matters are generally regarded as private matters.
- If the matter cannot be settled within the family circle, then senior relatives or neighbours are invited to help resolve the matter.
- The objective is to look at ways to reconcile the disputing parties and to restore normal family relations.
- If a solution to the problem is found, then the head pronounces the outcome, which is accepted by everyone.
- This procedure ends with a ritual that involves everyone partaking of the same meal or shaking hands or hugging one another to symbolise the end of the dispute.
- If the proposed solution is not accepted by the disputing parties, then the headman (head of customary court in a particular district) serves as a mediator and is tasked with making a formal judicial decision.

3.6.2.2 The settlement of disputes between non-related family groups

The procedure is as follows:

- The people involved in the dispute first try to settle the dispute among themselves by way of negotiation. All parties participate in the discussions.
- If no consensus is reached, the headman or village head is invited to assist. He/she acts as a mediator.
- A ritual in the form of a reconciliatory meal is held if the parties come to an agreement at any stage during the process of negotiation or mediation. This demonstrates the restoration of normal relations and harmony between the parties and the broader community.

3.6.2.3 Concluding remarks

Today people are not strictly arranged along family lines like they were in the past. Therefore, the practice in rural and urban areas nowadays is to seek the advice of neighbours, rather than extended family groups. Disputes are also reported to the police, church groups, street committees and local civic associations. Resolution takes place by negotiation and mediation. It is important to note that the contentious Traditional Courts Bill, which is currently still being debated, will affect customary law, the role of traditional leaders and the rights of rural people.

3.7 THE IMPACT OF THE CONSTITUTION, 1996 ON SELECTED AREAS OF THE SOUTH AFRICAN LAW OF CIVIL PROCEDURE

3.7.1 General

The Constitution has a significant influence on civil procedure. The purpose of this discussion is not to deal with this topic in a comprehensive manner, but to inform you, in broad terms, that civil litigation can no longer be conducted without considering the values embodied in section 36 of the Constitution.

Section 8 provides that Chapter 2 (Bill of Rights) applies to "all law", and therefore this chapter also applies to the law of civil procedure. Several of the rights enshrined in Chapter 2 directly relate to the law of civil procedure, the most important (for our purposes) being equality before the law (s 9); the right to freedom and security (s 12); property (s 25); the right to have access to adequate housing (s 26); and access to courts (s 34).

3.7.2 Selected areas evincing constitutional influence

3.7.2.1 Eviction

An owner's common law right to obtain an eviction order is seriously limited by the Constitution and certain land reform legislation. The latter is complex, and the various Acts have divergent procedural requirements for obtaining eviction orders in different courts. For purposes of this module, you need only take cognisance of these Acts in order to be prepared in practice to establish their applicability in a particular instance. The legislation includes the following:

- Restitution of Land Rights Act 22 of 1994
  This Act protects the lawful and unlawful occupiers of urban and rural land who have instituted land restitution claims.
- Land Reform (Labour Tenants) Act 3 of 1996 (LTA)
  This Act protects persons living on agricultural land who, instead of wages, have obtained the right to use land for farming purposes.
- Interim Protection of Informal Land Rights Act 31 of 1996 (IPILRA)
  This Act protects *de facto* holders of informal land rights in respect of rural and urban land pending the final determination of the status of such rights. The land concerned is mainly found in the former so-called "independent homelands".
- Extension of Security of Tenure Act 62 of 1997 (ESTA)
  This Act protects former lawful occupiers of agricultural land.
- Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (the so-called "PIE" Act)
  This Act finds application when the eviction of a person from his or her urban home is sought, and applies in respect of land throughout the Republic. If ESTA, IPILRA or LTA do not apply to a particular case, and the occupier falls within the definition of an ''unlawful occupier'' as defined in section 1 of the Act, then this Act applies. Buildings and structures that do not fulfil the function of a dwelling or a shelter for humans (e.g. commercial property) fall outside this Act. If the land has been occupied for less than six months, the court may grant an eviction order if it considers it just and equitable to do so after considering all relevant circumstances (which include the rights and needs of the elderly, children, disabled persons and households headed by women). If the land has been occupied for longer than

six months, the court must in addition consider if land is available for the relocation of the unlawful occupier. This Act suspends the exercise of a landowner's proprietary rights until this determination has been made, and if the procedural requirements of the Act have been met, a landowner may approach the court for an order (*Ndlovu v Ngobo; Bekker and Bosch v Jika* 2003 1 SA 113 (SCA)). This Act clearly confirms certain values such as dignity, equality and freedom, and requires courts to, where necessary, create innovative remedies in order to protect and enforce the constitutional rights of the owner and the occupier (*Transnet Ltd v Nyawuza* 2006 5 SA 100 (D) 105G–107D).

3.7.2.2 Arrest

The right to freedom and security (s 12) led to the Supreme Court of Appeal decision in *Bid v Industrial Holdings (Pty) Ltd v Strang (Minister of Justice and Constitutional Development, Third Party*) 2008 3 SA 355 (SCA), in which it was held that the arrest of a person to confirm or found jurisdiction was unconstitutional.

In *Malachi v Cape Dancing Academy Int (Pty) Ltd* 2010 6 SA 1 (CC) at 19A–B, the court confirmed an earlier finding that the section in the Magistrates' Courts Act, 1944, codifying the common law, and which authorised arrest *tanquam suspectus de fuga*, was unconstitutional. Uniform Rule 9 (regulating arrest) has since been repealed, and arrest *tanquam suspectus de fuga* no longer exists.

3.7.2.3 Execution

The Constitutional Court held in J*aphtha v Schoeman; Van Rooyen v Stoltz* 2005 3 SA 140 (CC) that a writ of execution that would deprive a person of ''adequate housing'' would be in conflict with such person's right in terms of section 26, and would consequently need to be justified in terms of section 36(1). Mokgoro J explained the position thus:

> The interests of creditors must not be overlooked. There might be circumstances where, notwithstanding the relatively small amount of money owed, the creditor's advantage in execution outweighs the harm caused to the debtor. In such circumstances it may be justifiable to execute. It is in this sense that a consideration of the legitimacy of a sale in execution must be seen as a balancing process.

For this reason, the court held that execution must be subject to judicial oversight. In *Gundwana v Steko Development and others* 2011 3 SA 608 (CC), the Constitutional Court consequently held that (in an instance when it was requested that immovable property be declared specially executable after default judgment) the Registrar may not grant such an order, and that execution may only follow upon judgment in a court of law. The court further declared the practice under the rules of court of allowing a Registrar to grant orders declaring immovable property that constitutes a person's home executable, constitutionally invalid (para. [55]; [65]). Read amended Uniform Rule s 45 and 46 which give effect to these judgments.

Judicial oversight will ensure that the impact that the execution may have on indigent debtors who are at risk of losing their homes be considered, as well as any alternative course of action. It is submitted that this amended practice ensures compatibility with section 26 of the Constitution.

Of interest is also *FirstRand Bank Ltd v Folscher and another and similar matters* 2011 4 SA 314 (GNP) in which the court considered the meaning of ''primary residence'' and ''home of a person'' (as used in Uniform Rule 46 and *Gundwana*). The court held that execution against a holiday home or a second home that is not usually occupied by the debtor does not trigger the rule requiring judicial oversight. Likewise, the term ''judgment debtor'' was held to refer to an individual who owns the primary residence, and not to immovable property owned by a company, close corporation or a trust, even if the immovable property is the shareholder's, member's or beneficiary's only residence (para. [31]–[32])!

Note that the summons initiating an action in which relief is claimed that embraces an order declaring immovable property executable must contain a clause which draws the attention of the debtor to section 26(1) of the Constitution, and which informs the debtor about the need to present information to court supporting his or her claim that an order for execution will infringe his or her section 26 right of access to adequate housing.

3.8 A FEW REMARKS ON THE CONDUCT OF PRACTITIONERS

The conduct of legal practitioners (attorneys or advocates) in practice is subject to a professional code of conduct. The main sources of this code of conduct are the Attorneys Act 53 of 1979 (as amended) and the Regulations promulgated under it, the Admission of Advocates Act 74 of 1964, the rules and rulings of the various law societies and bar councils, court decisions, the common law, textbooks, and the influence of international codes. The purpose of a professional code of conduct is to provide the norms in terms of which it can be established whether prospective practitioners and current practitioners are fit and proper persons to practise law.

You should bear in mind that a practitioner is admitted to practice by the High Court, and, therefore, a practitioner is termed an ''officer of the court''. Because a practitioner is part of the legal system, he or she is compelled to uphold the law at all times, and to promote the general administration of justice. This includes a practitioner's duty to respect the processes of court, and not to hamper his or her opponents in conducting their cases. The professional conduct of practitioners crops up in various relationships, such as in the relationship with their clients, other practitioners, the courts, the state, the community, and the particular professional body (law society or bar council). In all these relationships, it is expected that practitioners will conduct themselves with integrity, objectivity, dignity and good judgement, demonstrating sufficient knowledge and skill, respect for the law, commitment, equity and fairness. Serious breaches of the code of conduct can lead to the removal from the roll of attorneys or advocates, as appropriate. The duty of practitioners is well expressed in the following principles laid down in the ''General Principles of Ethics'' of the International Bar Association:

> 1 *Lawyers shall at all times maintain the highest standards of honesty and integrity towards all those with whom they come into contact.*
>
> 2 *Lawyers shall treat the interests of their clients as paramount, subject always to their duties to the Court and the interests of justice, to observe the law and to maintain ethical standards.*
>
> ...
>
> 10 *Lawyers shall use their best efforts to carry out work in a competent and timely manner, and shall not take on work which they do not reasonably believe they will be able to carry out in that manner.*
>
> ...
>
> 12 *Lawyers shall always behave towards their colleagues with integrity, fairness and respect*.

Keep these comments in mind when studying the contents of this module, and when applying your acquired knowledge in practice. Remember that these principles are not limited to the professional sphere, but also apply to every aspect of a lawyer's personal life.

ACTIVITY

(1) How does the function of a South African judge differ from that of a Continental judge?
(2) Explain the assertive and sometimes aggressive behaviour of counsel alluded to in the scenario at the beginning of this study unit.
(3) Explain the distant behaviour of the judge in the scenario at the beginning of this study unit.

FEEDBACK

(1) 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.
(2) 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 to promote and protect their client's rights.
(3) In Anglo-American systems of procedure, the judge is accorded a passive role, 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.

SELF-ASSESSMENT

Critically discuss the resolution of disputes within both family groups and non-related family groups in African customary law. (When asked to "critically discuss" a topic, ensure that both the strengths AND the weaknesses are considered, and that a conclusion regarding the topic is presented.)

STUDY UNIT

4

The structure of the South African court system

Two law students, Jan and Susan, are studying the 1996 Constitution and arguing about which 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

4.1 THE CONSTITUTIONAL COURT
4.2 THE SUPREME COURT OF APPEAL (SCA)
4.3 THE HIGH COURT
4.4 THE MAGISTRATES' COURT
4.5 THE SMALL CLAIMS COURT

LEARNING OUTCOMES

After studying this study unit, you should be able to

- identify the existing courts
- explain the function of each court
- describe the jurisdictional scope of each court

COMPULSORY READING MATERIAL

Pete *et al Civil Procedure* 3ed (2017) 3–10

Sections 167(3)–(7), 168, 169 and 173 of the Constitution of the Republic of South Africa, 1996;
Sections 6(1)–(2); 21(1) and 50 of the Superior Courts Act 10 of 2013

4.1 THE CONSTITUTIONAL COURT

The Constitutional Court is situated in Johannesburg. It comprises the Chief Justice of South Africa, the Deputy Chief Justice of South Africa and nine other judges. A matter that 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 as amended by the Constitution Seventeenth Amendment Act of 2012 (CSAA). This court has **four functions**:

(1) It is the highest court of **appeal** in respect of both constitutional and non-constitutional matters (s 167(3)(a)).
(2) It is the only court that 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 (s 167(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**.

4.2 THE SUPREME COURT OF APPEAL (SCA)

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 High Court of South Africa or various courts of similar status to the High Court of South Africa (except in respect of labour or competition matters), as well as matters referred to it in circumstances defined by an act of parliament (s 168(3) of the Constitution).

This court may hear appeals on both constitutional and non-constitutional matters. As regards appeals that it hears on constitutional and non-constitutional matters, a further appeal may lie to the Constitutional Court.

4.3 THE HIGH COURT OF SOUTH AFRICA AND COURTS OF SIMILAR STATUS

Divisions of the High Court are situated in various major centres of South Africa.

The High Court functions as a **court 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 regional magistrates' courts. (**Note:** At present, if a claim or value exceeds R400 000, the matter falls within the jurisdiction of the High Court.) They also function as courts of appeal or review in respect of decisions taken in magistrates' courts.

The High Court of South Africa may hear any matter that it is not prohibited from hearing by the Constitution or an Act of Parliament (s 169 of the Constitution, as amended). However, any finding that legislation or the conduct of the President is unconstitutional by this court (as well as the Supreme Court of Appeal), must be confirmed by the Constitutional Court – until this is done, such finding is without effect. The jurisdiction of the High Court is set out in the following legislation:

- **Section 169 of the Constitution, 1996** – this deals with the constitutional jurisdiction of the High Court.

- **Section 21(1) of the SCA** – this section provides that every High Court Division 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 study unit 7, para. 7.2 below and the case *Zokufa v Compuscan Credit Bureau* 2011 1 SA 272 (ECD).) The High Court also has jurisdiction over all persons residing in its 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 Constitution, 1996** – 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** – this is granted in terms of sections 16–19 of the Superior Courts Act, 2013.

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

4.4 THE MAGISTRATES' COURTS

These courts are also referred to as the "lower courts" and function either in a district magisterial district, or a regional magisterial district. These courts have no constitutional jurisdiction (s 170 of the Constitution) and section 110 of the Magistrates' Courts Act 32 of 1944 provides that these courts may not pronounce on the validity of "any law" or of any conduct of the President.

4.5 THE SMALL CLAIMS COURT

The small claims courts are regulated by the Small Claims Courts Act 61 of 1984. Small claims courts were introduced 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 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-oriented court

The purpose of the Act is obviously to solve problems experienced by litigants in other 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 different and simplified procedures that are applied in small claims courts do not render these courts inferior to other courts; small claims courts are part of the structures of the court system recognised in terms of section 166(e) of the Constitution of 1996. And since they are courts of law, their judgments are binding and execution of judgment is enforced by the state.

Small claims courts should also not be regarded as inferior to other courts because of the low value of the claims submitted. The legal issues involved in these cases are not necessarily simple; in fact, the opposite is often true: complex issues of law may arise, despite the low value of the claims.

A small claims court is not a court of record. In other words, the proceedings during the 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)). Like all other courts, proceedings must, as a rule, take place in an open court (s 4), and the process of these courts is effective throughout the Republic (s 3(4)).

Nevertheless, the **following shortcomings** of small claims courts should be recognised:

- The very low jurisdictional limit restricts consumers to extremely minor claims (currently limited to R15 000).
- Certain claims are totally excluded from the jurisdictional competence of a small claims court (s 16).
- Only natural persons may appear in a small claims court as plaintiffs (s 7).
- Review of proceedings is permitted (s 46), but appeal is prohibited (s 45).

By comparing the procedures adopted in small claims courts with the equivalent procedures adopted in superior and magistrates' courts, we can see how small claims courts have been made more accessible and user-friendly than other courts.

- Representation of a litigant by a member of the legal profession is forbidden. The intention is to keep to a minimum any legal costs that would otherwise be incurred. To facilitate (assist) self-representation by each of the litigants, pre-trial proceedings are informal, the rules of evidence have been relaxed and the role of the judicial officer (the commissioner) has been radically modified in that he or she plays an active role in assisting the litigants in presenting their cases.
- Pre-trial formalities have been simplified and reduced to the barest essentials (no pleadings are required, and only a letter of demand and a summons is used).
- 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**. In contrast, in the small claims courts, the commissioner plays an active role.

Read sections 3, 4, 712, 14, 15–22, 26, 29, 45 and 46 of the Small Claims Courts Act, 1984.

ACTIVITY

(1) Read the facts given at the beginning of the study unit and explain who was correct, Jan, Susan, or both of them? In your answer refer to the relevant legislation.
(2) Briefly explain the fundamental differences between small claims courts and other courts.

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 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) Your explanation should focus on the self-representation of parties; the simplification of pre-trial formalities and the relaxed rules of evidence; and the role of the judicial officer.

SELF-ASSESSMENT

Formulate an opinion on whether it is justified to operate small claims courts in our society, considering the fact that magistrates' courts are found within municipal areas, and thus easily accessible to most people.

PART

2

Jurisdiction

PART A

Introduction to jurisdiction of the superior and lower courts

STUDY UNIT

5

Introductory remarks regarding jurisdiction

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

OVERVIEW

5.1 THE DISTINCTION BETWEEN COURTS
5.2 THE MEANING OF JURISDICTION
5.3 THE MEANING OF INHERENT JURISDICTION
5.4 THE MEANING OF "CREATURES OF STATUTE"
5.5 WHEN JURISDICTION IS DETERMINED

LEARNING OUTCOMES

After studying this study unit, you should be able to

- explain what jurisdiction entails
- describe why it is important to determine which court can exercise jurisdiction prior to the commencement of litigation
- explain the implications of the term "inherent jurisdiction"
- illustrate the meaning of the term "creatures of statute"

COMPULSORY READING

Pete *et al Civil Procedure* 3ed (2017) 65

Section 173 of the Constitution of the Republic of South Africa, 1996

5.1 THE DISTINCTION BETWEEN COURTS

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

- the Constitutional Court
- the High Courts and any courts of a similar status
- the Supreme Court of Appeal

(Courts such as the Labour Court and the Lands Claims Court have the status of a High Court.)

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

- magistrates' courts (district magistrates' courts and regional magistrates' courts), which have been established in terms of the Magistrates' Courts Act 32 of 1944
- small claims courts, which 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
- 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 maintenance courts

You should be aware that a large number of specialist courts exist, and that in some cases these courts sit as magistrates' courts. It is beyond the scope of this module to address all types of civil courts available to civil litigants.

5.2 THE MEANING OF JURISDICTION

No single court in South Africa has jurisdiction (i.e. the competence), as court of first instance, to hear all disputes instituted anywhere in the country. Before an action is instituted, therefore, it is 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 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 that is not vested with jurisdiction, such court will refuse to hear the matter and a new action will have to be instituted in another court. Also, to proceed in the High Court with a claim that falls within the jurisdiction of a magistrates' court, brings the risk of being awarded costs on the scale applicable to magistrates' courts (thus being awarded costs on a lower scale).

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 this definition, the following tw**o 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 second requirement, namely, the power to enforce a judgment, is derived from the doctrine of effectiveness (refer to study unit 6, para. 6.2 below for a discussion of this concept).

5.3 THE 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's exercising its inherent jurisdiction is that it has discretion regarding its own procedure. In other words, a court may condone any procedural mistakes or determine any point of procedure.

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.

5.4 THE MEANING OF "CREATURES OF STATUTE"

Lower courts do not have inherent jurisdiction. The reason for this is that they derive their powers from the particular statute that created them. Because of this, lower courts are sometimes called "**creatures of statute**". The exercise of jurisdiction in a lower court is, therefore, dependent on the extent to which its enabling statute permits it to exercise such jurisdiction.

This is best illustrated by referring to the magistrates' courts. A magistrates' 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, and has no authority that cannot be found within the four corners of this Act. In other words, it may only do what the Act permits it to do.

5.5 WHEN JURISDICTION IS DETERMINED

Study Pete *et al* 65 (para. 1.4).

The determining moment is when proceedings are instituted (see also Part 3: Court Procedure). Once a litigant has commenced proceedings in a particular court, he or she must continue them in that court unless the leave of the court is obtained for the removal of the matter to another court (see Part 3: Court Procedure), or the proceedings are withdrawn by the plaintiff.

ACTIVITY

(1) What is one of the first matters you should consider before the matter can be instituted?
(2) Explain in your own words why superior courts may exercise inherent jurisdiction.
(3) Explain in your own words why magistrates' courts are "creatures of statute".

FEEDBACK

(1) (An important consideration before instituting any action is which court will have jurisdiction to hear the action, in this case, the divorce. This entails determining not only the kind of court in which such proceedings may be instituted (e.g., Constitutional Court, High Court, family court or magistrates' court), but also determining the specific court (e.g., South Gauteng High Court, Johannesburg or KwaZulu-Natal High Court, Durban).

(2) A superior court exercises inherent jurisdiction because its competence is not reliant on statutory law alone, 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.

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

PART B

Jurisdiction of the superior courts

STUDY UNIT 6

Terminology

Peter, who lives in Durban, owns an expensive Ferrari, which is parked in his garage at his home in Durban. He sells the car to Tsepo, who lives in Pretoria, for an amount of R405 000. Tsepo pays the purchase price, but Peter refuses to deliver the car to him.

OVERVIEW

LEARNING OUTCOMES

After studying this study unit, you should be able to

- understand, examine and/or discuss the terms and phrases you will come across during your study of this course
- distinguish between the different terms and phrases

COMPULSORY READING

Sections 1–3 of the Domicile Act 3 of 1992

6.1 INTRODUCTORY REMARKS ON LATIN TERMS

Please note that the prescribed textbook contains a comprehensive, concise *Glossary* from page 687 onwards. You may find it useful to explain unfamiliar phrases and facilitate your understanding of the study material. However, we have included a few of our own to assist you further with your studies.

Actor sequitur forum rei

Definition: This Roman-law rule means that the plaintiff must institute action against the defendant in the area in which the defendant is domiciled or resident. This 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 vested with jurisdiction he/she 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 Roman Empire.

In **South African law**, however, these terms have special meanings:

(1) An *incola* is a person who is **either domiciled or resident** within a specific court's area of jurisdiction. **Note:** Peter is an *incola* of the KwaZulu-Natal High Court, Durban (read the facts at the beginning of the study unit).
(2) A *peregrinus* is a person who is **neither *domiciled nor resident*** within that court's area of jurisdiction. **Note:** Tsepo is a *peregrinus* of the KwaZulu-Natal High Court, Durban (read the facts at the beginning of the study unit).

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 KwaZulu-Natal High Court, Durban is regarded as a *peregrinus* of the North Gauteng High Court, Pretoria.
(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 does live elsewhere **in South Africa – a local *peregrinus*** (such as Tsepo in the given facts) – and a person who lives **outside South Africa – a foreign *peregrinus*** (if Tsepo were a Zimbabwean citizen). 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** that 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*.

Examples: 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** that 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. (See also *actor sequitur forum rei* above.)

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 that has jurisdiction to hear claims relating to such property.

6.2 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 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.

Note: This term is relevant only when dealing with jurisdiction in respect of money claims where the defendant is a foreign *peregrinus* (see also 8.4 below). The practice of accepting jurisdiction against a foreign defendant on the basis of attachment has its origin in Roman-Dutch law. The general principle underlying this practice is said to be the doctrine of effectiveness (see below). The effect of the attachment is either to confirm an accepted ground of jurisdiction *(ratio jurisdictionis)* or to found jurisdiction by providing a basis on which the court may assume jurisdiction where there is no *ratio jurisdictionis*.

***Bid Industrial Holdings (Pty) Ltd v Strang and Another* 2008 (3) SA 355 (SCA)**

Note: Arrest (of a defendant) to found or confirm jurisdiction has been held to be unconstitutional. See the case *Bid Industrial Holdings (Pty) Ltd v Strang and Another* 2008 (3) SA 355 (SCA).

However, the Supreme Court of Appeal has held that attachment to confirm or found jurisdiction of a court is not unconstitutional because it serves the purpose of making any judgment that the court may give in favour of the plaintiff effective. Therefore, all principles developed at common law regarding attachment to found or confirm jurisdiction still apply to the attachment of property.

The court in *Bid Industrial Holdings* also used the power given to it in terms of section 173 of the Constitution to develop the common law to introduce a new basis upon which a court may assume jurisdiction in respect of a foreign *peregrine* defendant **if attachment of property to found or confirm jurisdiction is not** possible. It held that a court may, in such instance, assume jurisdiction in respect of such defendant if (a) the defendant is served with the summons while in South Africa, and (b) there was an "adequate connection between the suit and the area of jurisdiction of the court concerned" when the appropriateness and convenience of the matter being decided by that court is considered (para. [56]).

The court did not elaborate on what would constitute an "adequate connection" but did indicate that the strongest connection would be provided by the cause of action arising within that jurisdiction. With regard to appropriateness and convenience, the court held that these concepts can be developed case by case.

Claim sounding in money

This rather clumsy expression is the standard term used to describe an action based upon a claim that 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 that the plaintiff seeks: if it is payment of money, the claim is one that 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 (i.e., a foreign *peregrinus*), attachment to found or confirm jurisdiction is necessary 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/she 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

The term "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:

***Ex parte Minister of Native Affairs* 1941 AD 53**

(1) A ***distinction*** should be drawn between **place of residence and *domicilium***. A person may be domiciled in one place and reside in another.
(1) 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 the summons**.
(2) A person **does not reside** in a place that 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, briefly describe 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 or her. 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 7

General overview of jurisdictional principles

Peter, who lives in Pretoria, owns an expensive Ferrari, which is parked in his garage at his home in Bloemfontein. He sells the car to Tshepo, for an amount of R500 000. Tshepo pays the purchase price, but Peter refuses to deliver the car.

OVERVIEW

LEARNING OUTCOMES

After studying this study unit, you should be able to

- identify the different common-law principles described in the study unit
- analyse how they are applied in current legal practice
- discuss the interrelationship of the remaining study units in part 3

COMPULSORY READING

Pete *et al Civil Procedure* 3ed (2017) 96–105

Sections 167(3)–167(7) of the Constitution, 1996

7.1 INTRODUCTION

In the following study units, we 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 that are relevant in respect of one kind 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 the purposes of this course, we have classified claims as those dealing with money, property, status and constitutional matters.

7.2 RELATIONSHIP BETWEEN COMMON-LAW PRINCIPLES AND LEGISLATION

In study unit 4, paragraph 4.3 above, which dealt with the jurisdiction of the High Courts, section 21 of the Superior Courts Act, 2013 was discussed. Bear in mind what was said there: section 21 has been interpreted to mean 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.

7.2.1 Claims sounding in money

This is the standard term used to describe an action based upon a claim that 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. Traditionally, the common-law principle that applied in respect of such claims was *actor sequitur forum rei*. Even in Roman times, however, this principle was not always followed. Therefore, the principle of *ratione rei gestae* has resulted in the situation where courts other than the court in which area the defendant is domiciled or resident may also exercise jurisdiction.

7.2.2 Claims relating to property

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

7.2.3 Matrimonial actions

In terms of the common-law principle that applied to divorce actions, the only competent court was the one where the parties were domiciled. This principle has now been altered by statute (see the Divorce Act 70 of 1979).

7.2.4 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 an issue is a constitutional matter rests with the Constitutional Court.

ACTIVITY

Read the scenario at the beginning of this study unit and answer the questions that follow.

(1) What type of claim is a claim for delivery of the car?
(2) Which court will have jurisdiction if Tsepo institutes action for delivery of the car?
(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?

FEEDBACK

(1) A claim for return of the car is a claim for the delivery of specific movable property.
(2) The *forum rei sitae*, which is the Free State High Court, 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 North Gauteng High Court, Pretoria, will have jurisdiction.

STUDY UNIT 8

Jurisdiction in respect of claims sounding in money

Abel, who is late for a meeting, fails to stop at a stop sign in Johannesburg, and is involved in an accident with Tshepo who, as a result of the accident, suffers damages due to bodily injuries and damage to his vehicle. Both parties live in Pretoria. Abel denies that he is to blame for the accident, and Tshepo decides to sue Abel for the amount of R420 000.

OVERVIEW

LEARNING OUTCOMES

After studying this study unit, you should be able to

- explain when a particular court has jurisdiction over a defendant who lives within the Republic in respect of claims sounding in money
- explain when the attachment of property for jurisdictional purposes is allowed
- explain the effect of section 28 of the Superior Courts Act, 2013 regarding the attachment of property
- ascertain whether a court may exercise jurisdiction over a foreign *peregrine* defendant

COMPULSORY READING

Pete *et al Civil Procedure* 3ed (2017) 99–104; 109–112

Sections 21(3); 28 and 42(2) of the Superior Courts Act, 2013

8.1 SCHEMATIC OUTLINE

The following schematic outline is to give you a clear view of the jurisdictional principles as an integrated whole. We suggest that you regularly consult this outline while studying this study unit.

Defendant

(determine his/her status as either an *incola* or *peregrinus* of the Republic)

Incola of the Republic	*Peregrinus* of the Republic
Common law jurisdiction grounds	Attachment (property) required
** Ratio domicilii* (follow defendant: *actor sequitur forum rei)*	** Ad fundandam iurisdictionem* (to found jurisdiction)
** Ratione rei gestae* (cause of action)	** Ad confirmandam iurisdictionem* (to confirm jurisdiction)
** ratione contractus* (where contract concluded, breached, OR to be performed)	
** ratione delicti commissi* (where delict committed)	
PLUS	
S 28 Superior Courts Act, 2013 (attachment prohibited)	

Note: For purposes of this module, a thorough knowledge of the content of this study unit is deemed sufficient for examination purposes. Read Pete *et al* for additional information only.

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

When a defendant is domiciled or resident *somewhere* in South Africa, the court(s) where such a defendant is resident or domiciled will be able to hear the matter. The ground for 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, notably determining the question **"when is the action instituted"**?

In *Mills v Starwell Finance* (Pty) Ltd 1981 (3) SA 84 (N), it was held that the action is instituted when the summons is issued and served. This view was confirmed in *Baren en 'n Ander v Lottering* 2000 (3) SA 305 (C) at 309F–G.

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.

8.3 WHERE THE DEFENDANT IS A *PEREGRINUS* OF THE COURT CONCERNED, BUT AN *INCOLA* OF ANOTHER COURT IN SOUTH AFRICA (LOCAL *PEREGRINUS*)

When a defendant is neither domiciled nor resident in the jurisdictional area of the court concerned, such a defendant is a *peregrinus* of that particular court, but because he or she is still domiciled or resident somewhere in the Republic, such a defendant is termed a **local** *peregrinus* (to distinguish him or her from a foreign *peregrinus*).

When a defendant is a local *peregrinus* of the court concerned, this court may exercise jurisdiction only if the cause of action arose within its jurisdictional area. A "cause of action" comprises the facts that 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*.

When does a cause of action arise within a court's jurisdictional area? All claims that are instituted are based on some cause of action. A cause of action usually arises from either 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 that 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 local *peregrine* defendant's property, in contrast with the position of foreign *peregrini* defendants (see below). This is because section 28(1) of the Superior Courts Act 10 of 2013 **prohibits** attachment of property, 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 of property for the purpose of founding or confirming jurisdiction is not only unnecessary but is prohibited**. (See also study unit 6, para. 6.2 above.)

8.4 WHERE THE DEFENDANT IS A *PEREGRINUS* OF ALL SOUTH AFRICAN COURTS (FOREIGN *PEREGRINUS*)

Read Pete *et al* 3ed 109–112.

8.4.1 Introduction

When a defendant is neither domiciled, nor resident within the borders of the Republic, such a defendant is a foreign *peregrinus*.

Before a claim sounding in money is instituted against a defendant who is a foreign *peregrinus*, it is usually necessary to acquire some hold over that person. This is usually done by attaching his or her property. Such attachment is necessary to ensure that the court's judgment can be carried out. However, attachment to found or confirm jurisdiction cannot be applied to matrimonial actions or actions in *personam* that do not have a monetary or property component (*Herbstein and Van Winsen The Civil Practice of the High Courts of South Africa* Vol 1 at 105).

8.4.2 Where the defendant is a foreign *peregrinus* and the plaintiff is an *incola* of the court concerned

In instances 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 iurisdictionem***.

What is of cardinal importance in this respect is that the order for attachment founds jurisdiction. Accordingly, it is not necessary for the cause of action to have arisen within the court's area of jurisdiction: attachment *ad fundandam iurisdictionem* alone founds jurisdiction and constitutes the ground on which the assumption of jurisdiction is justified. However, an order for attachment *ad fundandam iurisdictionem* is permissible only if a further condition is complied with, namely, that the plaintiff is an *incola* of the court concerned.

This principle is based on **policy considerations** that South African courts should come to the assistance of South African subjects and enable them to litigate at home, which evolved as a result of 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 iurisdictionem* 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 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***.

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**.

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 (within the particular court's area of jurisdiction)
- the plaintiff is an *incola* of the court concerned

NOTE:

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 to assist a local plaintiff. In the case of attachment *ad fundandam iurisdictionem*, **it is the attachment itself that vests jurisdiction** and **not the status of the plaintiff**.

8.4.3 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 the court's area of jurisdiction. This is known as **attachment *ad confirmandam jurisdictionem***; in other words, the attachment **confirms or strengthens the partial or imperfect jurisdiction** that 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 iurisdictionem* has taken place because the defendant is a foreign *peregrinus*.

Where a court exercises jurisdiction based on attachment *ad confirmandam iurisdictionem*, the nature of the proceedings is irrelevant, provided that money is claimed (e.g. 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 a *peregrinus* of the court concerned.

To summarise:

- Attachment *ad confirmandam iurisdictionem* is permissible where the defendant is a *peregrinus* of the whole Republic
- attachment of the defendant's property has taken place (within the court's jurisdiction area)
- and the cause of action has arisen within the court's area

8.5 EFFECT OF SECTIONS 21(3) AND 42(2) OF THE SCA AND THE LOCATION OF THE PROPERTY FOR PURPOSES OF ATTACHMENT

Historical background:

Section 26(1) of the Supreme Court Act 59 of 1959 provided that a civil process of a division ran throughout the Republic. The question of whether this section extended jurisdiction to allow (the arrest of the defendant or) the attachment of the defendant's property anywhere in the Republic was decided in the negative in *Ewing McDonald & Co Ltd v M & M Products Co* 1991 (1) SA 252 (A) in which it was held that section 26 was merely procedural and, therefore, made the execution and service of a process more convenient. It could not be used to found or confirm jurisdiction. It essentially confirmed the position that the attachment of the property of a foreign *peregrinus* had to take place within the jurisdiction of the court in which the plaintiff instituted the action (and thus which was asked to exercise jurisdiction in the main action). If the property was situated in the Republic, but in the jurisdiction 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.

To remedy this situation, section 19(1)(c) was enacted in 1999, which changed the common law in that attachment to found or confirm jurisdiction could then take place anywhere in the Republic, and was no longer confined to the jurisdiction area of the court in which the action was instituted.

The Supreme Court Act 59 of 1959 was repealed in its entirety by the Superior Courts Act, 2013 (SCA). The equivalent section of the repealed section 26 is section 42 of the Superior Courts Act, 2013. Section 21 of Superior Courts Act, 2013, is to some extent similar to the repealed section 19(1) but is problematic, as can be seen below.

Section 42(2) of the SCA:

Section 42(2) of the SCA provides that a civil process of a Division runs throughout the Republic and may be served or executed within the jurisdiction of any Division. This means that the process issued by a particular court (such as a summons or notice of motion) may be served within the jurisdiction of any division of the High Court in the Republic. It also means that the judgment or order of a particular court is enforceable within the jurisdiction of any division of the High Court in the Republic. The result is that even if a defendant or his property is situated outside the jurisdiction of a particular court, that court is able to exercise control over the person or property of the defendant, provided that he is an *incola* of South Africa. However, in those instances where the defendant is a *peregrinus* of South Africa, and neither the defendant, nor any of his or her property may be in the country when judgment is granted against him or her, the judgment would be rendered ineffective. Therefore, to establish jurisdiction in a claim sounding in money against a foreign *peregrinus*, the attachment of such defendant's property is usually required (see *Bid Industrial Holdings* case above, where the court considered alternative options when attachment was not possible).

Section 21(3) of the SCA:

Section 21(3) provides that any Division may issue an order for the attachment of property to confirm jurisdiction. This section is subject to section 28 of the SCA and section 4 of the Admiralty Jurisdiction Regulation Act, 1983. (Remember, s 28 prohibits the attachment of property of a person resident in the Republic to found jurisdiction.)

The following two points should be noted:

- This section only provides for attachment of property *ad confirmandam iurisdictionem*, and makes no reference to attachment *ad fundandam iurisdictionem*. However, it is contended that as attachment *ad fundandam iurisdictionem* has been part of our common law, the provisions of this section must be read together with the common-law principles regarding attachment *ad fundandam iurisdictionem*. Consequently, the position regarding attachment *ad fundandam jurisdictionem* is thus governed by common law (hence an order for attachment *ad fundandam iurisdictionem* is possible in terms of the common law).
- Unlike the position with the repealed section 19(1)(c), no mention is made of a requirement as to where the property to be attached must be situated. It is contended that as the legislature is silent on this matter and did not specifically provide where attachment must take place, again this provision must be read with the common-law principles regarding attachment, and consequently the requirement is that the property must be situated within

the jurisdiction area of the particular court approached for the order. Unfortunately, the result is that this section, in its present form, amounts to a regression, in that the *incola* plaintiff is again placed in the invidious position in which he or she found him or herself prior to 1999. It is hoped that the courts (or preferably, parliament) will clarify the uncertainty regarding the interpretation of this section in the near future. (**Note:** our view differs from Pete *et al* 112, "Step 4".)

In sum: regardless of whether attachment *ad fundandam iurisdictionem* or *ad confirmandam iurisdictionem* is sought, our contention is that the property in respect of which the attachment is sought must be situated within the area of jurisdiction of the particular court concerned (as required under common law).

8.6 PROCEDURAL ISSUES CONCERNING THE ATTACHMENT OF PROPERTY

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 for notice of motion (see Part 3: Court Procedure) 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 that 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 to the value of the claim to obtain the release of his or her property.

8.7 WHEN SUBMISSION WILL VEST A COURT WITH JURISDICTION

Submission refers to the situation where a person who would otherwise not be subject to the jurisdiction of the court consents to the court's jurisdiction, either by positive act or negatively, by not objecting to the judgment of the court, thus conferring jurisdiction on the court. 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.

Submission by an *incola* defendant will never occur, since the court is already vested with jurisdiction *ratione domicilii*. Likewise, a local *peregrinus* cannot submit to the jurisdiction of a court, and an action must be instituted against him or her in the court within whose area the cause of action arose (or alternatively, of course, in whose area he or she is an *incola*).

As far as a defendant who is a foreign *peregrinus* is concerned, the question arises whether he or she can submit to jurisdiction in order to avoid the attachment of property. Based on case law, a foreign *peregrinus* cannot avoid attachment to found jurisdiction. However, where the cause of action has taken place within a court's jurisdictional area, and a foreign defendant submits to the court's jurisdiction before the attachment order has been made, submission will render attachment unnecessary. Therefore, it appears that this is the only instance in which submission to jurisdiction can take place. Thus, rather than being an independent ground for jurisdiction, submission is merely a substitute for the confirmation of jurisdiction by attachment.

On the question of **when** submission occurs, it is accepted that 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 several ways.

Examples: 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 promptly 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.

ACTIVITY

Re-read the scenario at the beginning of this study unit, and answer the following questions:

(1) Fully explain which court(s) will have jurisdiction to hear the matter.
(2) Tshepo wishes you, as his attorney, to take steps to have Abel's property that is situated in Pretoria, attached. Explain fully to Tshepo whether this is possible.
(3) If Abel is a foreign *peregrinus* with property in Pretoria, would any of your answers relating to (1) and (2) above change? Explain fully.
(4) If Abel is a foreign *peregrinus* with property in Pretoria, may he submit to the Pretoria High Court to avoid the attachment of his property? Explain.

FEEDBACK

(1) The High Court in Johannesburg will have jurisdiction to hear the matter, as the cause of action (*ratione rei gestae*: the collision – *delicti commissi*) occurred within its area of jurisdiction. However, the High Court in Pretoria will also have jurisdiction to hear the matter *ratione domicilii* as Abel, the defendant, resides within its area of jurisdiction. (Where more than one court has jurisdiction, the plaintiff, as *dominus litis,* may choose in which court to institute action. Matters such as convenience and cost will inform the decision.)
(2) Section 28 of the Superior Courts Act, 2013, prohibits the attachment of property for jurisdictional purposes of persons domiciled or resident anywhere in the Republic. As Abel is an *incola* of the Republic (he resides in Pretoria), the attachment of his property is prohibited by virtue of section 28 of the Superior Courts Act, 2013.
(3) Yes, the answers will change. Because Abel, the defendant, is now a foreign *peregrinus*, attachment of his property for jurisdictional purposes **must** take place. Although the cause of action occurred in Johannesburg, the High Court will not be able to assume jurisdiction on the basis of attachment *ad confirmandam iurisdictionem* because the property is situated in Pretoria. However, since the plaintiff is an *incola* of Pretoria and the defendant's property is situated in Pretoria, the High Court of Pretoria will still have jurisdiction, albeit on a different basis, namely, attachment *ad fundandam iurisdictionem*.
(4) No, Abel cannot submit to the court's jurisdiction, as the cause of action did not arise in this court's area of jurisdiction (*Briscoe v Marais* decision).

STUDY UNIT

9

Jurisdiction in respect of claims relating to property

Lebong lives in Pretoria. Samuel lives in Johannesburg, but also owns a farm in Bloemfontein. Samuel sells the farm to Lebong for R1.3 million. Lebong pays the purchase price, but Samuel fails to sign the transfer documents.

OVERVIEW

LEARNING OUTCOMES

After studying this study unit, you should be able to

- identify the jurisdictional principles relating to property
- explain the concept of *forum rei sitae*
- determine when the *forum domicilii* might also have jurisdiction

COMPULSORY READING MATERIAL

Pete *et al Civil Procedure* 3ed (2017) 106–107.

9.1 INTRODUCTION

The general principles that 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 (i.e. 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 that directly affects specifically identifiable property, for instance, the delivery of a specific item of jewellery or an order that a particular erf be 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 means that no other court may hear this claim.

9.2 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; this case is related to transfer of property in a divorce order)
- 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*.

9.3 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

It is debatable whether the jurisdiction of the *forum rei sitae* is exclusive as far as movable property is concerned. (Also see Herbstein and Van Winsen *The Civil Practice of the High Courts of South Africa* 80–81). 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 that 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 42(2) of the Superior Courts Act of 2013. Our courts have not pertinently decided this question; therefore, the **current position** is that, while the *forum rei sitae* will always have jurisdiction, it is unclear whether the *forum domicilii* of the defendant will also be able to exercise jurisdiction. Where the *forum rei sitae* is approached for relief, it is irrelevant whether the defendant is a *peregrinus* or an *incola*.

ACTIVITY

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

(1) Can Lebong institute an action against Samuel in the South Gauteng High Court, Johannesburg, 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 Free State High Court, Bloemfontein, 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 Free State High Court, Bloemfontein – will have jurisdiction. However, it is possible that the *forum domicilii* of the defendant – the South Gauteng High Court, Johannesburg – will also have jurisdiction.

STUDY UNIT 10

Matrimonial jurisdiction

Lebo and Pindi married and settled permanently in Swaziland. After a while Lebo takes up a position in Pretoria, but Pindi continues to live in Swaziland. Lebo returns home to Swaziland for short holidays a few times a year, during which he tends to his home and family. After a few years Lebo meets another woman in Pretoria and wants to divorce Pindi and settle down with his new partner in Pretoria.

OVERVIEW

10.1 INTRODUCTION
10.2 THE CONCEPTS OF DOMICILE AND RESIDENCE IN THE CONTEXT OF DIVORCE JURISDICTION
10.3 CURRENT LEGISLATION REGULATING DIVORCE JURISDICTION

LEARNING OUTCOMES

After studying this study unit, you should be able to

- identify the court(s) that has jurisdiction to hear a divorce action in a given set of facts
- explain the difference between domicile and residence within the context of divorce jurisdiction

COMPULSORY READING MATERIAL

Pete *et al Civil Procedure* 3ed (2017) 113–114

Section 2 of the Divorce Act 70 of 1979; sections 28(1A) and 29(1B) of the Magistrates' Courts Act 32 of 1944.

10.1 INTRODUCTION

Unlike the position regarding money claims, the jurisdictional principles that govern issues of status are not based on the concept of effectiveness. They are based on the degree of recognition that 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 that changes status often requires foreign recognition. If the court that 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 that has the greatest interest in their status and future arrangements.

Although, in the past, the common domicile rule was generally appropriate, it did cause severe hardship to the wife in certain circumstances. 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.

10.2 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 that 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 thus 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 para. 10.3 below) 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. A domicile of choice is acquired by a combination of lawful presence at a particular place and the intention to settle there for an indefinite period (see s 1(2) of the Domicile Act).

Unfortunately, the phrase "ordinarily resident" is not defined in the Act. It is, therefore, necessary to refer to judicial interpretation 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). The court also held that the term "ordinarily resident" requires a greater degree of permanence than just residence (at 184–185). 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.

10.3 CURRENT LEGISLATION REGULATING DIVORCE JURISDICTION

The question of 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.

At this point it should be noted that an independent domicile also applies to couples who enter into a civil union under the **Civil Union Act 17 of 2006,** which legalised same-sex marriages. (The legal consequences of a civil union are the same as those of a marriage under the Marriage Act 25 of 1961, and any reference to marriage in any law is deemed to include a civil union, and any reference to a husband, wife or spouse is deemed to include a spouse or partner in a civil union.)

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 the following 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.

It is unclear how much time must elapse before domicile or residence in terms of the Act has been established. 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 (also see s 1(1) of the Domicile Act).

This **contrasts** with the provisions of **section 2(1)(b), which require a period of residence of not less than 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, however. It seems that this period of one year's residence includes any antenuptial period of residence (i.e. 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 that 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".

With the advent of the Jurisdiction of Regional Courts Amendment Act 31 of 2008 (JRCAA), the jurisdiction of the regional courts was extended to include divorce matters. This Act also repealed section 46(1) of the Magistrates' Courts Act in so far as it provided that a magistrates' court could not grant a divorce, because a divorce affects the status of the parties and status must be decided by the High Courts.

Section 1 of the Divorce Act of 1979 has been amended to extend the definition of "court" to include a reference to a regional magistrates' court division.

The jurisdiction of the regional magistrates' courts in respect of divorce and related matters is now as follows:

(a) **Section 28(1A)** of the Magistrates' Courts Act provides that a regional magistrates' court shall have divorce jurisdiction over both or either party who is

"(i) domiciled in the court's area of jurisdiction on the date on which the proceedings are instituted; or

(ii) ordinarily resident in the court's area of jurisdiction on the said date and has been ordinarily resident in the Republic for a period of not less than one year immediately prior to that date".

(b) **Section 29(1B)(a)** of the Magistrates' Courts Act provides that a regional division shall have jurisdiction to determine actions relating to the nullity of a marriage and divorce, as well as related matters. A regional magistrates' court may **also** hear any matter provided for in terms of the **Recognition of Customary Marriages Act, 1998**. In terms of this Act, a valid customary marriage can only be dissolved through a decree of divorce on the grounds of the irretrievable breakdown of the marriage, in the same way as civil marriages.

(c) In terms of **section 29(1B)(b)**, a regional magistrates' court hearing any of these matters shall have the same jurisdiction as any High Court regarding such matter.

ACTIVITY

Read the scenario at the beginning of the study unit again, and answer the following questions:

(1) Explain fully which high court(s) would have jurisdiction to hear Lebo's action for divorce.
(2) Explain fully whether Pindi would be able to approach the Pretoria High Court for a divorce order.
(3) Explain whether Pindi may commence divorce proceedings in any court other than the one mentioned in (2) above.

FEEDBACK

(1) Section 2(1)(b) provides that a court is competent to exercise divorce jurisdiction if one of the parties to a marriage is ordinarily resident in its area of jurisdiction at the time of the institution of the action, and that this party has been ordinarily resident in the Republic for not less than one year prior to the institution of the action.

In term of the given facts, Lebo is ordinarily resident in Pretoria and has been ordinarily resident there (and thus the Republic) for a period of not less than one year (as he has been living and working in Pretoria for a few years).

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

(2) In terms of the given facts, Pindi is neither domiciled nor resident in the jurisdictional area of the North Gauteng High Court, Pretoria, 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 Lebo complies with the provisions of section 2(1)(b), Pindi may institute divorce proceedings in the North Gauteng High Court, Pretoria, even though she is domiciled in Swaziland and has never been to Pretoria.

(3) In terms of section 29(1B)(a) of the Magistrates' Courts Act 32 of 1944, Pindi may also institute the action in the Pretoria regional magistrates' court on the same ground (contained in s 28(1A)(ii) of the Act).

PART C

Jurisdiction of the lower courts

STUDY UNIT

11

Jurisdiction of the magistrates' courts

You are a candidate attorney in Pretoria. Thandi, who lives in Rustenburg, arrives at your office for legal advice.

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. Thandi then signed a contract with Thomas, a builder from Polokwane, in terms of which Thomas would build a house for her on this land. The contract also stipulates that she would pay Thomas R90 000 for the building work.

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

Buildrite, a supplier of building materials, had delivered goods to the value of R70 000 to Thandi's premises. She had not yet paid for these goods. Thomas, the builder, removed the goods from Thandi's premises, planning to use them at another building site.

She thinks that the value of the house alone, when finished, will be about R200 000; the value of the house together with the land, about R300 000; and the expense of finding another builder to complete the building work, about R150 000.

OVERVIEW

LEARNING OUTCOMES

After studying this study unit, you should be able to

- describe the implications of the term "creatures of statute"
- explain which sections of the Magistrates' Courts Act are of primary importance in determining the jurisdiction of a particular magistrates' court and why
- apply the various jurisdiction principles to a given set of facts and explain whether a particular magistrates' court has jurisdiction
- explain the different financial limitations on jurisdiction
- identify the other provisions that govern jurisdiction

COMPULSORY READING MATERIAL

Pete *et al Civil Procedure* 3ed (2017) 66–95; 196–197

Section 28–32; 37; 40; 43; 45; 47; 50 and 110 of the Magistrates' Courts Act 32 of 1944

11.1 PROVISIONS GOVERNING JURISDICTION

Bear in mind that when we explained the concept "creatures of statute" in study unit 5, paragraph 5.4 in relation to magistrates' courts, we pointed out that regard must be had to legislative provisions in order to determine precisely what the magistrates' courts are permitted to do. Because the magistrates' courts may exercise statutory jurisdiction only, the common-law principles that 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. 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 magistrates' court where a defendant "resides, carries on business or is employed" has jurisdiction. This section in fact contains the jurisdiction ground in the magistrates' courts in this regard, and the common-law principles (such as *ratione domicilii*) thus do **not** apply (and thus may not be used to indicate why a particular magistrates' court has jurisdiction).

11.1.1 Primary provisions

Unlike the High Courts, where the only general limitation that is placed on the exercise of jurisdiction is geographical (i.e., which one of the various High Courts has jurisdiction), a particular magistrates' court is limited by considerations regarding the nature of the claim, the amount of the claim, and then, in addition, by geographical considerations. Therefore, in determining whether a magistrates' court has jurisdiction, the following three-step approach should be followed:

- Consider section 46: As a general rule, this section deals with the kinds of claim that no magistrates' court whatsoever may hear (such as the interpretation of a will). Such matters must be brought in the High Court.
- Consider section 29: If a matter is not prohibited by section 46, regard must be had to the claim amount, and this section sets out the maximum amount that may be claimed in a particular court (district or regional magistrates' court).
- Consider section 28: once it has been determined that a particular court may hear the matter, the correct magistrates' court must be identified. This section deals with jurisdiction in respect of persons.

11.1.2 Other provisions

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

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

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

11.2 SECTION 46: LIMITATIONS ON THE NATURE OF THE CLAIM

In preparation, read Pete *et al* 79–83.

11.2.1 Section 46(2)(a): Validity of wills

Although only the High Court has jurisdiction in this regard, the magistrates' courts do have jurisdiction to hear an action resulting from the provisions of a will, for example, regarding the payment of an amount bequeathed in a will.

11.2.2 Section 24(2)(b): Status as regards mental capacity

The magistrates' court may not make an order affecting the status of persons (with the exception of divorce matters). As far as status regarding mental capacity is concerned, it should be noted that 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 magistrates' court in which the person is involved.

11.2.3 Section 46(2)(c): Specific performance

11.2.3.1 General rule

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 by the superior courts only, 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 (e.g. 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/she contractually undertook to do so. This restrictive approach appears to be what the legislature intended when passing the subsection.

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

11.2.3.2 Exceptions to the general rule

(a) 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 as follows in *Victor Products (SA) Ltd v Lateulere Manufacturing Ltd* 1975 (1) SA 961 at 963:

> 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 notice 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**. **Note:** If the claim for specific performance without an alternative payment of damages is for the rendering of an account in respect of which the claim does not exceed the relevant financial limit, the matter may be heard in the magistrates'court.

(b) Sections 46(2)(c)(ii) and (iii)

As regards sections 46(2)(c)(ii) and (iii), it is important to note that the order that may be granted is **limited to the delivery or transfer of movable or immovable property**, and no more. In this regard, see *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.

11.2.4 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.

11.3 SECTION 29: LIMITATIONS ON THE AMOUNT OF THE CLAIM

In preparation, study Pete *et al* 67–72.

In this study unit, we discuss the financial limitations placed on magistrates' courts. These financial limitations mean that, even if a plaintiff has an action of a kind that a magistrates' court may hear, he/she cannot institute it in a particular magistrates' court if the amount claimed exceeds the financial limits imposed by section 29.

11.3.1 General

Note the following

- Currently, if the claim is R200 000 or less, then the matter falls within the jurisdiction of the district magistrates' court.
- Currently, if the claim is over R200 000 but less than R400 000, then the matter falls within the jurisdiction of the regional magistrates' court.

- Thus, if the claim is over R400 000, then the matter falls within the jurisdiction of the High Courts.
- The Minister may determine different amounts contemplated in subsections 1(a), (b), (d), (e), (f) and (g) pertaining to district courts and regional courts, in terms of section 29(1A).
- The exclusion of a case from the jurisdiction of the district magistrates' court does not necessarily mean that such case is excluded from the jurisdiction of the regional magistrates' court.

11.3.2 The provisions of section 29

- Section 29(1): "Subject to the provisions of this Act"

  This phrase refers to other sections of the Act dealing with jurisdiction. In particular, remember **section 45**, which sets out how to **consent to a claim** that exceeds the limits of section 29.

- Section 29(1): "Causes of action" and "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 a 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 (i.e. attachments and interdicts). This means that proceedings in terms of section 30 are also subject to the restrictions imposed by section 29, regarding the financial limits.

- 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 that would be paid for the property in an open sale. The plaintiff need not state what the value of the property is in his or her particulars of claim; it is up to the defendant to allege that the jurisdictional limit has been exceeded. Remember that although this seems to be a claim for specific performance, which would be prohibited from being heard in a magistrates' court in terms of section 46(2)(c), it is actually one of the exceptions for which provision is made in section 46(2)(c)(ii).

- Section 29(1)(b): "Actions of ejectment … where the right of occupation is in dispute between the parties"

  District and regional magistrates' courts possess jurisdiction in respect of actions of ejectment against the occupier of any premises or land within the relevant district or regional district, provided that where the right of occupation of any premises or land is in dispute between the parties, such right does not exceed the applicable financial limit "in clear value to the occupier".

  It is extremely difficult to lay down general rules for determining whether the "right of occupation exceeds R200 000 or R400 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 the right of occupation, 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 that the occupier is reasonably expected to make on the premises in dispute

> **Note:**
>
> This provision must be read in conjunction with the relevant statutory provisions regulating this area of the law, such as the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (known as PIE).

- Section 29(1)(c): "Actions for the determination of a right of way, notwithstanding the provisions of section 46"

  The provisions of section 46 are clearly excluded here. Also, it is 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.

- Section 29(1)(d): "Liquid document or mortgage bond"

  Definition: A liquid document is a document in which a debtor, above his or her signature or that of his or her agent, admits that he/she is liable for a fixed or ascertainable sum of money.

  Liquid documents include cheques, promissory notes, acknowledgements of debts and mortgage bonds. This concept is discussed in more detail in Part 3: Court Procedure. **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.

  Example: A district magistrates' court will have jurisdiction in a claim for payment of R70 000, even if the amount of the bond is for R500 000.

- Section 29(1)(e): "Credit agreement as defined in section 1 of the National Credit Act 34 of 2005"

  Definition: 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 goods concerned and pays the amount due in payments (instalments) 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/she sold by hire-purchase or lease, or payment of money owing in terms of the agreement. If he/she 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 of the district magistrates' court.

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 may exceed the limit, as each payment constitutes a separate claim. (In this regard, see the provisions of s 43, which are dealt with below.)

- Section 29(1)(f): "Actions in terms of section 16(1) of the Matrimonial Property Act 88 of 1984"

  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 magistrates' court for assistance. The court is approached by way of application and may then authorise the transaction.

  See also the comments regarding the interpretation of "claim of value of property in dispute", which are dealt with under section 29(1)(a) above.

- Section 29(1)(fA): "Actions, including an application for liquidation in terms of the Cloe Corporations Act 69 of 1984"

  This is the only insolvency application that a magistrates' court may hear, based on the understanding that close corporations are suited to meet the needs of smaller business entities. Otherwise, the Insolvency Act 24 of 1936 provides that sequestrations and liquidations must be decided by the High Courts.

- 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 of the particular magistrates' court**. In the district magistrates' courts, the claim or value of the matter in dispute must not exceed R200 000, and in the regional magistrates' courts, the claim or value of the matter in dispute may exceed R200 000 but must not exceed R400 000.

- Section 29(2): "Action" includes a claim in reconvention

  A claim in reconvention is a **counterclaim** that 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. (Counterclaims are dealt with in Part 3: Court Procedure.)

11.4 SECTION 28: LIMITATIONS REGARDING GEOGRAPHICAL CONSIDERATIONS

In preparation, read Pete *et al* 83–95.

11.4.1 General

The question of whether an action should be instituted in the magistrates' 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 of whether **any** magistrates' court has jurisdiction in respect of certain categories of persons. Rather, it answers the question: In **which particular** magistrates' 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 magistrates' court** and the person in respect of whom the court's jurisdiction is being exercised.

Also 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 magistrates' 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".

11.4.2 The provisions of section 28

- Section 28(1)(a): "Any person who resides, carries on business or is employed"

  The concept "resides" was dealt with above in explaining the terminology used in the High Court. The meaning of the concept is unchanged in both courts.

  The question of whether a person "carries on business" within the particular court's area of jurisdiction is one of fact, and is similar to the question of whether a person "resides" in a particular place. However, the phrase connotes regularity. Note that the business carried on must be a person'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. In this case the company may be sued where its **local head office** is situated.

  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 or regional division X, but who is sent to district Y to finalise a matter there (which will take a few days only), does not then become subject to the jurisdiction of the court of district or regional division Y.

- Section 28(1)(b): "Any partnership …"

  A partnership is not a juristic entity and, if sued in terms of common law, all the partners had to be sued jointly. This was extremely inconvenient if the partners lived in different districts (or regional divisions); therefore, 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 the names of all the partners at the time that the cause of action arose.

- Section 28(1)(c): " … in respect of any proceedings incidental to any action"

  The interpretation of "incidental" is problematic. Different kinds of proceedings are incidental to (i.e., arising out of the same facts as) the main action. Interlocutory and preliminary applications are two examples of such proceedings. However, many, but not all, counterclaims are incidental to the main action.

- Section 28(1)(d): "Cause of action arose wholly"

  In the High Court, for example, it is sufficient to show – in an action based on a contract – that the contract was concluded, breached, or was to be performed, within a particular jurisdictional area. In **the magistrates' court, however, it must be shown not only that the contract was concluded within the district or regional division concerned, but also that the breach occurred there as well**; in other words, the **cause of action must have arisen "wholly" within the district or regional division**.

  What does the word "**wholly**" mean in the context of the Act? The concept of "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 purpose of this subsection is to make matters more convenient for the plaintiff and witnesses in certain kinds of cases. For example, it frequently happens that a person is involved in a transaction that occurs in a district or regional division 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.

- Section 28(1)(e): "Any party to interpleader proceedings"

  Definition: Interpleader is a form of procedure by which a person in possession of property that is not his or her own, 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 particular magistrates' 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 particular magistrates' court is in possession of the property and conflicting claims are made in respect thereof.

- 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 that it is not empowered to hear, for example, the validity of a will in terms of section 46.

In paragraph 11.6.3 below, 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 magistrates' 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 matters where the amount claimed exceeds section 29 limitations.

Therefore, as a general proposition, we may 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 is necessary, in terms of section 45.

How must a defendant indicate that he or she objects to the jurisdiction of the court? The filing of 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 file appearance to defend within a certain time to ensure that the plaintiff does not obtain a default judgment against him or her. 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.

- 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 particular magistrates' 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 magistrates' 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 or regional division (rule 5(6)(b)).

- 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 magistrates' court was competent to entertain an action against the state. The court held that the question of whether the respondent was entitled to sue the appellant in the Cape Town District Magistrates' 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, the rule adopted should be similar 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 countrywide 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.

11.5 OTHER PROVISIONS THAT DETERMINE WHETHER A PARTICULAR MAGISTRATES' COURT MAY EXERCISE JURISDICTION

Apart from the sections discussed above, numerous other sections also influence the authority of a particular magistrates' 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 magistrates' court is competent to hear an action and make the required order:

- Section 30 provides that magistrates' courts may grant interdicts.
- Sections 31 and 32 deal with forms of interdict peculiar to the magistrates' court.
- Section 37 provides that, to determine a matter that a particular magistrates' court may hear, the court may decide on matters outside its jurisdiction.
- Section 50 deals with how a defendant can transfer a matter to the High Court if he or she is unhappy that the matter is being heard by a particular magistrates' court.

In terms of section 30, magistrates' courts may grant interdicts, attachment orders and *mandamenten van spolie*. 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 magistrates' 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.

11.5.1 Interdicts

Definition: 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 very similar to an order for specific performance. However, in *Badenhorst v Theophanous* 1988 (1) SA 793 (C), it was held 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 that must be placed on an interdict in order to decide whether it falls within the limits set by section 29. How, for instance, do you 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 or her costs on the High Court scale.

11.5.2 *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 *mandament* 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 *mandament 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 that must be returned will determine whether a particular magistrates' court is prohibited by section 29 from exercising jurisdiction.

11.5.3 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 or her creditors, or otherwise plans to abscond with his or her assets.

11.5.4 Sections 31 and 32: Rent interdicts

Read Pete *et al* 196–197.

As soon as a lessor falls behind with his or her rental, the landlord acquires a tacit hypothec over all the household effects (*invecta et illata*) that are on the leased property, to offset the rent 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 that prohibits removal of the goods from the leased premises.

- 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 a 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 that 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, so 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 hereby 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.

- 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 that may result from 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.

11.5.5 Section 37: Incidental jurisdiction

Read Pete *et al* 73–74.

It sometimes happens that, during the proceedings of magistrates' courts, a question arises that falls outside the jurisdiction of these courts. The question may be one that no magistrates' court may hear, in terms of section 46, or it may be one that exceeds the jurisdictional limits of the courts, as imposed by section 29. Section 37 provides that while a magistrates' 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 to determine a claim for rates, or consider the validity of a divorce agreement to make an order for the payment of maintenance.

11.5.6 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 to be heard by a particular magistrates' 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. However, section 50 gives a defendant the opportunity to have a matter moved from the magistrates' 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 the summons has been issued.

If the applicant complies with the requirements laid down in section 50, the case must be stayed in the magistrates' court. The only check on a defendant's freedom to require that a matter be heard before a High Court, rather than a particular magistrates' court, is the costs order that the High Court may make. If the plaintiff is eventually successful, the court may grant him or her High Court costs on the attorney-and-client scale (thus costs against the defendant), which is considerably higher than the usual party-and-party scale.

11.6 PROVISIONS AFFECTING CLAIMS THAT FALL OUTSIDE THE JURISDICTIONAL LIMITS

In preparation, read Pete *et al* 72–79.

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 set out how to reduce a claim so that it falls within the jurisdictional limit of a particular magistrates' court.
- Section 45 sets out how the parties can consent to the jurisdiction of a particular magistrates' 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 provides that one claim cannot be split into many different smaller claims to bring the claim within the financial limits.
- Section 43, which is the opposite of section 40, deals with how to institute an action where more than one amount is claimed and the total amount exceeds the jurisdictional limit, although each amount is less than the limit.
- Section 47 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 particular magistrates' court.

11.6.1 Section 38: Abandonment of part of claim

Details of any abandonment must be set out explicitly in the summons – or in the 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 that 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 particular court can grant, whichever is the lesser amount**. This is because, if a plaintiff proves that he or she 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.

11.6.2 Section 39: Deduction of an admitted debt

If a plaintiff wishes to claim more than the jurisdictional limit of the particular court, and is aware of a possible counterclaim that 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. Unlike 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. **Therefore, the effect is 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**.

11.6.3 Section 45: Consent

Section 45 gives parties the opportunity to consent that a district or regional magistrates' 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**. Therefore, matters excluded from the jurisdiction of the magistrates' courts by section 46 remain excluded, no matter what the parties agree to. 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 particular court has jurisdiction over the defendant in terms of section 28, but the amount of the claim exceeds the limitations imposed by section 29 (e.g. A wishes to sue B in district X [where B resides] for damages *ex delicto* amounting to R130 000)
(2) where the particular 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 (e.g. A wishes to sue B in regional district Y for damages *ex delicto* amounting to R330 000, and the court in regional district Y does not have jurisdiction over B in terms of section 28)
(3) where the particular court has no jurisdiction over the person of the defendant, but the amount of the claim is within the limitation imposed by section 29 (e.g. A wishes to sue B in district Y for damages *ex delicto* amounting to R100 000, but the court in district Y does not have jurisdiction over B in terms of section 28)

Each of these possibilities will be dealt with separately.

- 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)).

- No jurisdiction in terms of either section 28 or 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 kind of case:

  > Whereas A intends to issue a summons against B for payment of the amount of R330 000, the parties hereby agree that the summons will be issued from the magistrates' court for the regional district of Trustville and B consents to the jurisdiction of the said court.

- No jurisdiction in terms of section 28, but jurisdiction in terms of section 29

  For some time, the view was 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 district or regional magistrates' court. In *Truck & Car Co (Pty) (Ltd) v Ewart* 1949 (4) SA 295 (T), it was held that this prohibition relates only 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 district magistrates' court that has jurisdiction in terms of section 28:

  > *The parties agree that any action that might result from this contract will be instituted in a district* magistrates' *court, and the parties hereby agree to the jurisdiction of the said court.*

This clause is valid because consent has merely been given to the jurisdiction of a district magistrates' court, not to the jurisdiction of a particular magistrates' 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 district* magistrates' *court of X and the parties hereby consent to the jurisdiction of the said court.*

11.6.4 Section 43: Cumulative jurisdiction

The claims must exist between the same parties. Section 43(2) provides for an exception but note that the exception only applies to interdicts or arrests, and not to all types of claims.

11.6.5 Section 40: Splitting of claims

Section 40 is the counterpart of section 43.

The following case illustrates how it is determined whether a single cause of action has been improperly split.

Mohamed & Son v Mohamed 1959 (2) SA 688 (T) involved a plea by the defendant, based on section 40 of the Magistrates' Courts Act of 1944, in defence of a suit brought by the plaintiff. The **pertinent facts** are that the plaintiff, a dealer, periodically sold goods to the defendant on credit. The credit sale was an arrangement of several years' standing. Upon failure of the defendant to pay for the goods sold, the plaintiff instituted separate actions to recover the purchase price of the delivered goods in respect of the separate sales.

The defendant's plea was that the separate actions by the plaintiff amounted to a splitting of claims contrary to section 40, in order to circumvent the limitations on the financial jurisdiction of the district magistrates' court. Section 40 **prohibits the splitting** of a "substantive claim" exceeding the jurisdiction of the particular magistrates' 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.

11.6.6 Section 47: Counterclaims exceeding jurisdiction

It is, of course, possible that a defendant may have a counterclaim that exceeds the financial jurisdiction of district or regional magistrates' courts. A defendant has two options in this situation: He or she may abandon part of the claim, in terms of section 38, 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 particular magistrates' 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 particular magistrates' 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 particular magistrates' 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 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 magistrates' court claim as a counterclaim to the defendant's High Court proceedings. If the defendant fails to institute action within this time, the particular magistrates' 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 scenario at the beginning of this study unit, and answer the questions that follow.

(1) If Thomas does in fact complete the building work and Thandi fails to pay him as agreed, may Thomas institute action against Thandi for payment? Explain.
(2) Explain whether Thandi may institute action against Thomas for an order directing him to complete the building work as agreed.
(3) May Thandi institute action against Rashid to force him to transfer the property to her? Explain.
(4) Thandi wishes to institute action against Rashid for damages in the amount of R90 000 because of his failure to transfer the property. In which court(s) may she do so?
(5) If Thandi signed the building contract with Thomas in Pretoria, in which court(s) may she institute action against Thomas for damages in the amount of R150 000 for breach of contract?
(6) What can *Buildrite* do to stop Thomas from removing the goods if it hears about Thomas's intention to do so before he removes the goods?
(7) Advise Thandi what she may do to recover the goods if they have been removed from her premises.
(8) Thandi accepts that she has to pay Thomas R30 000 for work already done on her premises, but also wants to sue Thomas in a district magistrates' court in the amount of R220 000 for the cost of finding and paying another builder. Advise her on the possibility of doing so.
(9) Thandi wants to recover the money paid to Rashid, and wants to sue Rashid for payment of R80 000. She also wants to sue Rashid for defamation in the amount of R150 000, because he verbally abused and falsely accused her of unsavoury business dealings in public. Advise Thandi whether she may institute action in a district magistrates' court using one summons for both claims.

FEEDBACK

(1) Yes. Such a claim has been held not to amount to a claim for specific performance in terms of section 46(2)(c). A claim for payment of money (whether in terms of a contract or not) is never "specific performance".

(2) This amounts to a claim for specific performance, as Thomas is required to perform a contractual obligation. As Thandi has not included an alternative claim for damages, she may not institute action in a magistrates' court. (Include a discussion of relevant case law in your answer.)
(3) Yes, she may, because this claim can be classified as one of the exceptions listed in section 46(2)(c)(ii). However, the amount of the claim will dictate whether the action may be brought in the district or the regional magistrates' court. (Include a discussion of the quantitative jurisdictional limits in your answer.)
(4) Thandi may institute action in the Johannesburg district magistrates' court in terms of section 28(1)(a) because Rashid "resides" in Johannesburg and the amount is less than the quantitative jurisdiction limit of R200 000 (s 29). (Jurisdiction in terms of s 28(1)(d) cannot be determined, as the facts do not indicate where the contract was concluded and breached. The Kempton Park court will not have jurisdiction in terms of s 28(1)(g) because the action is for damages and not in respect of the property; the mere situation of the property is insufficient.)
(5) Thandi may institute action against Thomas in the Polokwane district magistrates' court in terms of section 28(1)(a) as Thomas "resides" in Polokwane, and the amount is less than R200 000 (s 29). Thandi may not institute action in either the Pretoria or the Kempton Park magistrates' courts, as the cause of action did not arise "wholly" in either in terms of section 28(1)(d): only conclusion of the contract occurred in Pretoria, and only breach of contract occurred in Kempton Park. (Include relevant case law and an explanation of what is meant by "whole cause of action" in your answer.)
(6) *Buildrite* may approach the court for a prohibitory interdict.
(7) Thandi may apply for a *mandamenten van spolie* against Thomas. Although she is not the owner of the goods, they were unlawfully removed from her possession, and she is entitled to have possession restored to her.
(8) Thandi has two options. She may either abandon R20 000 in terms of section 38 to bring her claim within the quantitative jurisdiction of the district magistrates' court, or she may deduct the admitted debt of R30 000 from her claim in terms of section 39.
(9) Both actions are between the same parties. The actions are also based on separate causes of action. Consequently, in terms of section 43, which allows different claims based on different causes of action to be included in one summons, Thandi may proceed to institute action against Rashid. It does not matter that the combined claim amount exceeds the quantitative jurisdiction limit of the district magistrates' court, as the claim amounts for the individual claims each fall within this limit (s 29), thus giving the court the same jurisdiction in respect of each claim that it would have had if separate actions had been instituted regarding each claim.

SELF-ASSESSMENT

Compare the provisions of section 38 and 39 to determine which is the more advantageous procedure for a plaintiff with a claim that exceeds the quantitative jurisdiction limit of a particular magistrates' court, but who nevertheless wishes to litigate in that court.

(When comparing the procedures, bear in mind (a) the risk of the defendant instituting a larger counterclaim in the case of s 39; (b) the proviso in s 38(2); and the effect of the provisions of the sections.)

PART

3

Court procedure

PART A

Pre-litigation stage

STUDY UNIT

12

Pre-litigation issues

Abel sells his farm to Jafta for R500 000. Jafta takes occupation and begins to farm. Despite a reminder, he refuses to make any payments towards the purchase price of the farm in terms of the contract of sale. Jafta alleges that the farmhouse is derelict and that the borehole is not as strong as he thought when he viewed the farm, which means that he will not be able to irrigate as much land as he planned to, and so the farm is useless to him.

Abel wants to cancel the sale because of the failure to pay the purchase price, and to take possession of his farm again. The question now is which form of proceedings Abel ought to use to achieve the desired relief.

OVERVIEW

LEARNING OUTCOMES

After studying this study unit, you should be able to

- explain the practical effect of the *audi alteram partem maxim* on the different forms of proceedings
- explain the role of representatives and the power of attorney
- explain the role and function of demand
- distinguish between the main forms of proceedings

COMPULSORY READING MATERIAL

Pete *et al Civil Procedure* 3ed (2017) 35–36; 39; 55–58; 122–127; 132–149

Uniform Rule 7; Magistrates' courts rule 52(2)

12.1 INTRODUCTION

Having applied the law relating to jurisdiction as set out in the Part 2 of the study guide, other matters such as the capacity to litigate, the identification of the parties, the appropriate form of legal proceedings and notification of proceedings need to be considered before the actual commencement of proceedings. These matters will be dealt with here in Part 3, in the study units that follow.

12.2 LEGAL STANDING (*LOCUS STANDI IN IUDICIO*)

Study Pete *et al* 35–36 and 39, and read 39–54 merely for noting of persons lacking capacity to litigate and in need of assistance to do so.

The literal translation would mean "place or position before the court". For purposes of legal proceedings it essentially means that a party must, first, have a **direct and substantial interest** in the matter and, secondly, have the necessary **capacity to litigate**.

12.3 REPRESENTATION BY POWER OF ATTORNEY

Study Pete *et al* 55–58.

In principle, every natural person who is a party to civil proceedings is entitled to represent himself or herself personally. For practical purposes, however, such a person would usually instruct an attorney to act on his or her behalf. These instructions are confirmed and specified in a document known as a ''power of attorney''.

> Herbstein and Van Winsen, *The Civil Practice of the High Courts of South Africa* (2009) (Vol 1 267), describe a power of attorney as a written document in which an agent is given the authority to act on behalf of his or her principal either in a specific situation or to act on behalf of such principal in respect of all actions which the principal could perform himself or herself.

Although a client may terminate his or her mandate to an attorney at any time, an attorney may, after accepting a client's brief, withdraw only for sound reasons. It is also important to note that a practitioner is duty-bound to adhere to the specific instructions of a client, provided that the instructions are not improper.

12.3.1 When is a power of attorney required in litigation?

In terms of Rule 7(1), the filing of a power of attorney is not required for the issuing of a summons or the entering of an appearance. However, it is required for the conduct or defence of a civil appeal (see Rules 7(2) and 7(3)) in the High Court. However, this position differs from that in the Supreme Court of Appeal. Rule 5(1) of the Rules of the Supreme Court of Appeal provides that a power of attorney need not be filed with the Registrar unless the authority of a legal practitioner to act on behalf of a party is disputed. In such an event, a power of attorney has to be filed within a stipulated period. Likewise, the filing of a power of attorney is not required in the magistrates' court, but if the authority to act is challenged, proof of such authority must be presented to court (see rule 52(2)).

12.3.2 Why is a power of attorney then drawn up?

A carefully drawn up power of attorney is essential for the protection of both the attorney and the client, and to determine the extent of the attorney's brief. Therefore, there should always be a power of attorney kept on the client's file.

The power of attorney generally contains details of the action to be instituted and of the relief to be claimed. A client does not wish to be involved, unknowingly or unwillingly, in expensive or protracted litigation, or in an appeal which he or she never contemplated. The attorney, on the other hand, is entitled to protection as far as his or her own costs are concerned. Should an attorney conduct litigation without the authority of the client, he or she will not be entitled to recover the costs incurred from his or her client, since no contractual relationship will exist.

Should an attorney's power to act be disputed, proof of his or her mandate must be given. Study Uniform Rule 7(1) in this regard and familiarise yourself with the procedure that must be followed in instances where a mandate is disputed.

12.4 THE DEMAND

Study Pete *et al* 122–127.

The start of litigation proceedings is not necessarily preceded by a demand by or on behalf of a person who wishes to institute such proceedings, unless (1) a demand is necessary to complete a cause of action that is relied upon or (2) it is required by legislation. It stands to reason that a litigant having a complete cause of action does not need to issue a demand.

A demand applies to both application proceedings and summons proceedings and can be made either orally or in writing. The purpose of a demand is to inform the prospective defendant/respondent

- that a particular attorney acts on behalf of the prospective plaintiff/applicant
- about the nature and content of the claim against him or her
- that payment or performance of the claim is claimed
- about the time period within which action is required
- about the consequences of failure to comply with the demand

in order to convince such a person to meet his or her obligations to avoid litigation.

12.4.1 When necessary

Where a demand is an essential part or element of the cause of action (i.e., where a demand is a condition precedent to liability), litigation proceedings may not commence until the liability is complete. (It stands to reason that the cause of action must exist at the time proceedings commence.) The rules of substantive law determine whether a demand is an essential element of the cause of action. **For example:** in a contract that stipulates that, if the defendant defaults, a notice must be given to him or her to rectify such default within a certain number of days, and such notice is not given, the cause of action is not complete. On the other hand, if a contract stipulates that certain moneys must be paid on demand, a summons will constitute sufficient demand (see e.g. *Joss v Barclays Western Bank Ltd* 1990 1 SA 575 (TPD)).

12.4.2 When statutorily required

Often, particular legislation requires a demand or a notice to prospective litigants to notify them about a person's intention to institute action against them, and that stipulates the time period within which the action must be instituted as well as that which must lapse after receipt of the notice and the commencement of proceedings. Examples include the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002, and section 29 of the Small Claims Courts Act 61 of 1984. The legislative provisions in respect of demand or notice are peremptory and strict compliance is essential.

12.5 THE MAXIM OF *AUDI ALTERAM PARTEM*

The *audi alteram partem* rule is fundamental to all proceedings, whether by way of notice of motion or summons, and an understanding of the maxim will help you to grasp the rules of pleading, as well as many of the provisions in regard to the prosecution of an action.

Literally translated, the maxim means "hear the other side". When applied to the sphere of civil procedure, it means that every person is entitled to be heard before an order or judgment is granted against him or her. This explains why our courts meticulously enforce the requirement that an opponent should be notified timeously of the steps to be taken against him or her, and that he or she should be given an opportunity of replying to the case stated against him or her, and of placing his or her own defence before the court.

This also partly explains why pleadings and process documents are used: each party knows exactly what the basis of the opposing party's claim is, and will, therefore, know how to reply to it. Hence this prevents any party from being caught unprepared during the trial.

12.6 FORMS OF PROCEEDINGS

Study Pete *et al* 145–149.

12.6.1 Background

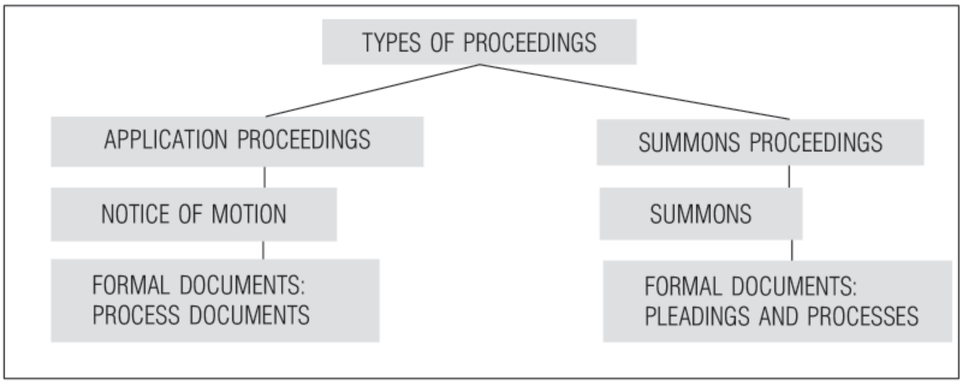
Since there are different ways in which an action can be instituted, for various reasons it is important to use the correct form of procedure for each case. Firstly, if the incorrect form is used, the court may

(1) refuse to hear the case or to hear it in its present form
(2) penalise the party that used the incorrect form when it issues an order for costs, even if the court is prepared to condone the use of the incorrect form

Secondly, there are certain advantages attached to the different process forms, including speed and cost saving. A particular form of proceedings may thus be selected because it affords the most inexpensive means of approaching the court. The litigant can naturally make this choice only if the law allows him or her to do so, that is, if the law does not compel him or her to use a particular form of proceeding or does not prohibit him or her from using a particular form.

Generally, there are two ways in which a litigant may approach the court, namely, by means of an application or by means of a summons.

Consequently, one speaks of application (or motion) proceedings and summons (also called action) proceedings. In the case of application proceedings, all applications are directed to the court by means of notice of motion, while, in the case of summons proceedings, the court is approached by means of a summons. The following is a schematic representation of this:



12.6.2 The identification of the applicable form of proceedings

From the beginning you should know that there is neither a magic formula nor any absolute rules to determine which choice to make. This is clearly illustrated by the fact that there has been an increase in the use of application proceedings in respect of proceedings that were normally instituted by means of summons proceedings, and that the courts are extending this practice, rather than limiting it. (See e.g. *Abaany Property Investments Ltd v Fatima Ayob & Sons Ltd* 1994 2 SA 342 (T) 343J.)

The main reason for this phenomenon is obvious: application proceedings are much faster and, therefore, far cheaper than summons proceedings. However, it must be pointed out that application proceedings are not permissible in all circumstances, and the courts often have to decide on this issue. Determining the appropriate form of proceedings to use can only be established by a process of elimination. Hence, the following questions should be asked:

(1) Does legislation or the rules of court prescribe the use of application proceedings? Examples include the liquidation of companies; the sequestration of estates; and applications in respect of marital matters (Rule 43 of the Uniform Rules of Court).
(2) Is it compulsory to use summons proceedings? Examples include divorce proceedings and unliquidated claims for damages.
(3) Does a matter fall under neither of the above categories? In such an event (i.e. when application proceedings are neither prescribed nor forbidden), the following principle applies:

> An application by means of notice of motion may be made if (a) there is no real dispute over any fundamental question of fact, or (b) if there is such a dispute, it can nevertheless be satisfactorily decided without the necessity of oral evidence.

12.6.3 When is there a "dispute of fact"?

Note that a dispute of fact does not arise where the respondent merely states that he or she disputes the truth of the applicant's statements but offers no evidential reply to them – in other words, where there is simply a bare denial. The reason for this is that, if motion proceedings could be delayed or terminated merely by a bare denial, such proceedings would be of no value. The attitude of the courts is that a firm and practical approach to disputes must be adopted in motion proceedings to ensure that they (the courts) function effectively and that justice is done.

Also note that a **real** dispute of fact has to occur: the mere fact that the parties are not in agreement on all facts does not mean that a real dispute on any material question of fact has occurred.

12.6.4 Procedure where a dispute of fact arises

Where a genuine dispute of fact arises that cannot be settled without the hearing of viva voce evidence, the court hearing the motion proceedings may

(1) dismiss the application (although this happens very seldom, if ever, in practice) (see Uniform Rule 6(5)(g))
(2) order oral evidence to be heard on specified issues (see Uniform Rule 6(5)(g))
(3) order the parties to trial with appropriate directions as to pleadings, the definition of issues, etc. (see Uniform Rule 6(5)(g))

Magistrates' courts rule 55(1)(k) simply refers to "any dispute of fact" and empowers a court to make directions similar to those in (2) and (3) above.

ACTIVITY

Read the set of facts at the beginning of the study unit, and answer the following questions.

(1) What is the nature of the dispute that arose between Abel and Jafta?
(2) What is the reason for your answer?
(3) What type of proceedings would be appropriate in the light of the above questions?
(4) Explain when a power of attorney is required in litigation.

FEEDBACK

(1) It is a dispute in law.
(2) Abel wants to cancel the contract – the question of whether Abel has grounds for cancellation is clearly a question in law.
(3) Application proceedings. As it is a dispute in law and not a real dispute of fact, the dispute can simply be decided on the documents before the court.
(4) It is necessary for the conduct or defence of a civil appeal in the High Court (Rule 7), and also when an attorney's mandate is disputed in both the High Court and the magistrates' court.

SELF-ASSESSMENT

You are an attorney. Explain to your candidate attorney why it is prudent to keep a properly drafted and signed power of attorney in a client's file at your office.

STUDY UNIT 13

The parties to litigation

A Pegasus Airlines plane takes off from Durban airport with 30 passengers on board. A hundred sea miles east of Durban, the plane crashes into the Indian Ocean. After analysing the flight data recorder, it is clear that the accident was caused by Pegasus's failure to maintain the plane adequately. Approximately 20 of the deceased have dependants who are now in financial difficulty. These dependants hold Pegasus liable for their situation. Pegasus faces the possibility of receiving a number of individual claims, and each of these potential plaintiffs will have to prove basically the same claim. What practical solution is there to save costs and time?

OVERVIEW

13.1 A DESCRIPTION OF THE PARTIES
13.2 JOINDER
13.3 THIRD PARTY PROCEDURE
13.4 *IN FORMA PAUPERIS* PROCEDURE

LEARNING OUTCOMES

After studying this study unit, you should be able to

- explain who the parties to the litigation are and how they are cited
- explain how multiple parties may be brought before court
- distinguish between voluntary and compulsory joinder

COMPULSORY READING MATERIAL

Pete *et al Civil Procedure* 3ed (2017) 58–59; 440–442; 449–452

Uniform Rule 10; 13; 14; 17(4) and 40. Magistrates' courts rule 2; 5(4); section 42 and 43 of the Magistrates' Courts Act 32 of 1944

13.1 A DESCRIPTION OF THE PARTIES

Read Uniform Rule 17(4) and magistrates' courts rule 5(4) and note that the parties must be very well defined in the summons. A female defendant's marital status need not be mentioned, because it has been held that such a requirement is old-fashioned and contrary to the equality provisions in the Constitution (*Nedcorbank Ltd v Hennop* 2003 3 SA 622 (T)). See also Uniform Rule 14 (in respect of proceedings against partnerships, firms and associations), which allows these bodies to sue and be sued in their own name. However, this Rule does not endow these bodies with legal personality, but simply provides a procedural benefit by simplifying and streamlining actions.

13.2 JOINDER

Read Pete *et al* 440–443 in broad terms. The outline given below is sufficient information on the topic for examination purposes.

Under common law, it was generally not possible for different plaintiffs with different causes of action to join in the same action against the same defendant. It was also impossible to sue two different defendants, liable in different causes of action, in one summons.

The Uniform Rules of Court have, however, amended the common law position, with the result that joinder is in fact possible, provided that it complies with the provisions of Rule 19(1) and Rule 10(3).

The common law provisions in respect of the compulsory joinder of parties have not been altered by the Uniform Rules of Court, and such provisions thus still apply.

The provisions governing joinder in the High Court and the magistrates' court are similar, and in both courts voluntary and compulsory joinder of plaintiffs and defendants are possible.

- Voluntary joinder

  In the case of **plaintiffs**, each plaintiff must have a claim and they must act against the same defendant(s). The essence of joinder of plaintiff lies in the expression "substantially the same question of law or fact". In the case of **defendants**, the essence of joinder also lies in the expression "substantially the same question of law or fact" but note that several defendants may be sued in the alternative or jointly when a plaintiff alleges that he or she suffered damages but does not know which one of the several defendants is to blame. Such plaintiff is not expected to take the risk of first proceeding against the one, and then against the other.

- Compulsory joinder

  In contrast to the abovementioned position where the party to the proceedings has the option of joinder, there is another situation where the High Court, irrespective of the wishes of the parties, will not hand down a judgment or make an order unless another (third) party is joined in the action.

  The court will determine that joinder of a third party as a party to the proceedings is necessary if such a party has, or may have, a direct and real interest in any order that the court may make, or if such order will prejudice that party, unless the court is satisfied that the party has distanced himself or herself from his or her right to be joined in the proceedings.

  In the magistrates' court, on application by a party, the court may order that another person be added as plaintiff or defendant on such terms as it deems fit (rule 28(2)). All that has to be shown is that joinder would be "convenient" and "in accordance with the interests of justice".

13.3 THIRD PARTY PROCEDURE

Read Pete *et al* 449–452 in broad terms so that you understand the purpose of the procedure as well as the circumstances when it may be used. For the sake of completeness you should have a broad knowledge of the above, since you may occasionally be required to use it in practice. The procedure in the High Court and in the magistrates' court is essentially the same.

The purpose of third-party procedures is twofold. First, the procedure enables a litigant to avoid instituting multiple actions in respect of the same matter. (The term ''third party'' refers to a person who is not initially a party to a suit, but who is later involved in such suit in terms of Uniform Rule 13; rule 28A.) Secondly, it enables a third party's liability (if any) to be determined by a court at the same time that the liability of the other party is determined.

Any party (i.e. a plaintiff or a defendant) to an action may employ this procedure. However, such procedure may be resorted to only in the following circumstances, namely, where a party claims that

(1) he or she is entitled to a contribution or indemnity from the third party in respect of any payment which he or she may be ordered to make

or

(2) a question or matter in dispute in the action is substantially the same as that which arose, or will arise, between him or her and the third party, and should be decided not only between the parties to the action (i.e. the plaintiff and the defendant), but also between one or more of them and the third party.

The effect of the third-party notice is that, after service on the third party, such party becomes a party to the action (see Uniform Rule 13(5); rule 28A(5)). ''Joinder'' therefore occurs irrespective of the wishes of the third party, and no provision is made in the Rule for such joinder to be opposed. The third party may, in terms of Uniform Rule 13(9); rule 28A(9), merely request that the case be tried separately, and may except to the notice and plead thereto.

13.4 *IN FORMA PAUPERIS* PROCEEDINGS

Read Pete *et al* 58–59.

Uniform Rule 40 lays down a procedure in terms of which indigent persons may obtain free legal aid by approaching the Registrar, after which legal representatives are appointed.

Briefly study the procedure laid down in Rule 40. You are at least expected to know

(1) who qualifies for this form of legal aid (Rule 40(2)(a))
(2) what documentation must be submitted to the Registrar when instituting an action in terms of this Rule (Rule 40(2))
(3) what steps may be taken against a litigant in *forma pauperis* (Rule 40(6))
(4) the position with regard to costs (Rule 40(7))

ACTIVITY

Carefully read through the set of facts at the beginning of this study unit, and then answer the following questions:

(1) Imagine that 20 plaintiffs, each of whom has a legally valid claim, get together because they do not want to institute individual claims against Pegasus in the High Court for financial reasons. They seek a solution for their dilemma. Advise these potential plaintiffs on possible actions that could save time and money.
(2) Would other plaintiffs who are not part of this group of 20 people be able to join in the action that has already been instituted? Explain.

FEEDBACK

(1) In terms of Uniform Rule 10, the 20 plaintiffs may voluntarily join as plaintiffs, since each of them has a claim against Pegasus (the same defendant) and each of them (i.e. one or more) would be entitled to institute a separate action against Pegasus. In addition, the action would depend on the same legal or factual question (each person is a dependant of one of the deceased and each one's damage is the result of negligence on the part of Pegasus).
(2) Yes: Uniform Rule 12 provides that a person may join as plaintiff to an action. Where, in terms of Rule 12, a person is entitled to joinder, he or she may apply for leave to join as plaintiff. However, such an applicant will have to show the court that he or she has a *bona fide* case and that his or her application is made seriously.

SELF-ASSESSMENT

List the documentation that must be submitted to the Registrar when instituting an action under Uniform Rule 40 on behalf of a litigant *in forma pauperis*.

STUDY UNIT

14

Service

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

OVERVIEW

LEARNING OUTCOMES

After studying this study unit, you should be able to

- explain the practical application of the maxim *audi alteram partem*
- identify the appropriate method of service in the case of a particular set of facts
- give a practical illustration of the application of section 42 of the Superior Courts Act, 2013

COMPULSORY READING MATERIAL

Pete *et al Civil Procedure* 3ed (2017) 132–144

Uniform Rule 4; 5. Magistrates' courts rule 5; 9 and 10

14.1 INTRODUCTION

One of the fundamental principles of civil procedural law is that the process and documents arising out of any proceedings must be brought to the attention of the opposite party. This requirement may be said to be derived from the *audi alteram partem* rule (see study unit section 12.5).

Notice of legal proceedings is accomplished by **service** of documentation either personally by a party or his or her legal representative, or by the sheriff. This means that, for example, after being issued, a summons must be served on the opposite party. Therefore, it is by means of service that proceedings are brought to the attention of such party. (Proceedings that flow from proceedings that have been initiated without proper notice to a party against whom relief is sought, are null and void.)

''Service'' simply means that a copy of the particular document is handed to the person upon whom service is effected, after explaining the document's nature and contents. The original is then filed in the court file.

It is appropriate to explain briefly what is meant by the term ''issue''. Once a summons has been drawn up and is ready to be served, it must first be taken to the office of the Registrar of the relevant High Court division. Here, it is signed by the Registrar or Assistant Registrar, a case number is assigned to it, and a court file is opened. The office of the Registrar also officially stamps the original summons and copies of it. Once a summons has been issued, it cannot be altered without the consent of the person issuing it, or without leave of the court. The process is similar in the magistrates' court, except that a summons may be amended prior to service (see below).

In terms of Uniform Rule 4(1), service of any process directed to the sheriff (e.g. summonses and writs), and any document initiating application proceedings, must be effected by the sheriff. All other documents (such as notices) are served by the party or his or her legal representative. The position is similar in the magistrates' courts.

By law, the summons must be served by the sheriff or an officer in the employ of the sheriff. After service has been effected, the official concerned must draw up a document under his or her signature, known as a ''return of service'', in which he or she records the manner in which service of the summons was effected, and any other relevant details such as the date, time and place of service.

The return of service serves as proof of service, and the original return of service must be filed in the court file. Section 43(2) of the Superior Courts Act, 2013 provides that the return is *prima facie* proof of the matters set out therein. This means that the contents may be disputed, but the court will require the clearest of evidence before the return of service will be impeached.

14.2 MANNER OF SERVICE

There are different ways in which a summons may be served, namely, by way of

- normal (usual) service
- substituted service
- edictal citation

14.2.1 Normal (usual) service

Study Pete *et al* 134–140.

Normal (also referred to as usual or ordinary) service refers to service effected in accordance with the rules of court in the ordinary course of events.

Note that although the Uniform Rules of Court do not specify the manner of service in matrimonial matters, it has become practice in various High Courts to insist on **personal** service in such matters. Rule 9(3) of the magistrates' courts rules, requires personal service in respect of divorce matters and nullity of marriage.

14.2.2 Substituted service

Study Pete *et al* 141; 143–144.

Where a person is believed to be within the Republic, but service cannot be effected on him or her in terms of the rules of court, because it is not known precisely where such person is to be found, an application may be made to the court for leave to sue by substituted service, and the court will then give directions as to how such service is to be effected.

It is important to bear in mind that substituted service is an extraordinary method of service, since it deviates from the normal method of service provided for in the court rules. Consequently, an application to court must be made on Notice of Motion seeking the court's permission to serve the summons by means of substituted service, and requesting the court to give directions as to how the summons must be served. An abbreviated summons must accompany the application for consideration by the court. On hearing the application, and on being satisfied that it is a proper case for substituted service, the court will give directions as to how service is to be effected, for example, by registered post, by service on a relative, by publication in the *Government Gazette* or by any combination of these methods.

In *CMC Woodworking Machinery (Pty) Ltd v Pieter Odendaal Kitchens* 2012 5 SA 604 (KZD) the court gave leave for a notice to discover to be served by way of substituted service, and that service be effected by way of a Facebook message addressed to the defendant. See Rule 4A and note that this was a highly exceptional application of substituted service, and that its application is not restricted to summonses.

14.2.3 Edictal citation

Study Pete *et al* 142–143.

The respective rules of court (Uniform Rule 5; rule 10) prescribes how service must be effected on a defendant who is, or is believed to be, outside the Republic. This is so even when his or her exact whereabouts are known and even when personal service is possible. Such a person cannot be summonsed before our courts in any manner other than by means of edictal citation.

The court is also approached by way of Notice of Motion.

14.3 SERVICE WITHIN THE REPUBLIC, OUTSIDE THE COURT'S JURISDICTION AREA

In terms of section 42(2) of the Superior Courts Act, 2013, the civil process of a division is valid throughout the Republic and may be served or executed within the area of jurisdiction of any division. Thus, summons may be served in any division of the High Court. (Refer to Part 1: Jurisdiction, where section 42(2) was considered.)

ACTIVITY

Carefully read through the set of facts at the beginning of this study unit and then answer the following questions:

(1) Simply identify the appropriate form of service.
(2) Give reasons for your answer in (1) above.
(3) What is the essential difference between substituted service and edictal citation?
(4) In what way does service ensure that the *audi alteram partem* maxim is acknowledged?

FEEDBACK

(1) Substituted service.
(2) E is within the Republic, but personal service will not succeed, since his exact whereabouts are uncertain.
(3) In the case of substituted service, the defendant is within the borders of the Republic, but his or her exact whereabouts are unknown. In contrast to this, edictal citation is used where the defendant is outside the borders of the Republic, even if his or her whereabouts overseas are known.
(4) The maxim means that the other party to the litigation must be heard before an order can be granted against such person. The purpose of service is that this party is given notice that an action is being instituted against him or her. In this way, he or she will be able to defend himself or herself against the action (i.e. he or she will be heard).

PART B

Litigation stage

STUDY UNIT

15

The conduct of application proceedings

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

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

OVERVIEW

LEARNING OUTCOMES

After studying this study unit, you should be able to

- distinguish between the two types of applications, as well as identify the circumstances in which each one is used
- explain the operation of application proceedings as a form of litigation

COMPULSORY READING MATERIAL

Pete *et al Civil Procedure* 3ed (2017) 153–175

Uniform Rule 6; Magistrates' courts rule 55

15.1 INTRODUCTION

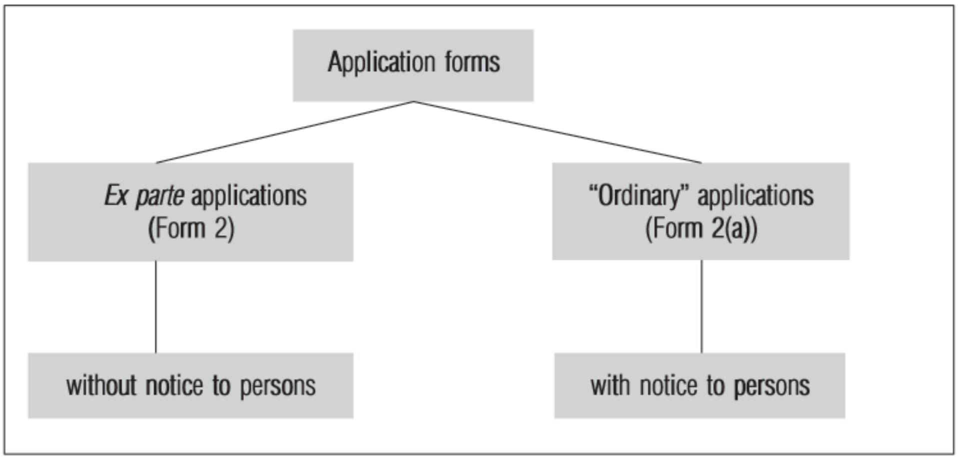
In contrast to summons proceedings (which are discussed in study unit 16), there is no distinction between the pleading stage and the trial stage. We do not speak of pleadings in the case of the application: the equivalent documents in the last-mentioned procedure are called ''processes''. These processes contain not only the formulation of the factual dispute, but also the evidence that the different parties offer as proof of their respective factual allegations. This is possible because these processes are drafted in the form of affidavits. The processes not only consist of the applicant's affidavit, but also of the supporting affidavits of the witnesses. Therefore, it is clear that not only the claims or defences of the respective parties are formulated in these documents, but also all the evidence in the possession of such parties. Hence, when the case comes before the court, the claim, defence and supporting evidence are all in the court's possession. Consequently, the hearing of the application consists exclusively of the arguments of the legal representatives of the respective parties. In exceptional cases (see **study unit 12 para. 6.4** above), *viva voce* evidence may be heard.

If the application is not opposed, the facts, as set out in the documents, are accepted. The only question that must be answered is whether a case can be made for granting the requested order (e.g. that the company be liquidated, or that X be admitted as an attorney).

15.2 APPLICATION FORMS

There are two forms of notice of motion that can be used to institute an application, namely, the *ex parte* application and the "ordinary" application. (The latter reference is not used in the magistrates' court.)

The following is a schematic representation of the application forms in the High Court. (The forms in the magistrates' court correspond with those of the High Court, except that the notice of motion must comply with Form 1, Annexure 1 to the magistrates' courts rules):



15.2.1 *Ex parte* applications

We covered the *audi alteram partem* principle above and showed that the general rule is that notice of litigation must be given to everyone whose rights may be affected by any order in the legal proceedings or who has any interest in any such order. Since an *ex parte* application can be heard by a court without notice being given to anyone, it can be said that, in this respect, this form of application is an exception to the general rule. Therefore, it is obvious that it is used only in the exceptional circumstances set out in **Pete *et al* 172–173.**

Where, however, the rights of other persons may be affected by any order granted in pursuance of an *ex parte* application, the court will not grant a final order, but will issue what is known as a *rule nisi*. The *rule nisi* is an order calling upon the respondent, or on all interested parties, to show cause on a day fixed in the rule (known as the ''return day of the *rule nisi*'', and being the day upon which these parties may, if they are so advised, oppose the application) why the relief specified in the *rule nisi* should not be finally granted. Where immediate relief is essential to the applicant, the court will ordinarily further order that the *rule nisi* operate as an interim order (usually in the form of an interim interdict) pending the confirmation or discharge of the *rule nisi* on the return day.

The court may, if it is deemed desirable to do so, order that the *rule nisi* be served on certain interested parties, for example, the Master of the High Court, the Companies and Intellectual Property Commission (CIP), the state, and so on. Although these persons or bodies are not parties to the application, the court may, in view of their official capacity, consider it necessary that they receive notice of such an order. For example, where a company has been deregistered and an order for reinstatement as a registered company is applied for, the court will normally order that the *rule nisi* be served on the CIP Commission by virtue of its interest in proceedings that affect companies.

15.2.2 "Ordinary" applications

Study Pete *et al* 164–171.

As has already been indicated, this form of application differs from an *ex parte* application in that notice of the application is given to another person or persons. Such person, or persons, receives notice of the application in that it is ''served'' on him or her after it has been issued, that is, a copy of the application is handed to him or her. For this reason, this form of application is often referred to as "on notice" applications, especially in the magistrates' court.

15.2.3 Related forms in which applications can appear

- Interlocutory applications

  In the preceding sections, we looked at the two forms of notice of motion used to institute legal proceedings. However, often a party may want to approach the court for relief in respect of matters related to proceedings that have already been instituted. This is particularly the case in respect of summons proceedings. For example –

  > C sues D. The parties prepare for the hearing and D fails to disclose some documents. C's preparation is prejudiced by this failure and C approaches the court in terms of Uniform Rule 35(7) for an order to force D to disclose.

  Rule 6(11) of the Uniform Rules of Court determines that, in these cases, the court must be approached by means of interlocutory applications. However, note that, although Rule 6(11) refers to ''notice'', the courts have decided that this does not mean ''notice of motion''. Interlocutory applications are, therefore, brought purely by way of notice. As a result, the parties are not bound by the severity of the Rules.

- Urgent applications

  Study Pete *et al* 155–156.

  Uniform Rule 6(12) (magistrates' courts rule 55(5)) makes provision for this kind of application. This does not mean that an applicant may completely disregard the usual requirements for applications. The principle is that, as far as possible, the normal rules of procedure should be followed, and that any departure from such normal rules of procedure must be justified by the urgency of the matter. In other words, the mere fact that an applicant views the matter as urgent does not mean that he or she may bring the application in any form and at any time and place, or with too short a time limit for responses by the respondent. If a departure cannot be justified, the court may strike the application off the roll with costs or may postpone the matter to afford the respondent more time to respond to the application. In *Luna Meubel Vervaardigers (Edms) Bpk v Makin (h/a Makin's Furniture Manufacturers)* 1977 4 SA 135 (W), it was held that the degree of relaxation of the normal rules should not be greater than the urgency that the case demands. Carefully read Uniform Rule 6(12) (rule 55(5)) – you will notice that, in terms of such rule, the normal rules of procedure may be dispensed with.

  In the High Court, if time permits, the notice of motion must be prepared in accordance with Form 2(a) of the First Schedule. The usual prayers for relief should include an additional prayer that the forms and service provided for in the Uniform Rules of Court be dispensed with and that the matter be heard as one of urgency. The founding affidavit (see below) must obviously also set out very clearly the circumstances that render the matter urgent, as well as the reasons why, in the normal course of events, a hearing will not afford proper redress.

  Bear in mind that an applicant may not himself or herself create urgency by, for example, waiting too long to act so that the ordinary rules can no longer be applied. In various divisions of the High Court, it is the practice that a certificate of urgency signed by the applicant's advocate must accompany the documents before the Registrar will place the application on the roll.

15.3 FORMAL ASPECTS OF APPLICATION PROCEEDINGS

15.3.1 The form and content of the application proceedings

Study Pete *et al* 158–161.

15.3.2 The different types of affidavits

In the case of *ex parte* applications, there is only one type of affidavit, namely the supporting affidavit. If an ''ordinary'' application is unopposed, there will also obviously only be a supporting affidavit. However, if the application is opposed, the situation differs. (For the sake of clarity, it must be pointed out that a party opposes an application by giving written notice to the applicant within the *dies induciae* stated in the notice of motion of his or her intention **to oppose** the application – see Uniform Rule 6(5)(d)(i) and magistrates' courts rule 55(1)(f). This notice fulfils the same function as the notice of intention to defend in summons proceedings – see study unit 20, para. 20.2.)

The general rule is that, in all application proceedings that are opposed, the papers will be restricted to the following three sets of affidavits:

(1) The supporting affidavit of the applicant, which is attached to the notice of motion.
(2) The answering affidavit by the respondent in terms of Rule 6(5)(d)(ii) (magistrates' courts rule 55(1)(g)(ii)). In this affidavit, the respondent, supported in so far as may be necessary by other affidavits, deals paragraph by paragraph with the allegations and evidence contained in the supporting affidavit.
(3) The replying affidavit by the applicant in terms of Rule 6(5)(e) (magistrates' courts rule 55(1)(h)(ii)), in which the applicant deals paragraph by paragraph, in so far as may be necessary, with the allegations and evidence contained in the respondent's answering affidavit.

The court is empowered, in its discretion, to permit the filing of further sets of affidavits (see Rule 6(5)(e); magistrates' courts rule 55(1)(i)). This means that a further set of affidavits will be required from the respondent. The court will exercise its discretion in this regard in exceptional circumstances only, for example where there is something unexpected in the applicant's replying affidavit where a new matter is raised or where the court requires more detailed information on record.

15.3.3 Remedy in the case of defects: motion to strike out

Study Pete *et al* 162–163.

An affidavit may not, save in exceptional cases of urgency, contain hearsay evidence, any other inadmissible evidence or matter that is argumentative, irrelevant, vexatious or scandalous. Where an opposing party wishes to object to such matter, he or she may apply to have the offending matter struck out. Such application is not brought by means of notice of motion, but merely upon proper notice to the other side (see Uniform Rule 6(15)).

ACTIVITY

Carefully read through the set of facts at the beginning of this study unit and then answer the following questions:

(1) Indicate what factors must be considered in determining the correct type of application to be used.
(2) In the light of these factors, what type of application must Sandra lodge?
(3) What documents comprise this application?
(4) Advise Paul on the type of application that must be used in his case.
(5) Advise Paul on the steps that must be followed to ensure that the case serves more quickly than usual before the court.

FEEDBACK

(1) To put it simply, they are determined by the questions you must ask yourself if you find yourself in this kind of situation. Thus, the first question to ask is

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

   Logically, the second question, which follows, is

   – whose rights or interests are affected by this application?

(2) An *ex parte* application: the above questions should have indicated that (independent) proceedings will be instituted and that the interests and rights of no-one other than Sandra will be affected by the application. Therefore, she is not obliged to give notice of the application to anyone else.
(3) Rule 6(1) determines that an application consists of a notice of motion, supported by an affidavit containing the facts on which the application rests.
(4) The "ordinary'' application will be used, since Theresa must be given notice of the application in order to have the opportunity to present her side of the story.
(5) This application can be brought before the court as a matter of urgency in terms of Rule 6(12). The application will be the same as any other application, except that it will be accompanied by a certificate of urgency, and the notice of motion will show that the court is asked for leave to deviate from the prescribed forms of service and that the application be dealt with as an urgent application.

STUDY UNIT

16

The conduct of summons proceedings

OVERVIEW

LEARNING OUTCOMES

After studying this study unit, you should be able to

- be able to map the course of summons proceedings, identify the different types of summonses, as well as describe the conduct of summons proceedings, so that you can view and study the entire process as an integrated whole
- have a general background, which will serve as the basis for a more intensive study of all aspects of the proceedings in further study units

COMPULSORY READING MATERIAL

None.

16.1 INTRODUCTION

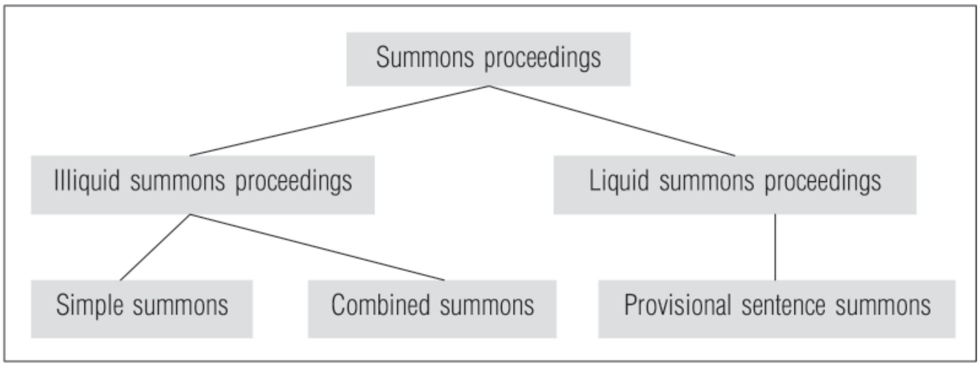
By this stage you have mastered one form of litigation, namely, application proceedings. The other form, summons proceedings, can now be studied.

When application proceedings are inappropriate, or when the summons procedure is prescribed, an action is initiated by way of a summons.

The summons proceedings are divided into the **illiquid summons proceedings** and the **liquid summons proceedings** (**Note:** ''proceedings'', not ''summons''!). The latter is instituted by way of the provisional sentence summons (see study unit 18), whereas the former is instituted either by way of the combined summons or by way of the simple summons (see study unit 17). It can thus be stated that action proceedings (summons proceedings) are instituted by way of one of three types of summons.

Although it is possible for a defendant to enter appearance in provisional sentence proceedings, and that a plea stage can be indicated (see study unit 18), this is exceptional. Consequently, in paragraph 16.2 below, the emphasis falls on illiquid summons proceedings, and a synopsis is provided of the course of the summons proceedings.

See the following schematic representation:



16.2 A GENERAL EXPLANATION OF THE CONDUCT OF THE PROCEEDINGS

It is important that you understand this study unit well, so that you can see the conduct of the proceedings as an integrated whole. We suggest that you consult the schematic explanation at the end of this discussion while you are reading through this work. You should also refer to it while you are studying the study units dealing with procedure.

In study unit 15, paragraph 15.1 above, we indicated that, whereas there is no clear distinction between the pleading stage and the trial stage in application proceedings, summons proceedings are characterised by a clear distinction between these two stages.

- Pleading stage

  In illiquid summons proceedings, pleadings are exchanged between the parties. The pleadings consist of printed or written statements that are made by the parties to an action. The material facts upon which the parties respectively rely to establish their claims or defences must be set out concisely and in summary form. In practice, ths really means that conclusions of fact are pleaded.

- Trial stage

  Once the process of pleading has been completed, the action is set down for trial. At the trial, the parties endeavour, by means of witnesses who appear in person and who give evidence *viva voce* (i.e. orally), and who hand in documents or other real evidence, to prove by such evidence the basic facts formulated in the pleadings. These witnesses are examined in chief, are cross-examined and are re-examined. After all the evidence has been led, argument is addressed to the court on the pleadings and on the evidence, and judgment is then delivered.

When a summons is issued, a claim is actually being instituted. Therefore, the person instituting the claim is called the plaintiff. This claim is called a ''claim in convention''. The person who is defending himself or herself against this claim is called the defendant. However, it is also possible for the defendant to have a claim against the plaintiff, in which case it is referred to as a ''counterclaim''. If the defendant institutes a counterclaim, this claim is then also referred to as a ''claim in reconvention''.

The plaintiff commences the claim in convention by means of either a simple summons or a combined summons. Because the simple summons is issued in respect of a liquidated claim, it is not accompanied by any other document setting out the details of the claim – the amount and nature of the claim are merely stated in the summons. On the other hand, because the combined summons is used in respect of an unliquidated claim, it is accompanied by a document known in this instance as ''the particulars of claim''. The particulars of claim are attached to the summons, forming a single document; hence the term ''combined summons''. If, in the case of a simple summons, the defendant has formally indicated that he or she intends to defend the action, the plaintiff files his or her declaration (setting out the material details of the claim, similar to the particulars of claim) only at this stage (see study unit 17, para. 17.2). Before a plaintiff delivers a declaration, he or she will consider whether to apply for summary judgment (see study unit 23, para. 23.4). Where such an application is unsuccessful, or where the application is abandoned, a declaration must also be delivered.

Once a summons has been served (see study unit 14), and, if the defendant wishes to defend the action, he or she must, within the time stipulated in the summons, deliver and file a notice of intention to defend (see study unit 20, para. 20.2). (At this stage, if the plaintiff has filed a simple summons, he or she will now file his or her declaration.) Thereafter, the defendant must raise his or her defence by filing his or her plea on the merits (see study unit 20, para. 20.3) to the plaintiff's declaration or particulars of claim, as the case may be. Alternatively, the defendant may raise a special plea (see study unit, para. 21.6) to object to an issue not apparent *ex facie* the declaration or particulars of claim, as the case may be.

The defendant may, together with his or her pleadings, file a counterclaim. By means of the counterclaim, the claim in reconvention is introduced, and the pleadings in reconvention are usually filed simultaneously with the pleadings in convention, which might follow. The plaintiff (now the defendant in reconvention) responds to the defendant's (now the plaintiff in reconvention) counterclaim by means of a plea in reconvention. The pleadings in reconvention, which might now follow, are the same as the pleadings in convention discussed below (see study unit 20).

To return to the pleadings in convention: usually, the pleadings close after the defendant's plea has been delivered and filed, but this need not necessarily be the case. The plaintiff could respond to the defendant's plea by means of a replication (see study unit 20, para. 20.4), and, if issues are not joined hereby, the defendant may reply to the replication by means of a rejoinder (see study unit 20, para. 20.4). At this stage, the pleadings should close (see study unit 20, para. 20.4); the matter is then set down for trial, and the pre-trial preparation stage commences. (However, although this will not be dealt with again in this study guide, it should, for the sake of completeness, be mentioned that, after rejoinder, the parties may exchange the following pleadings: a surrejoinder to the rejoinder; a rebutter to the surrejoinder; and a surrebutter in response to the rebutter. These are exchanged in exceptional circumstances only.)

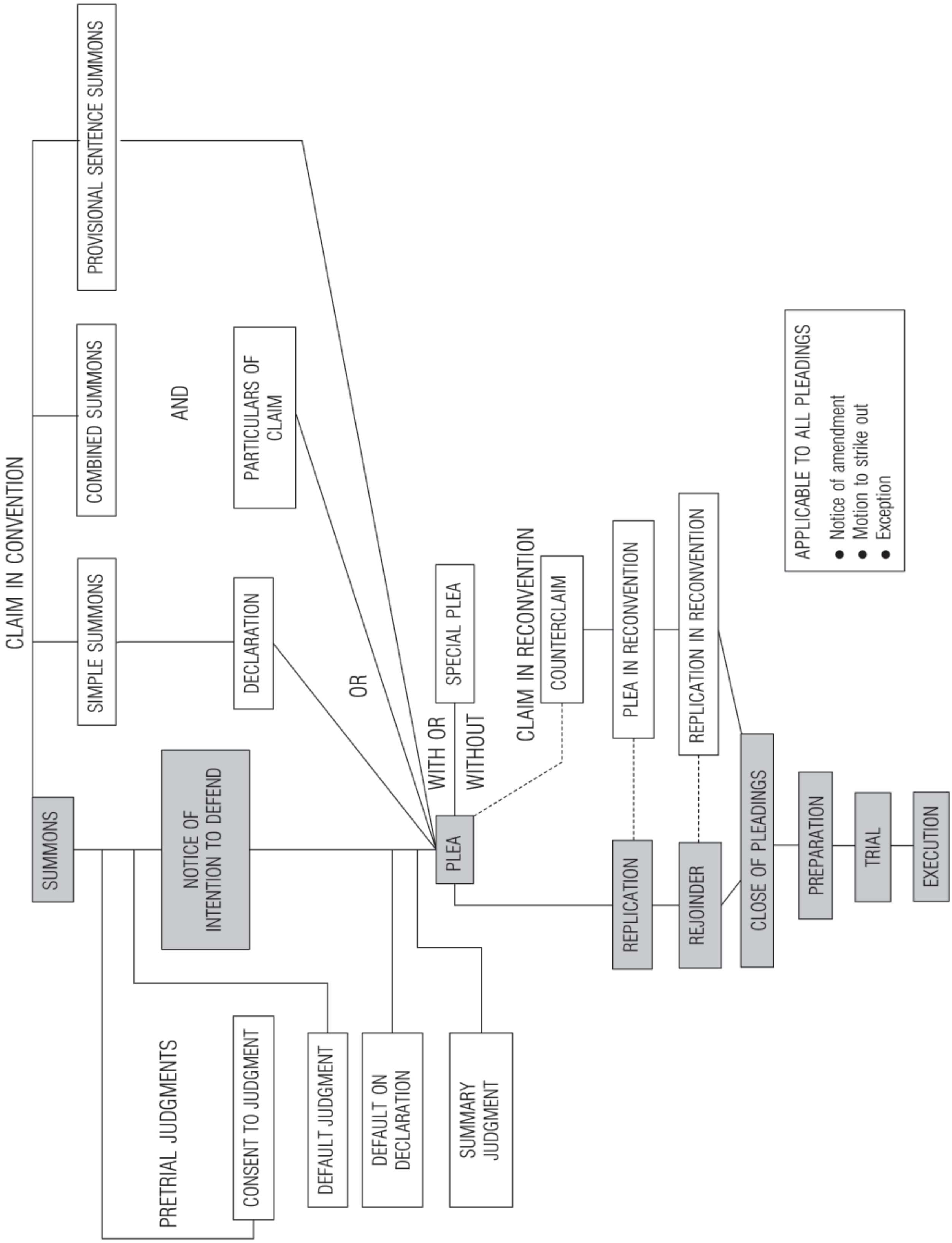
In the normal course of pleadings, certain irregularities in the pleadings might need to be corrected, rectified or objected to in this respect. Procedurally, this may be effected by means of the following processes or pleadings: a notice of amendment (see study unit 21, para. 21.4), a motion to strike out (see study unit 21, para. 21.3) or the raising of an exception (see study unit 21, para. 21.5). These procedural remedies may be used in respect of any pleadings.

Prior to the trial stage, it is possible to obtain a judgment known as a pre-trial judgment. Should the defendant not timeously file a notice of intention to defend or a plea, as the case may be, the plaintiff may apply for default judgment to be granted against the defendant (see study unit 23, para. 23.3.2). Likewise, if a defendant has in fact filed a notice of intention to defend, but has no *bona fide* defence, and has done so merely to delay proceedings, the plaintiff may apply for summary judgment (see study unit 23, para. 23.4). So, too, when the plaintiff has failed to deliver timeously his or her declaration and has been barred from doing so, the defendant may have the matter set down for hearing, and the court may grant absolution from the instance or make any order it deems fit (see study unit 23, para. 23.3). Lastly, the defendant may consent to judgment. The consent is furnished to the plaintiff, who applies to the Registrar to have it converted to a judgment by a judge in chambers (see study unit 23, para. 23.2).

It is also possible to institute a claim by means of a third summons, namely, the provisional sentence summons. This is an extraordinary procedure and is specifically designed to assist a creditor, armed with sufficient documentary proof (see study unit 18, para. 18.1), in recovering his or her money speedily without resorting to the illiquid summons proceedings. However, the judgment is provisional in the sense that a defendant may enter into the principal case within two months after provisional sentence has been granted (see study unit 18, para. 18.3). In such a case, the summons is deemed to be a combined summons, and the usual litigation process (as described above) then follows.

The schematic outline in paragraph 16.3 below provides a visual representation of this study unit.

16.3 SCHEMATIC OUTLINE



STUDY UNIT

17

The simple summons and the combined summons

X and Z take early retirement and decide to build a smaller house. Z, however, still appears regularly in advertising slots on television and at the cinema in order to supplement his pension. Z concludes a contract with Y, in terms of which Y agrees to build a house for R8 000 per square meter. According to the architect's plan, which is in an annexure to the contract and which was initialled by both parties, the total surface area of the planned house is 300 square metres. Unfortunately, building does not go well and there is a dispute over the contract price. Z alleges that Y delivered poor workmanship and that he is thus entitled to far less money than was agreed to in the contract. While Z and his attorney are inspecting the site, Z falls down a shaft that Y's workers have negligently failed to secure. Z lands up in hospital. Apart from incurring high hospital costs, he will no longer be able to appear in advertising slots because of the injuries to his face. Now Z and Y plan to sue each other. The question is: which summons will be appropriate for each to use to commence proceedings against the other?

OVERVIEW

17.1 INTRODUCTION
17.2 THE SIMPLE SUMMONS AND DECLARATION
17.3 THE COMBINED SUMMONS
17.4 THE EFFECT OF THE CONSTITUTION, 1996 AND THE NATIONAL CREDIT ACT OF 2005 ON THE CONTENT OF A SUMMONS IN WHICH EXECUTION OF IMMOVABLE PROPERTY IS RELEVANT

LEARNING OUTCOMES

After studying this study unit, you should be able to

- distinguish between the two types of illiquid summonses
- apply the theoretical distinction to a given set of facts

COMPULSORY READING MATERIAL

Pete *et al Civil Procedure* 3ed (2017) 179–184

Uniform Rule 17; 18 and 20; Form 9 and 10, First Schedule. Magistrates' courts rule 5 and 7; Form 2 and 2B, Annexure 1

17.1 INTRODUCTION

If you refer to Forms 9 and 10 of the First Schedule to the Uniform Rules of Court, you will note why a summons may be defined as a written instruction to the sheriff to notify a person (normally termed ''the defendant'') against whom the plaintiff wishes to obtain relief (in the form of an order) to give notice, within a specified time (the *dies induciae*), of his or her (the defendant's) intention to defend the action if the claim is disputed. This description relates to the definition of ''action'' in Uniform Rule 1, which makes it clear that summons proceedings are instituted by way of a summons.

(There are naturally differences between the external appearance of the two forms. Examine these yourself. The reason for the differences will become apparent after studying this study unit, and are associated with the nature and purpose of each type of summons.)

Note that, although Rule 17(1) refers to ''a summons or a combined summons'', in this study guide we refer to the two types as the simple summons and the combined summons, respectively. Elsewhere, you may find that the simple summons is referred to as the ''ordinary summons'' or the ''summons for a debt or liquidated demand''.

The simple summons and the combined summons may be distinguished from each other on the basis of the nature of the claim in respect of which each is applied, as well as on procedural grounds. Since using the wrong type of summons can give rise to certain penalties against a practitioner, you must have a thorough knowledge of the circumstances in which each type of summons is the correct or most appropriate one. To assist you in this regard, two important questions are posed in each instance.

17.2 THE SIMPLE SUMMONS AND DECLARATION

The answers to the following two questions are important:

- *When is the simple summons employed?*

  The simple summons is employed when the plaintiff's claim is for a debt or liquidated claim.

- *What is meant by the expressions "a debt or liquidated claim"?*

  Unlike the previous Transvaal, Natal and Orange Free State Rules of Court, the Rules contain no definition of ''a debt or liquidated demand''. As a result, the meaning to be attached to the expression was left to judicial interpretation. In the course of time, the courts assigned reasonably clear interpretations to the expression in various judgments. Some of these interpretations are indicated below. Naturally, the interpretations are not comprehensive, but they do nevertheless provide clear guidelines.

  – In the case of the old Transvaal Rule 42, the expression was interpreted as ''a claim for a fixed or definite thing, as, for instance, a claim for transfer or ejectment, for the delivery of goods, for rendering an account by a partner, for the cancellation of a contract or the like''.
  – The courts have also indicated that the debt is liquidated where it is admitted or where the monetary value is capable of being ascertained speedily. Examples in this regard are the current market price of a particular article that is sold, or the reasonable, accepted remuneration for the rendering of specific services.
  – In order to be a ''liquidated demand'', the demand must be described in such a way that the amount may be determined merely by mathematical calculation.

– What ‘‘ascertained speedily’’ embraces is a question of fact, and the courts will thus exercise their discretion in deciding whether a particular claim is capable of being ascertained speedily.

Students must note, in particular, that neither an action for divorce nor an action for damages constitutes a claim for a debt or a liquidated demand.

Therefore, from the above, it is clear that the **nature of the claim** (i.e. whether we are dealing with a debt or a liquidated claim) determines whether a simple summons must be employed.

As regards the form of the summons, such summons must be drawn up so as to correspond as closely as possible to Form 9 of the First Schedule of the Uniform Rules of Court. From an examination of Form 9, it clearly appears that only the cause of action need be set out concisely. However, it must be described with sufficient clarity to enable the court to decide whether judgment may be given, and to inform the defendant about the claim against him or her so that the defendant may defend himself or herself against further legal steps. In the magistrates’ courts, see Form 2, Annexure 1.

The declaration, which is the equivalent of the particulars of claim (see below), is used only in proceedings commenced by simple summons. However, a plaintiff is only obliged to serve and file a declaration if a defendant has delivered a notice of intention to defend, provided that the plaintiff did not apply for summary judgment (see study unit 23, para. 23.4).

17.3 THE COMBINED SUMMONS

The answers to the following two questions are important:

- *When is the combined summons employed?*

  The combined summons is primarily used where the plaintiff’s claim is unliquidated, that is, where it is not a claim for a debt or liquidated demand as defined in 17.2 above. Matters for which a combined summons is used often involve serious factual disputes that require the leading of oral evidence to resolve the issues.

- *What does the expression “unliquidated claim” mean?*

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

  In every case where the claim is not for a debt or liquidated demand, the plaintiff must annex to his or her summons, particulars of the material facts relied upon by him or her in support of the claim (the ‘‘particulars of claim’’) (Uniform Rule 17(2); magistrates’ courts rule 5(2)). This Rule also requires that the particulars of claim must comply with the provisions of Uniform Rule 18, because it is a pleading (see study unit 19 below).

This summons, together with the particulars of claim, are known as a ‘‘combined summons’’, since they combine in one document a summons and the equivalent of a declaration. The big difference, however, is that the particulars of claim, unlike the declaration, do not constitute a separate pleading and are inseparably linked to the summons; hence the designation ‘‘combined summons’’. The summons and the particulars of claim thus form a unit. Therefore, a declaration may never be used in the case of a combined summons.

17.4 THE EFFECT OF THE CONSTITUTION, 1996 AND OF THE NATIONAL CREDIT ACT OF 2005 ON THE CONTENT OF A SUMMONS IN WHICH EXECUTION OF IMMOVABLE PROPERTY IS RELEVANT

In the judgment delivered in *Standard Bank of South Africa Ltd v Saunderson* 2006 2 SA 264 (SCA) 277C–E on 15 December 2005, the Supreme Court of Appeal issued the following practice directive, with which every summons must comply:

The summons initiating action in which a plaintiff claims relief that embraces an order declaring immovable property executable shall, from the date of this judgment, inform the defendant as follows:

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

This notification is especially important when immovable property is the primary or ordinary residence of the defendant. Consequently, the North Gauteng High Court, Pretoria, issued a practice directive in *First Rand Bank Ltd v Folscher and another, and similar matters* 2011 4 SA 314 (GNP) in respect of actions instituted to enforce a debt secured by a special hypothec over such property. In terms of this practice directive, if the issue of summons is preceded by a notice in terms of section 129 of the NCA, such notice must include a notification to the debtor that, should action be instituted, and judgment obtained against him or her, execution against the debtor's primary residence will ordinarily follow, leading to eviction from such home. The purpose of these steps is clearly to inform a debtor of his or her rights.

(For future use in practice, note that rules of practice in respect of actions instituted under the NCA have in the meantime come into force in the KwaZulu-Natal High Courts (Pietermaritzburg and Durban), the Western Cape High Court, Cape Town, and the North Gauteng High Court, Pretoria.)

ACTIVITY

Re-read the set of facts at the beginning of the study unit, and then answer the following questions:

(1) What single factor will determine which summons Y and Z will issue, respectively?
(2) Y sues Z for the payment of the contract price. What type of summons should Y use? Give reasons for your answer.
(3) Z sues Y for damages that he sustained during his fall. What type of summons should Z use? Give reasons for your answer.
(4) In which one of the abovementioned actions will the need for a declaration arise, and in which circumstances?

FEEDBACK

(1) The nature of the claim (i.e. the type of claim).
(2) The simple summons, because the nature of the claim is a ''debt'' or it is ''liquidated''. The reason for this is that the contract price (i.e. the monetary value of the claim) can be

established by means of an ordinary mathematical calculation. (Remember, the surface area of the house was given and the building cost was calculated at a specific amount per square metre. In addition, the parties agreed to this.)

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

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

STUDY UNIT

18

The provisional sentence summons

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

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

OVERVIEW

18.1 INTRODUCTION
18.2 THE PROVISIONAL SENTENCE SUMMONS
18.3 THE NATURE AND EFFECT OF PROVISIONAL SENTENCE

LEARNING OUTCOMES

After studying this study unit, you should be able to

- describe the nature, purpose and operation of the provisional sentence summons
- distinguish, on theoretical grounds, between this type of summons and the illiquid summons in respect of their fields of application and procedural grounds
- apply the theoretical distinction if you are confronted with a given set of facts

COMPULSORY READING MATERIAL

Pete *et al Civil Procedure* 3ed (2017) 424–432

Uniform Rule 8; Form 3, First Schedule. Magistrates' courts rule 14A; Form 2A Annexure 1

18.1 INTRODUCTION

Provisional sentence is an extraordinary and summary procedure. The exceptional nature of the procedure lies in that the case can be decided before trial, and that the court is concerned with *prima facie* proof only. Judgment is given on the assumption that the documents submitted are genuine and valid.

A basic aspect of provisional sentence is that it is fundamentally an executory procedure. It accelerates the procedure for granting judgment – although such judgment is provisional – and entitles a successful plaintiff to execute the judgment immediately, subject to giving the defendant the necessary security *de restituendo*.

The essence of the procedure is that it provides a creditor who has sufficient documentary proof (i.e. a liquid document) with a remedy for recovering his or her money without it being necessary to resort to the more cumbersome, more expensive and frequently protracted illiquid summons proceedings.

Although, in the past, criticism was levelled at the provisional sentence procedure, it should be noted that this procedure fulfils a useful role in commerce and contributes to the fact that the payment of an amount owing to the creditor is not delayed by the mere wilful action of the debtor. Moreover, the defendant is not unprotected – payment of the judgment amount occurs only against provision of security *de restituendo* by the plaintiff. In addition, the defendant may also enter into the principal action (in specific circumstances).

18.2 THE PROVISIONAL SENTENCE SUMMONS

Study Pete *et al* 424–428, and study 429–432 in broad outline.

This is the third type of summons with which an action can be instituted in the High Court. It can be used only if the cause of action is based on a liquid document.

(Please note that the name of the summons has been chosen for the sake of convenience – Uniform Rule 8(1) and magistrates' courts rule 14A(1) merely refer to ''a summons ... in accordance with Form 3 [Form 2A]'' where a person ''may be summoned ... for provisional sentence''.)

As in the case of the illiquid summons procedure, the nature of the claim determines whether a provisional sentence summons ought to be used. Once again, the questions posed in respect of the two types of illiquid summons are applicable. Hence, we ask when a provisional sentence summons should be used and what the meaning is of a particular technical concept that is used in this connection, namely, "a liquid document" (**Study Pete *et al* 425–427**).

Hence, a court will allow a provisional sentence summons only if

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

and

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

18.3 THE NATURE AND EFFECT OF PROVISIONAL SENTENCE

(1) The plaintiff is of right entitled to payment, or, failing such payment, to take out a writ of execution against the defendant's property under security *de restituendo*.

Security *de restituendo* is the security that the plaintiff must give for the restitution of the money he has received from the defendant in terms of the judgment in the event of the defendant successfully defending the main case.

(2) However, the judgment is provisional in the sense that the defendant may still defend the main action, but only within two months of the granting of provisional sentence, and then only if he or she has paid the judgment debt and costs.

(3) A defendant who may and who wishes to enter into the principal case must deliver notice of his or her intention to do so (see study unit 20, para. 20.2) within two months after provisional sentence has been granted, in which case the summons will be deemed to be a combined summons (see study unit 17, para. 17.3) on which the defendant must deliver a plea within 10 days (see study unit 20, para. 20.3). In default of such notice or plea, the provisional sentence automatically becomes a final judgment, and the security given by the plaintiff falls away (Uniform Rule 8(11); rule 14A(11)).

ACTIVITY

Re-read the set of facts at the beginning of the study unit, and then answer the following questions:

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

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

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

FEEDBACK

(1) Both types of summons can be used: the provisional sentence summons can be used because it is specifically designed for the institution of an action where the claim is based on a liquid document. Since the liquid document is evidence of an established monetary debt, the claim that arises also falls within the definition of a ''debt or liquidated claim'' (see study unit 17, para. 17.2, above). This means that, in these circumstances, a plaintiff can choose which type of summons will be used. (The fastest, most effective and cheapest type of summons is a question of fact. In theory, it is the provisional sentence procedure.)

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

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

STUDY UNIT 19

The principles of pleading

> The necessity to plead material facts does not have its origin in this rule. It is fundamental to the judicial process that the facts have to be established. The court, on the established facts, then applies the rules of law and draws conclusions as regards the rights and obligations of the parties and gives judgment.
>
> *Buchner v Johannesburg Consolidated Investment Co Ltd* 1995 1 SA 215 (T) 216

OVERVIEW

LEARNING OUTCOMES

After studying this study unit, you should be able to

- define certain basic concepts in respect of pleadings
- distinguish between pleadings and process documents
- describe the purpose and function of pleadings in the litigation procedure

COMPULSORY READING MATERIAL

Uniform Rule 18; magistrates' courts rules 17; 20 and 21

19.1 INTRODUCTION

Before we discuss the litigation process in the following study units, it is important that you familiarise yourself with certain concepts, and that you understand the importance of pleadings. Then, the reason behind the rules for the drafting of pleadings will be clear.

19.2 THE BASIC CONCEPTS

Note the following:

- **Pleading stage:** In illiquid summons proceedings, the stage from the issue of summons up to the close of pleadings is known as the pleading stage.

- **Pleading:** This is a written document containing averments by the parties to an action in which the material facts on which they rely in support of their claim or defence are clearly and concisely set out to enable the opponent to plead thereto, and which is exchanged between such parties.

  Note that, here, the term ''pleading'' is used in a **generic** sense to include all types of pleadings. It should not be confused with the ''plea'', which refers to the defendant's statement of his or her defence to the plaintiff's claim, and which is merely one species of the genus of ''pleadings''.

- **Process:** There is a difference between a pleading and a process. Although ''process'' is not defined in the Act, the phrase ''process of the court'' was interpreted in *Dorfman v Deputy Sheriff, Witwatersrand* 1908 TS at 703 to mean ''something which 'proceeds' from the court; some step in legal proceedings which can only be taken with the aid of the court or of one of its officers''. Included in this concept are, *inter alia*, subpoenas, notices and the like. It is particularly important that you can distinguish between pleadings and process documents, since certain remedial steps (see study unit 21) can be taken only in respect of defective pleadings, and certain procedural steps can be taken only in respect of pleadings (see study unit 23, para. 23.3.1).

19.3 THE FUNCTION OF PLEADINGS

The importance of pleadings cannot be overemphasised. From the description in paragraph 19.2 above, it is clear that the object of pleadings is to enable the parties to come to court fully prepared to meet the case of the opponent, and to enable the court to isolate the issues that have to be adjudicated upon. The parties are bound by the pleadings unless duly amended.

Pleadings serve several functions, and the most important are subsequently discussed.

- Pleadings serve to define and limit the disputed issues of fact and law for the benefit of both the court and the parties. In this way, time and money are saved, and justice can be dispensed more quickly and effectively. In addition, they may also encourage the settlement of a dispute.
- Pleadings also serve to apprise each party of the case he or she is expected to answer. The parties are, therefore, given the opportunity of preparing their cases and the evidence that they intend leading in support of their own contentions and in rebuttal of their opponent's. The pleadings prevent the parties from being taken by surprise at the trial, thus obviating time- and money-consuming adjournments.
- The pleadings constitute a formal, summary record of the issues in dispute between the parties, which may be decided at the trial. In this way, they serve to prevent future disputes between the parties regarding issues that have already been adjudicated upon.
- The pleadings determine the onus of proof and the duty to begin (i.e. to present evidence first).

19.4 THE RULES FOR THE DRAFTING OF PLEADINGS

With the passage of time, a number of rules have been formulated that must be borne in mind when drawing up pleadings. The most important of these are contained in Rule 18(4). Other rules have been developed by the courts against the background of this Rule. What follows is a summary of the most important rules, since you will encounter them in greater detail in the course, Techniques in Trial and Litigation (TLI4801).

Study Uniform Rule 18(4) and read Rules 18(3), 18(5) and 18(7) attentively. Rules 18(8) to 18(11) contain provisions in respect of specific matters, and you are not expected to study these provisions. Take note that these lay down certain formal requirements for pleadings. With regard to the formalities in the magistrates' courts rules, see rule 17 with regard to the plea; rule 20 with regard to claims in reconvention; and rule 21 with regard to the replication and plea in reconvention.

- Pleadings must contain clear and concise statements of the material facts upon which the claim, defence or reply is based; but there must be adequate details so that the pleadings are not vague and embarrassing, and inform the opponent about matters in dispute.
- Details must be reflected clearly, logically and in a comprehensible form.
- Facts, and not the law, must be pleaded. However, evidence must not be pleaded.
- Pleadings should not contain repetitions. If repetition is necessary, this should be effected by reference, and not by restatement.

Apart from the general requirement relating to particularity of pleadings, it should be noted that the Rules also lay down specific requirements in respect of claims based on contract (Uniform Rule 18(6)), for divorce (Uniform Rule 18(8)(9)) and for damages (Uniform Rule 18(10)(11)). Failure to comply with any provision of Uniform Rule 18 will cause such pleadings to be deemed to be an irregular step, which entitles the opposite party to act in accordance with Uniform Rule 30 – see later (Uniform Rule 18(12)).

ACTIVITY

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

(1) The simple summons
(2) The combined summons
(3) The declaration

FEEDBACK

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

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

(3) Pleading. (See the explanation of the particulars of a claim in (2) above.)

STUDY UNIT

20

Litigation proceedings during the pleading stage: exchange of processes and pleadings

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

OVERVIEW

LEARNING OUTCOMES

After studying this study unit, you should be able to

- describe the sequence of the litigation proceedings up to and including the close of pleadings
- classify the different documents that are part of the litigation procedure as either processes or pleadings
- explain the purpose and function of the different pleadings that are exchanged between the parties to the litigation

COMPULSORY READING MATERIAL

Pete *et al Civil Procedure* 3ed (2017) 198–211; 219–224

Uniform Rule 19; 22; 24; 25; 29. Magistrates' courts rule 13; 17; 20; 21; 21A

20.1 INTRODUCTION

Read through study unit 16 above as well as the schematic representation of the summons procedure to prepare yourself for this study unit.

By now, you are familiar with the different summonses and the different methods of serving them. In this chapter, we deal with that stage of proceedings where a party has accepted service and wishes to defend the action against him or her. Pleadings and processes that are normally exchanged by the parties to an action up to and including close of pleadings, will now be dealt with in the sequence in which they occur.

20.2 NOTICE OF INTENTION TO DEFEND

Study Pete *et al* 198–202.

The notice of intention to defend is not a means of raising a defence. Instead, a defence is raised by means of a plea (see para. 20.3 below). As the name indicates, a notice of intention to defend is merely a notice and, as such, informs the plaintiff that the defendant intends defending the action. It is in this context that it is said that the defendant is ''defending the action''. Another expression that is also encountered when referring to the notice of intention to defend is that the defendant ''enters an appearance''. The notice of intention to defend is clearly not a pleading – refer to study unit 19 above.

The defendant who neglects to file and deliver a notice of intention to defend timeously, runs the risk of having a judgment by default (see study unit 23, para. 23.3.2) given against him or her. However, study Uniform Rule 19(5) to determine up to what stage proper delivery of such notice may still be effected.

Please note that in the magistrates' court an appearance to defend may also be entered after the prescribed *dies induciae* has expired, but before default judgment has been granted. However, if appearance to defend is entered after a plaintiff has already lodged a request for default judgment, the plaintiff is entitled to costs (rule 13(5)).

If the notice is defective in that certain requirements in terms of the rules have not been complied with, for example, if

(1) it has not been properly served,
(2) it has not been properly signed, or
(3) it does not comply with the requirements in respect of address for service, or
(4) exhibits any two or more of such defects or any other defect of form,

the registrar or clerk of the court shall not enter judgment against the defendant unless the plaintiff has delivered a notice in writing to the defendant calling upon him or her to deliver a notice of intention to defend in due form within five days of the receipt of such notice (rule 12(2)(a)).

20.3 THE PLEA ON THE MERITS AND THE COUNTERCLAIM

Study Pete *et al* 202–211; 219–222.

A plea on the merits is the only way in which a defendant may raise a defence against the plaintiff's claim. A plea must, therefore, deal with the merits of the plaintiff's case as set out in the plaintiff's particulars of claim or declaration, depending on the case.

Although the defendant must deal with each allegation in the particulars of claim or declaration, a plea deals especially with all the factual allegations. Just as the particulars of claim or the declaration must fully disclose the plaintiff's claim, so the defendant's plea must disclose his or her defence fully.

In such plea, the plaintiff's factual allegations are admitted, are denied, are placed in issue, or are confessed and avoided, and all the material facts upon which the defendant relies are stated clearly and concisely. It is also permissible, where the facts warrant it, for a defendant to plead that he or she has no knowledge of a particular allegation and is not in a position to admit or deny it (see Uniform Rules 22(2) and 22(3)). Every single factual allegation in the declaration or particulars of claim that is not specifically denied or not admitted, is deemed to be admitted (Uniform Rule 22(3) and magistrates' courts rule 17(3)(a)).

Uniform Rule 24(1) (magistrates' courts rule 20(1)) provides that a defendant may, together with his or her plea or, at a later stage, with the leave of the plaintiff or, if refused, the court, deliver a claim against the plaintiff. This is known as a counterclaim. Study this subrule so that you know what form the counterclaim takes. The counterclaim is called a ''claim in reconvention''. (The claim that is instituted by means of a summons is called a ''claim in convention''.) Since a counterclaim is similar to a claim that is instituted by a plaintiff in convention, the plaintiff has the opportunity to answer to the counterclaim with a plea on the counterclaim, which corresponds to the defendant's plea as regards form and content. The same pleadings as are exchanged between the parties in convention, are exchanged in reconvention; the only difference is that the parties act in the reverse order. In other words, the plaintiff in convention acts as the defendant in reconvention. The pleadings in reconvention are also exchanged until close of pleadings occurs. (In practice, the counterclaim is usually served at the same time as the plea, and, for convenience, is usually contained in the same document, but under a separate heading.)

20.4 THE REPLICATION, REJOINDER AND CLOSE OF PLEADINGS

Study Pete *et al* 222–224.

A replication contains the plaintiff's reply to the defendant's plea. Uniform Rule 25(1) and magistrates' courts rule 21 are essentially the same. This pleading is, however, not essential and is necessary only where the defendant raises new averments as to facts in his or her plea (on the merits).

See Uniform Rule 25(2) and rule 21(2), which indicate when a replication is unnecessary. A replication will typically be relevant in the case where a defendant's defence is one of confession and avoidance. For example, a defendant in a defamation action admits in her plea the publication of the alleged defamatory statements, but avers that such statements were made in privileged circumstances. The plaintiff will then deal with these in replication.

A plaintiff who fails to deliver a replication within the prescribed *dies induciae* is *ipso facto* (or automatically) barred from replicating (see Rule 26; magistrates' courts rule 21B). Where a replicationis not necessary, joinder of issue will be assumed and the pleadings will be deemed to be closed when the last day for filing the replication has elapsed (see Rule 25(2); rule 21(2)). (''Joinder of issues'' refers to the moment when the dispute is crystallised and is ready to be presented to court for adjudication. In practice, this usually coincides with close of pleadings.)

Rule 25(5); rule 21(5) make provision for the exchange of further pleadings by the parties, and also prescribe the dies *induciae* within which such pleadings must be delivered. The further pleadings which are intended have already been mentioned in this section. The most common of these is the rejoinder. If the plaintiff raises new averments of fact in the replication, the defendant is given an opportunity of reacting thereto by way of rejoinder. However, these pleadings are not often needed in practice.

Uniform Rule 29 and magistrates' courts rule 21A are identical and lay down when pleadings are deemed to be closed. **Study** these rules as a whole, since you must be familiar with the circumstances in which close of pleadings occurs.

ACTIVITY

(1) Simply name the pleadings (in the correct order) that can be exchanged in convention between D and F (referred to in the set of facts at the beginning of this study unit) after service of the combined summons.
(2) Explain briefly why the notice of intention to defend is excluded from the answer to (1) above.
(3) Briefly indicate when pleadings will be regarded as closed.

FEEDBACK

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

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

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

    Note: Had the question required the identifying of the pleadings in "a claim for damages", you would have started off with the combined summons – see study unit 17, paragraph 17.3 above, where the nature of the combined summons is discussed. Had the question referred to a claim that amounted to a debt or liquidated demand, the first pleading would obviously have been the declaration.)

(2) The notice of intention to defend (as is the case with all notices) is a process, not a pleading.
(3) The four circumstances in which pleadings are regarded as closed, are clearly set out in point form in Uniform Rule 29; rule 21A. Fill in these circumstances yourself in the space provided below.

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STUDY UNIT

21

Further possible pleadings and processes during the pleading stage: remedial steps

E and the Grootberg Local Council litigate in the local High Court. E is the registered owner of a smallholding within the area of the Grootberg Local Council (GLC). All registered landowners are statutorily obliged to pay tax to the GLC. In the summons, the GLC alleges that E is in arrears with the payment of tax and that E is liable for the payment of such arrears for a specific period of time. Just after E's attorneys entered appearance, GLC's attorneys notice that their information in the formulation of the claim is faulty. Once the new formulation is served on E's attorneys, it appears that E's attorneys are unhappy about the formulation of the claim. The question that arises is how the different defects must be dealt with and corrected in practice.

OVERVIEW

LEARNING OUTCOMES

Now that you have studied the pleadings that are normally exchanged between parties, as well as the concept of interlocutory applications, after studying this study unit, you should be able to

- identify the other pleadings and procedures that may be exchanged during the pleading stage
- explain the circumstances in which such documents may be used, and indicate the specific purposes that can be achieved by using them
- apply these different documents practically to a given set of facts
- distinguish between the various processes and pleadings
- describe the law of civil procedure as an integrated whole, with reference to examples of interlocutory applications

COMPULSORY READING MATERIAL

Pete *et al Civil Procedure* 3ed (2017) 211–219; 226; 228–242

Uniform Rule 23(1)–(4); 28; 30; 30A; 35(14). Magistrates' courts rule 19 (1)–(3); 23(15); 55A; 60; 60A

21.1 INTRODUCTION

The rules in regard to pleading are not rigid and unbending, and not every technical mistake in a particular pleading will render it open to objection.

Where there has been some breach of pleading (or, in certain cases, a process), the opposite party can take certain steps to rectify the situation. However, a party can also take certain steps to rectify a *bona fide* error in his or her own pleadings, or to enable him or her to deliver a pleading.

The court rules also contain provisions that allow parties to enforce compliance (or condone noncompliance) with the rules of court.

21.2 INSPECTION

Study Pete *et al* 226.

Study Uniform Rule 35(14); magistrates' courts rule 23(15). Note at what stage of the proceedings inspection can be requested, for what purposes, and precisely in respect whereof. It is important to note that any party can obtain inspection, but not merely in respect of any type of document or tape recording: the document must be clearly specified, and this procedure can therefore not be used for purposes of a ''fishing expedition'' in search of possible documents. Also note that the test is whether the document is essential, and not merely useful, for purposes of pleading.

21.3 APPLICATION TO STRIKE OUT

Study Pete *et al* 235–236.

Where any pleading contains averments that are ''scandalous, vexatious or irrelevant'', the opposing party may, within the period allowed for any subsequent pleading, apply for the striking out of such matter (see Uniform Rule 23(2); rule 19(2)). Although the rules refer to pleadings only, it is commonly accepted that offending passages in affidavits relating to motion proceedings may also be struck out. ''Irrelevant'' in this context means irrelevant in relation to the points in dispute, which have been raised and which must be decided by the court.

This procedure is used to rectify that part of an opposing party's pleading that contains an averment that is ''scandalous, vexatious or irrelevant''. It does not relate to the pleading as a whole. Below, the bold portion of an extract from a fictitious pleading indicates the nature of an averment that may be struck out:

''5.

The said accident was caused by the negligence of the defendant in that he:

(a) drove recklessly **as he is in the habit of doing**.

(b) ... .''

A court will grant such an application only if it is satisfied that the applicant will be prejudiced in the conduct of his or her claim or defence if the application is not granted. The striking-out procedure is not intended to be used for raising technical objections that are of no advantage to either party, but merely increase costs.

Since we are here concerned with proceedings that have already been instituted (are thus pending), this application is interlocutory in nature and is, therefore, made merely by way of notice.

21.4 AMENDMENT OF PLEADINGS

Study Pete *et al* 229–235.

Rule 28 provides that any party may amend any of his or her own pleadings or documents (but excluding an affidavit), which have been filed in regard to any proceedings. Such a party must, however, give notice of such intention to amend to all parties concerned, and must set out the details of the amendments in the relevant notice (see Rule 28(1) and 28(2)).

The amendment procedure is used for a variety of purposes, the most common of these being to correct errors in pleadings, to amplify the cause of action, to introduce a further or alternative cause of action, or to extend or limit the relief claimed.

The general rule in regard to all amendments is that the court will grant an amendment, unless the application for amendment is made *mala fide*, or the opposing party will suffer prejudice that cannot be compensated for by a postponement and/or an order as to costs (see *Embling v Two Oceans Aquarium CC* [2000] 2 All SA 346 (A)).

21.5 THE EXCEPTION

The purpose of excepting to a pleading may be twofold. In the case of a pleading that is vague and embarrassing, an exception is taken to prevent the person excepting from being taken by surprise or being prejudiced in his or her pleading, or at the trial. Where a pleading discloses no cause of action or defence, an exception provides a speedy and inexpensive method of determining the issue without having to embark on the lengthy and expensive procedure of a full trial. For this reason, an exception is adjudicated upon separately before the trial.

The principal distinguishing feature of an exception, as opposed to a plea on the merits or a special plea (see para. 21.6 below), is that the exception must appear *ex facie* the pleading that is being excepted to. This is a legal argument, and no fresh facts may be alleged in the exception; for the purpose of deciding the exception, the facts stated in the pleading being attacked must be taken to be true. For example, if, in the particulars of claim in which a widow claims damages for the death of her husband, the allegation of negligence is omitted, the summons may be excepted to, on the ground that it discloses no cause of action. Assuming the correctness of all the facts in the particulars of claim, the plaintiff would still not be entitled to succeed, for, unless the defendant caused the damage in a negligent manner, he or she is not in law obliged to compensate the party suffering such damage. (Fault is indeed one of the elements that must be proved to establish that a delict has been committed.)

A further important distinguishing feature of an exception is the fact that it must be taken to the pleading as a whole, and not to a portion of the pleading, unless such portion constitutes a separate cause of action or defence.

It is important to note, however, that, where a party intends to except to a pleading on the ground that it is vague and embarrassing, he or she must, by notice, afford his or her opponent an opportunity of removing the cause for complaint. Whenever an exception is taken to any pleading, the grounds upon which the exception is founded must be clearly and concisely stated (Uniform Rule 23(3); magistrates' courts rule 19(3)).

21.6 THE SPECIAL PLEA

Read Pete *et al* 211–219 in broad outline.

A plea on the merits, as its name indicates, deals with the merits of the plaintiff's claim as set out in his or her declaration or particulars of claim, as the case may be. A special plea, on the other hand, is a means of raising an objection on the basis of certain facts that do not appear in the plaintiff's declaration or particulars of claim, and has the effect of destroying or postponing the action.

Please note that, if a defendant intends to serve and file a special plea, we are of the opinion that he or she must still deliver a plea on the merits. Therefore, a special plea does not replace the plea on the merits. A failure to deliver the lastmentioned document will expose a defendant to a request for default judgment. (We base our opinion on *David Beckett Construction (Pty) Ltd v Briston* 1987 3 SA 275 (W) 280C–F. Note that the views in the various divisions of the court are not uniform, and the Uniform Rules are silent in this regard.)

21.6.1 The difference between the special plea and the exception

As stated above, an exception is limited to an attack on the allegations in the pleading as a whole, on the assumption that such allegations are true, and with one of the distinguishing features being that no factual allegation may be introduced outside the pleading that is attacked. The pleading is judged exactly as it stands. In common with an exception, a special plea assumes the truth of all the allegations in the declaration, and does not deal with the merits of the action at all. It differs from an exception in two respects. First, as its name indicates, it alleges special facts unconnected with the merits of the action as a result of which the action is either destroyed or postponed.

Secondly, a special plea may only be pleaded to a declaration or particulars of claim, whereas an exception can be brought against any pleading.

21.6.2 The two categories of special pleas

Although the nomenclature may vary, special pleas are usually divided into two categories after *Brown v Vlok* (1925 AD 56 at 58): those special pleas that seek to destroy the action (pleas in abatement) and those special pleas that seek to postpone the action until the defect has been cured (dilatory pleas). (Elsewhere, you may encounter a different nomenclature, in which reference is made to a ''declinatory plea'', ''a plea in abatement'' and a ''dilatory plea'', depending on whether these arise from the nature or the effect of the special plea.)

- Dilatory pleas

  Examples:

  – Where the defendant disputes the plaintiff's authority to sue because of the absence of a formal requirement that is a condition for suing (e.g. that a director is not competent to sue because of a lack of specific authorisation).
  – *Lis pendens.* If an action is already pending between the parties, and the plaintiff brings another action against the defendant or relating to the same cause and in respect of the same subject matter, whether in the same or in different courts, the defendant can take the objection of *lis pendens*.
  – *Arbitration.* The defendant may raise this as a special plea where the parties have previously agreed to submit their dispute to arbitration.

- Pleas in abatement

  Examples:

  – Special plea of prescription
  – Special plea of non-joinder or mis-joinder
  – Special plea of *res iudicata*
  – Special plea in respect of the jurisdiction of the court in matters concerning status (this is sometimes also referred to as a ''plea in bar'')

21.7 APPLICATION TO SET ASIDE IRREGULAR PROCEEDINGS

An irregular proceeding is not defined in the Rules.

However, it may be stated that the irregularity concerns formal irregularities; in other words, noncompliance with formal requirements in respect of procedural matters. For examples of this, compare, for instance, Uniform Rules 18(12), 22(5) and 24(5), where it is explicitly stated that noncompliance with the provisions of specific Rules will be deemed to be an irregular step. Other examples of irregular proceedings are the failure by an advocate to sign the particulars of claim (as required by Uniform Rule 18(1)), the premature set-down of a case, the use of the wrong kind of summons, and improper service.

The period within which the applicant must act commences as soon as a party takes notice that a step has been taken or that a proceeding has occurred, and not once the irregularity has come to his or her notice. This interpretation was given in *Minister of Law and Order v Taylor* 1990 (1) SA 165 (EC), and corresponds with the current wording of Uniform Rule 30(2)(b). However, such an application may be launched only if the objector has not taken some further step in the litigation after becoming aware of the existence of an irregularity (Uniform Rule 30(2)(a)).

In *Kopari v Moeti* 1993 4 SA 184 (BGD) 188H, the step is described as ‘‘some act which advances the proceedings one stage nearer completion”. Objectively judged, the step must show the intention to continue with the action despite the irregularity (*Jowell v Bramwell-Jones* 1988 1 SA 836 (W) 904).

A further step would, therefore, include the next sequential exchange of pleadings and any objection to the content of a pleading (e.g. delivery of a replication or motion to strike out). It would not include the filing of a notice of intention to defend; our courts have held that this is merely an act carried out to enable the defendant to put forward his or her defence.

Rule 30(2) and magistrates’ courts rule 60A(2) provide that an application in terms of these rules must be accompanied by notice to all parties. Such an application is naturally also interlocutory in nature.

21.8 ENFORCING COMPLIANCE

Study Pete *et al* 237–240.

The information in the textbook does not require further comment. **Note** the procedure to be followed in the magistrates’ courts (rule 60(2)) and the consequences for the continued failure to comply with the rules of court (rule 60(3)).

ACTIVITY

A:

M sues N for damages on the ground of breach of contract. After M has served his simple summons, he realises that his attorney’s typist has typed in the amount claimed as R6 000 000 instead of R600 000. N is very upset about the summons that has been served on her, and goes to see her attorney. She tells him, amongst other things, that she and M are already involved in litigation in the Cape High Court in respect of an identical cause of action. N’s attorney reads through the summons and points out to N that M has issued the wrong type of summons against her. Answer the following questions in respect of this set of facts:

(1) Simply name the type of procedure that N’s attorney must follow owing to the use of the wrong type of summons.
(2) Briefly indicate why N’s attorney acts correctly by serving and filing a notice of intention to defend despite the procedure that is followed in (1) above.
(3) Simply name the procedure that M may follow to correct the incorrect amount claimed in the summons.
(4) Say that M serves his declaration on N immediately after he has received her notice of intention to defend. What procedure must N’s attorney use to address the fact that M has already instituted an identical action in the Cape High Court? Explain briefly.
(5) M believes that N is in possession of a tape recording of the negotiations that M and N have had, and which gave rise to the conclusion of the contract. Briefly explain in what circumstances M may request inspection of this recording.

FEEDBACK

(1) An application to set aside the summons as an irregular proceeding.

(2) The filing of a notification of intention to defend does not initiate a ''further step'', which could obstruct the procedure in (1) above. It has already been decided that it is simply an action with the purpose of allowing the defendant to raise a defence.
(3) Application to amend.
(4) N's attorney must file a special defence, since N has raised an objection *of lis pendens.*
(5) The answer to this question is contained in Uniform Rule 35(14). Make a short summary of the content of this Rule for yourself.

ACTIVITY

B:

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

(1) Ms Momentum describes Mr Dozie in the particulars of claim as a ''churl in a lumber-box who drives as if he owns the road''. Mr Dozie is offended by this statement, because not only is he of slender build, but he is also well known in local arts and culture circles and considers himself to be a cultured person. Moreover, he considers his vehicle to be stylish. As his attorney, explain what step can be taken to address his objection.
(2) Mr Dozie serves his plea on the merits and denies that Ms Momentum's vehicle sustained damages; alternatively, if it did, this did not amount to R120 000. He does not specifically deny being responsible for the damages, nor does he aver that the collision occurred due to Ms Momentum's negligence. What remedy is available to Ms Momentum?
(3) If Ms Momentum spells one of the street names incorrectly in the particulars of claim, may Mr Dozie take any steps to address this defect?
(4) If Ms Momentum wishes to correct this spelling error, which procedure may she follow?
(5) On what grounds may the procedure referred to in (4) be refused?
(6) Who is responsible for the costs of amending a pleading?

FEEDBACK

(1) Mr Dozie may bring an application for striking out, because the particulars of claim contain scandalous, vexatious or irrelevant averments. (Only the offending part is removed and the rest of the pleading stands.)
(2) She can raise an exception on the ground that the plea does not disclose a defence.
(3) No, there is no formal remedy available to him – a party may amend his or her own pleading only.
(4) She may bring an application for an amendment.
(5) No amendments will be made by which any party other than the party applying for such amendment may be prejudiced in the conduct of his or her action or defence – section 111(1).
(6) The party giving notice of such amendment (unless the court directs otherwise) (rule 55A(9)).

STUDY UNIT

22

Offer to settle, tender, interim payments and security for costs

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

OVERVIEW

LEARNING OUTCOMES

After studying this study unit, you should be able to

- identify the ways in which a matter can be settled in terms of the Rules and discuss any aspect of the offer to settle
- identify the most applicable method of settlement in a given situation
- compare settlement in terms of the Uniform Rules with settlement outside the Uniform Rules
- explain when security for costs may be requested

COMPULSORY READING MATERIAL

Pete *et al Civil Procedure* 3ed (2017) 415–418; 433–434.

Uniform Rule 34; 34A. Magistrates' courts rule 18; 18A.

22.1 INTRODUCTION

A defendant in a claim sounding in money, or in a claim for the performance of an act, is at liberty to attempt to settle such matter. A settlement is often reached by agreement between the parties, but, where such negotiations fail, the defendant can utilise the procedure laid down in Uniform Rule 34 in a further attempt at settling the matter. The benefits derived from a settlement are, first, that the action is extinguished, and, secondly, that no further costs are incurred. Magistrates' courts rule 18 is a mirror image of Uniform Rule 34.

However, an offer to settle need not be made in terms of Uniform Rule 34, but such an offer provides no protection against costs being awarded to the other party, unless it is pleaded. This type of offer is known as a (common-law) tender.

Another way of attempting to achieve a settlement between parties is by way of an interim payment. The need for such payment in actions for damages in terms of the Motor Vehicle Accident Act of 1986 arose as a result of the delay in the finalisation of litigation, which frequently happens in actions for damages as a result of personal injuries and death. These delays can often lead to undue financial hardship for the plaintiff and/or his or her next of kin. Interim payments not only eliminate these hardships but can also facilitate a reasonable and equitable settlement between the parties, and, in so doing, shorten the litigation process.

22.2 OFFER TO SETTLE

Study Pete *et al* 415–418.

For the purposes of the above rules of court, the following expressions have the following meanings:

- ''unconditional'' = liability in respect of the claim is accepted
- ''without prejudice'' = liability is denied

It is important to note that the fact that an offer has been made may not be disclosed in court before judgment has been given, and no reference to such offer may appear on any file in the office of the Registrar containing the papers of the case (Uniform Rule 34(10); rule 18(10)) – any party acting contrary to these rules will be liable to have costs given against him or her, even if he or she is successful in the action (Uniform Rule 34(13); rule 18(13)). The offer is, however, brought to the attention of the judge concerned before any order as to costs is made, since the fact that an offer was made is relevant to the apportionment of costs. A plaintiff who rejected an offer and then obtains judgment in his or her favour, but in a smaller amount than offered by the defendant, may be penalised by an adverse costs order.

22.3 COMMON LAW TENDER

A party to litigation is not obliged to offer a settlement in terms of the Rules. A tender can be made even before proceedings are instituted. If such a tender is satisfactory, it will provide a defendant with protection against costs, which accrue from the summons stage.

The concept of tender is derived from common law. Broadly speaking, tender is equivalent to payment by way of an offer of settlement. Common law requires that payment be made in money – *met opene Beurse en klinkende Gelde.* The amount thus offered in settlement need not be paid into court, and need be available only in the form of money or a cheque. The plaintiff must be notified of the manner in which payment is available.

If a defendant wants to use a tender to protect himself or herself against costs, he or she must plead a tender, which must be proved like any other fact. Where a tender is raised as a defence, it is done to show that the tender is accepted (and that, therefore, the cause of action is extinguished) or that the plaintiff is not entitled to costs from the date on which the tender is made. However, it is important to note that a tender must be unconditional. If the tender is not accepted, the tendered amount must be paid back; however, if the tender is accepted, the plaintiff may not sue for the balance of the claim.

22.4 INTERIM PAYMENTS

Study Pete *et al* 433–434.

We draw your attention to the following:

- Interim payments may be ordered only in an action for damages as a result of either personal injuries or the death of a person (usually the breadwinner). Personal injuries naturally refer to the plaintiff's own injuries.
- An application for an order for such payments may be made at any time after the lapse of the *dies induciae* in respect of the intention to defend.
- The damages that are relevant are confined to

  (1) the plaintiff's medical costs
  (2) the plaintiff's loss of income as a result of his or her physical incapacity
  (3) the plaintiff's loss of income as a result of the death of another person

Also note the prohibition on disclosure of an order made by the court: it may not be pleaded and it may not be disclosed to the court before the quantum of damages has been determined (Uniform Rule 34A(8); rule 18A(8)).

22.5 SECURITY FOR COSTS

Generally speaking, a party may request the other party by way of application to furnish security for costs, especially when it is uncertain or doubtful whether the other party will be in a position to pay the costs of litigation in the event that an adverse costs order is granted against such a party. In the High Court, Uniform Rule 47 and, in the magistrates' courts, rule 62 regulate this matter.

According to these court rules, as soon as practicable after the commencement of proceedings, a party must deliver a notice setting out the grounds upon which such security is claimed, and the amount demanded. If the amount of security only is contested, then the registrar/clerk of the court may determine the amount, but if the liability to furnish security is contested (or if the party fails or refuses to furnish security), the court must be approached on notice for an order. If security is then not furnished within a reasonable time, the court may dismiss any proceedings instituted or strike out any pleading filed by the defaulting party.

As to the form of security, the registrar/clerk of the court usually directs what form it shall take, as well as the amount and the manner in which it is to be furnished.

Note that the court has a discretion to order security or not. The circumstances of each case will be considered, as well as the reasonableness of the request. In general, a plaintiff or applicant may be requested to furnish security if the plaintiff or applicant is a foreign *peregrinus*; an unrehabilitated insolvent; a company or other body corporate; a vexatious litigant. The court may also order security in certain exceptional circumstances, such as when a party has no substantial interest in the proceedings or is a so-called “man of straw” (when a person is being put up as a dummy plaintiff while the real party hides behind the dummy).

ACTIVITY

(1) Briefly indicate the requirements that an offer must meet in terms of Uniform Rule 34(5).

Re-read the set of facts at the beginning of the study unit and then answer the following questions:

(2) Simply name the procedure that X, the seriously injured driver of the vehicle which Solly crashed into, must follow if he needs financial aid to cover his medical expenses.
(3) From the set of facts it appears that the passengers in the microbus also suffered damage, in that their property was either damaged or destroyed. To what extent can they make use of the procedure contained in Uniform Rule 34A? Briefly explain.

FEEDBACK

(1) These requirements are clearly set out in Uniform Rule 34(5). Summarise the four requirements briefly for yourself in the space provided below. Do it in the way you would when answering an examination question.

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(2) An application for interim payment in terms of Uniform Rule 34A.
(3) They cannot use this procedure, since the procedure can only be used in actions for damages for personal injuries or the death of a person (usually the breadwinner). Actions for damages for damage to property are, therefore, excluded.

SELF-ASSESSMENT

Briefly explain the reason why a court would order a foreign *peregrinus* plaintiff to furnish security for costs in a matter. (Consider whether local litigants should be protected and whether the foreigner owning property in the Republic would play a role.)

STUDY UNIT 23

Pretrial judgments

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

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

OVERVIEW

LEARNING OUTCOMES

After studying this study unit, you should be able to

- explain the fact that a court can pass judgment even before hearing a matter, which can then bring the matter to a close
- identify the different actions that can be taken when an opposing party neglects to deliver pleadings and process documents timeously (i.e. within the prescribed *dies induciae*) and what the results of such failure are, as well as solve problems according to the principles involved
- identify the action that can be taken when an opposing party litigates in a vexatious way
- describe the law of civil procedure as an interconnected whole by grouping the different procedures that belong together from a procedural point of view (e.g. the simple summons and summary judgment)

COMPULSORY READING MATERIAL

Pete *et al Civil Procedure* 3ed (2017) 243–251; 252–259

Uniform Rule 26; 31; 32. Magistrates' courts rule 11; 12; 14; 21B.

23.1 INTRODUCTION

Now that you have mastered the difference between a pleading and a process, as well as the entire course of the litigation process, we take you one step further by showing you that a court may deliver a judgment even before hearing the matter, in order to bring the matter to a close.

There are various instances in which a party may approach a court for judgment prior to a trial, ranging from the granting of judgment against a defendant to the dismissal of a plaintiff's claim.

In this study unit, we pay attention to the following:

(1) where the opposite party fails to file a pleading or process within the time laid down in the rules of court (referred to as the party ''in default'') (Note that the parties are naturally at liberty to agree among themselves on an extension of time, and the court itself may also be approached for such an extension – see e.g. Uniform Rule 27(1) in this regard.)
(2) where a defendant does in fact enter appearance timeously, but does so merely as a delaying tactic, knowing full well that no *bona fide* defence exists (In such a case, summary judgment is relevant.)
(3) where a defendant consents to judgment

We begin with this lastmentioned instance.

23.2 CONSENT TO JUDGMENT

Study Uniform Rule 31(1) and magistrates' courts rule 11. The contents of these rules are self-explanatory and do not warrant further comment. Note that, in certain cases, consent is excluded. Where the Rule provides that application by the Registrar must be made before a judge, this simply means that a judge sitting somewhere else (usually in chambers), other than in open court, may grant judgment.

Note that, in terms of the Divorce Act 70 of 1979 it is not permissible to consent to judgment in an action for relief in terms of the Act or for the nullity of marriage.

23.3 DEFAULT JUDGMENT AND BAR

As indicated in 23.1 above, a party who fails to deliver a pleading or process document in time, is ''in default''. Depending on the type of pleading or process, the other party can request a judgment (''default judgment'') immediately, or another step may first have to be taken before judgment may be requested. When a further step is required, this step is known as the giving of a "notice of bar". Although judgment by default and bar are related, there is a difference in application.

23.3.1 Bar

Important: Bar applies only in respect of pleadings. (See again study unit 19 above.)

In the High Court and in the magistrates' court, a distinction is drawn between the situation where (a) automatic bar occurs, and (b) where a notice calling for the delivery of a pleading is required first.

Rule 26 (rule 21B) clearly states that a party who fails to deliver a replication and the ensuing pleadings, is *ipso facto* (i.e. automatically) barred from doing so. This means that the party who is in default will no longer be entitled to deliver the specific pleading concerned.

In the case of all other pleadings, a party must first receive a notice of bar, and, if such party still fails to deliver within the period indicated in the notice of bar (or within a period agreed upon), he or she will be in default as regards the specific pleading, and will *ipso facto* be barred.

In the magistrates' court, bar is dealt with in three separate rules, namely, in rule 12(1)(b) in respect of a plea; in rule 15(5) in respect of a declaration, and in rule 21B. The bar procedure to be followed is the same as in the High Court.

23.3.2 Default judgment

Default judgment is relevant in the following cases:

(1) where the defendant does not timeously give notice of intention to defend
(2) where the defendant does not deliver a plea timeously
(3) where the plaintiff does not deliver a declaration timeously
(4) where a party fails to appear at the trial

Also note the following:

- **in respect of failure to file a notice of intention to defend:** Where the claim is unliquidated, evidence regarding the *quantum* of the claim must first be led before judgment by default will be granted. Also, where a defendant enters an appearance out of time, but before default judgment is granted, the plaintiff cannot merely ignore this and proceed to request judgment by default – the correct procedure is for the plaintiff to approach the court first to have the appearance set aside as an irregular proceeding, before any other action is considered.
- **in respect of failure to file a plea:** Again, evidence regarding an unliquidated claim is required before a judgment will be granted. Also, a notice of bar must be delivered first, before default judgment is requested.
- **in respect of failure to file a declaration:** Here, the plaintiff fails to deliver a pleading and, because a pleading other than a replication or one of the ensuing pleadings is in issue, a notice of bar must first be served on the plaintiff. Should the plaintiff then fail to deliver a pleading, he or she will be in default and will *ipso facto* be barred from doing so.
- **failure to appear at trial:** Note the various types of orders that may be granted.

The rules of court make provision that a party may apply to have a default judgment set aside. Note that the court has a discretion whether to set aside a judgment. The defendant must also advance sound reasons for the failure concerned.

The courts have held that ''sound reasons'' mean that

(1) a reasonable explanation must be given for the failure
(2) the application must be *bona fide* and not merely a delaying tactic
(3) the defendant must have a *bona fide* defence (See *Grant v Plumbers (Pty) Ltd* 1949 2 SA 470 (O) 476–477; *Coetzee v Nedbank Ltd* 2011 2 SA 372 (KZD) 373.)

23.4 SUMMARY JUDGMENT

Study Pete *et al* 252–259.

The summary judgment procedure is designed to protect a plaintiff who has a claim of a particular nature, against a defendant who has no valid defence to his or her claim, and who has simply entered an appearance to defend for the purpose of gaining time and preventing the plaintiff from obtaining the relief he or she seeks and deserves.

Summary judgment should not be granted lightly, and the courts will deprive a defendant of his or her defence in this manner only in clear cases. The courts are cautious and conservative in this regard because of the *audi alteram partem* rule, since summary judgment procedure does to a certain extent infringe on this principle.

Bear in mind that section 129 of the National Credit Act of 2005 contains certain requirements that must be met before any ''legal proceedings'' may commence to enforce a credit agreement.

Study Rule 32(1) and rule 14(1) so that you will be able to set out the types of claims that may give rise to an application for summary judgment.

You will immediately realise that these types of claims fall within the definition of a ''debt or liquidated demand'' (see study unit 6, para. 6.2, which deals with an ordinary/simple summons). Rule 32(1), furthermore, refers to a defendant's notice of intention to defend, which indicates that an action has already been instituted. This application is thus made within the framework of existing proceedings. From what has already been said, it should be clear that an application for summary judgment should follow from a simple summons only.

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

The information in the textbook is self-explanatory. **Note** the procedure and the content of the plaintiff's affidavit; the courses of action that the defendant may take in response to the application; and the powers of the court when hearing the application.

23.5 SUMMARY DISMISSAL

Summary dismissal is the counterpart of the summary judgment procedure and affords the defendant an inexpensive and speedy method of dismissing the plaintiff's action if it isvexatious or frivolous. The High Court has inherent jurisdiction to prevent an abuse of its process.

ACTIVITY

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

(2) Briefly explain the procedure that must be followed when judgment by default is requested where the plaintiff fails to deliver a declaration in the High Court.

Go back and read through the set of facts at the beginning of this study unit, and then answer the following questions:

(3) Briefly explain the procedure that the plaintiff in the first set of facts must follow to acquire judgment by default.
(4) Name the procedure that the plaintiff in the second set of facts may follow in the given circumstances.
(5) Explain in detail what action the defendant may take in reply to the procedure mentioned in (4) above.

FEEDBACK

(1) The grounds are clearly set out in Uniform Rule 32(1) and rule 14(1) and require no further explanation. Write down the grounds, using your own words, in the space provided below.

....
....
....
....

(2) The procedure is clearly described in Rules 31(3) and 31(4). Summarise this procedure in your own words in the space provided below. Write it down as you would answer an examination question.

....
....
....
....

(3) Firstly, the pleading that follows the notification of intention to defend is naturally the plea on the merits. Consequently, before the plaintiff may apply for judgment by default, it will first mean a notification of bar of the defendant. If the defendant still fails to deliver the plea, the plaintiff can go on to request a judgment by default.

Secondly, the claim is one for compensation for damages. This means that the claim is unliquidated. Consequently, the plaintiff must approach the court in terms of Rule 31(2) and evidence must be led in respect of the *quantum* of the claim.

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

STUDY UNIT 24

Preparation for trial

S and T are involved in a car accident. S suffers some serious injuries to his back and has had to have several operations. It is also expected that he will have to have future operations to his back. S sues T and claims damages. The pleadings are closed and both parties begin to prepare for the trial. On the one hand, both parties must be informed of the steps which may be taken to prevent them from being caught unprepared by the opposing party at the trial. On the other hand, they must also be informed about the steps they must take to shorten the trial as required by the Rules. In conclusion, the parties must also be informed about how they may present their evidence to the court.

OVERVIEW

LEARNING OUTCOMES

After studying this study unit, you should be able to

- distinguish between the steps that may be taken as well as the steps that must be taken during the preparation phase of the trial
- describe the purpose of the steps taken during the preparation phase
- discuss the ways in which evidence can be submitted to the court
- discuss any of the preparation steps and apply these steps to a given set of facts

COMPULSORY READING MATERIAL

Pete *et al Civil Procedure* 3ed (2017) 262–280; 284–294

Uniform Rule 21; 35; 36; 37; 38(2). Magistrates' courts rule 22; 23; 24(1); 25; 27(5); Magistrates' Courts Act 32 of 1944 section 54(1).

24.1 INTRODUCTION

The pleadings serve to delimit the issues between the parties, and after close of pleadings adjudication of the crystallised dispute between the parties can then occur at the trial. However, the parties are obliged to disclose to each other certain aspects of the evidence they wish to place before the court before the matter can go to trial. The aim of the pre-trial procedures is to facilitate an orderly and speedy trial and to prevent the parties from being taken by surprise at the trial by unexpected evidence. All in all, these various steps in preparation for trial may serve one, or both, of two functions. They are either taken to obtain information from another party to the action or they are taken to allow the party taking them to adduce certain evidence.

Although all the topics that will be dealt with in paragraphs 24.2 to 24.4 below do not fall into the chronological order we have thus far maintained, we nevertheless believe that they are related to one another and that discussing them together will lead to a better understanding of such topics. The topics may be divided into two broad categories, namely, steps that may be taken both before and after the close of pleadings, and steps that may be taken only after the close of pleadings.

Pete *et al* include detailed information on the topics in this study unit. You do not need to study the prescribed reading material in detail: follow the directions given in respect of each topic. In broad terms, you are expected to know the purpose of these steps, when they may be taken, and the consequences for non-compliance.

24.2 SET-DOWN OF CASES FOR TRIAL AND REMOVAL OF CASES

The following is sufficient for examination purposes. **Read intently Pete *et al* for an understanding of the process, and note the difference in the position between the High Court and magistrates' courts procedure.**

The plaintiff is *dominus litis* and, consequently, has the right to apply for set-down in the first instance. After pleadings have closed, the plaintiff may, by giving notice to the Registrar (or clerk of the court), forthwith set down the case on the roll for the allocation of trial dates. If the plaintiff neglects to do so within a certain period after close of pleadings, the defendant may set the matter down in a similar manner.

Unlike the position in a magistrates' court, in the High Court set-down is governed by the rules of the various divisions, and not by the Uniform Rules of Court. Note the different procedures followed in these courts.

24.3 STEPS THAT MAY BE TAKEN BOTH BEFORE AND AFTER CLOSE OF PLEADINGS

24.3.1 Medical examinations

Read intently Pete *et al* 273–276. Magistrates' courts rule 24 contains similar (albeit more detailed) provisions to Uniform Rule 36.

Note that the rules apply only where a party to an action claims compensation or damages in respect of an alleged physical injury, and if the party's state of health is relevant in the determination of the amount.

Uniform Rule 36(8)(a) provides that any party causing such an examination to be undertaken must ensure that the person conducting the examination provides a complete, written report on his or her findings, and must, on request, furnish any other party with a complete copy of this report (Rule 36(8)(b)); and must bear the expense of the examination (Rule 36(8)(c)).

24.3.2 Examination of inanimate objects

This examination is relevant where the condition of the inanimate object may have a bearing on deciding a point of dispute in the action.

24.3.3 Medical reports, hospital records, X-ray photographs and similar documents

Any party who is entitled to demand a medical examination such as that set out in 24.3.1 above, may, by written notice, require that the abovementioned documents be made available to him or her if they are relevant to the assessment of damages.

24.3.4 Expert evidence

No party may, except with the leave of the court or with the consent of all parties to the action, make use of expert evidence, unless the provisions of Uniform Rule 36(9) have been complied with. **Study this subrule** with regard to the requirements concerned as set out in **Pete *et al* 284–285**.

The purpose of the abovementioned provisions relating to expert evidence is to prevent a party being surprised at the trial, and to give a party the opportunity of arriving in court prepared to rebut the expert evidence presented by the opposite party. If the expert witnesses themselves get together to exchange opinions, this could shorten the duration of the trial.

24.3.5 Tender of plans, diagrams, models and photographs

Again, these documents may not be used unless the requirements have been complied with relating to notice, inspection and admission – see Uniform Rule 36(10).

24.3.6 Other productions

Uniform Rule 35(12) allows a party to require the production of documents and tape recordings **referred to in pleadings or affidavits**, and Uniform Rule 35(14) provides that a party must, for **purposes of pleading**, make specified documents and tape recordings available for inspection when requested to do so and after appearance has been entered.

24.4 STEPS THAT MAY BE TAKEN ONLY AFTER THE CLOSE OF PLEADINGS

24.4.1 Request for further particulars for trial

Pete *et al* 277–279.

Note that the request for further particulars for trial, and the reply to it, does not form part of the pleadings that are exchanged. Also note that only particulars that are, strictly speaking, necessary to prepare for trial may be requested. This does not mean that the requesting party is entitled to know what evidence the other party is going to lead, but only which facts will be presented. The purpose of the request is to inform a party more fully about what the opponent intends to prove and to put him or her in a position to prepare for the trial and to prevent him or her from being taken by surprise by evidence given against him or her, which he or she could not reasonably anticipate would be produced (*Thompson v Barclays Bank DCO* 1965 1 SA 365 (W)).

Note the prescribed *dies induciae* for both the request and the reply. If a party fails to furnish the particulars timeously or sufficiently, the opposing party may approach the court for an order for their delivery, or for the dismissal of the action or the striking out of the defence. The court will then make an appropriate order.

24.4.2 The pre-trial conference

Study Pete *et al* 290–295.

The pre-trial conference is a very important step in trial preparation. However, it is only compulsory in the High Court (Uniform Rule 37). In the magistrates' court (rule 54) it may be ordered by the court or requested by a party.

Uniform Rule 37 contains numerous peremptory provisions that indicate that a serious effort is being made to achieve the purpose of shortening the trial. In fact, Rule 37(9)(a) provides that, at the trial, the court must consider whether a special order as to costs should not be made against a party, or his or her attorney, owing to failure to attend the conference, or because there has been substantial failure to promote the effective disposal of litigation. **Study Uniform Rule 37(4) to (7)** so that you are aware of the obligations with which the parties must comply before, during and after the pre-trial conference.

24.4.3 Discovery of documents and tape recordings

Study Pete *et al* 266–271 in broad terms, and read Uniform Rule 35 and magistrates' courts rule 23 intently. You need to know when discovery takes place; what has to be discovered; the consequences of failure to discover.

Save for the procedure created by Uniform Rule 35(14), discovery may not be requested until after the close of pleadings. The purpose of discovery is, as the name indicates, to ascertain from other parties to the action what documents and tape recordings are in existence that might be relevant to the action. This enables a party to prepare fully and properly for trial and prevents him or her from being taken by surprise. The party thus knows what documents are in existence that may help him or her establish his or her own case, or to break down the case of his or her adversary, or what documents may help an opponent, or weaken his or her own case. Discovery, therefore, helps the parties and the court to discover the truth and thus to reach a fair decision/judgment. It is, therefore, important to ensure that discovery is not abused by parties, so that its important role is not diminished.

Discovery is obtained by written notice addressed to any party to the action to make discovery under oath within 20 days of such request. Discovery relates to all documents and tape recordings relevant to any matter in dispute in the action. Discovery is made by disclosing the necessary information in an affidavit – known as a ''discovery affidavit''.

A party may validly object to the discovery of a document if he or she is able to claim privilege for its contents. Examples are communications made ''without prejudice'', documents that fall under legal professional privilege, incriminating documents and documents that affect the security of the state. Privilege is usually seen as a matter falling within the law of evidence, so see your study guide for the Law of Evidence.

Please note that, although the definition of "tape recording" in Uniform Rule 35(5) and magistrates' courts rule 23(16)' is wide enough to cover all types of material on which visual images, sound and other information may be stored, the precise position with regard to all electronically stored information is unclear. Today, most documents are digitally stored and are often never printed. This, of course, poses challenges, especially with regard to the interpretation of a ''document'' for purposes of discovery.

24.4.4 Inspection of documents and tape recordings

Once a party has received the discovery affidavit from an opponent, he or she will, of course, be anxious to discover precisely what the documents are, and what they contain. To achieve this, the party so discovering may be required in terms of Uniform Rule 35(6) and rule 23(6) to make available the documents disclosed (with the exception, of course, of those documents that the party discovering may validly object to disclosing) for inspection and copying. The party on whom the notice is served may choose the time and place of production.

24.4.5 Specifying documents and tape recordings to be used at trial

Read Pete *et al* 271–272.

24.4.6 Production of documents and tape recordings

Read Pete *et al* 272–273, and simply note the objective of the step.

24.5 SECURING THE NECESSARY EVIDENCE

24.5.1 Advice on evidence

On commencement of the preparation phase, it is advisable to request advice concerning evidence for the purposes of the trial from the advocate who will be appearing in the proceedings. Copies of all pleadings and other relevant documents are forwarded to the advocate. After considering them, the advocate will indicate whether the available evidence is adequate, how it must be proved at the trial, and which witnesses will be necessary. Usually, the advocate also indicates the chances of success in the action.

24.5.2 Ways in which evidence may be placed before the trial court

Study Pete *et al* 279–283; 287–290 in broad terms. The information below is sufficient for examination purposes.

(1) Unless special circumstances exist, a witness must give evidence *viva voce* (orally) and in open court (Uniform Rule 38(2) – there is no corresponding magistrates' courts rule, although the same principle applies).

If a person is within the Republic, such a person can be compelled to attend any High Court in the Republic by issuing a subpoena from the office of the Registrar and by having it served on the witness required, by the sheriff (Uniform Rule 38(1); rule 26(1)).

Note that, where a witness is required by a subpoena to make available at the trial a document, instrument or object that is in his or her possession, or is under his or her control, such a subpoena is termed a *subpoena duces tecum.*

A witness duly subpoenaed to appear in court and who fails to do so (or fails to remain present) may be arrested after the court authorises a writ for his or her arrest (s 35 of the Superior Courts Act, 2013). In the magistrates' court, a witness failing, without lawful excuse, to comply with a subpoena may be fined a prescribed amount and, in default of payment, face imprisonment for a period not exceeding three months (Magistrates' Courts Act 32 of 1944 s 51(2)(a)).

(2) If a witness cannot give evidence in person, and if the necessary circumstances are present, he or she may be allowed to give evidence in the following ways:

- on commission (commission *de bene esse*)

  You should know when a court will order this, in what way evidence is given, and in what way such evidence is placed before the trial court. Note that application must be made to the court for evidence to be given in this way, showing that it is convenient and in the interests of justice to obtain evidence in this manner.

- by way of interrogatories

  Interrogatories differ from commissions *de bene esse* in that, while in the latter case evidence is given generally, in the former case specific evidence only is taken, and for this purpose specific questions are formulated, which must be put to the witness by the commissioner. This method is used if a person resides outside the court's jurisdiction or is outside this area at that stage (s 40 of the Superior Courts Act, 2013; s 52 of the Magistrates' Courts Act 32 of 1944).

- by way of affidavit

  Study Uniform Rule 38(2) (no equivalent rule in the magistrates' courts rules) in broad outline so that you know when evidence will be taken down by way of affidavit, and when such practice will not be permitted. The court has a discretion to allow this, and factors such as the costs involved in bringing a witness from overseas, illness and the nature of the evidence to be presented are relevant for the court's consideration. The courts are reluctant to grant such leave, and are usually disposed to do so only when the evidence so required is of a formal nature.

ACTIVITY

(1) With reference to the set of facts at the beginning of the study unit, simply name the different steps that the plaintiff will have to take in preparation for his or her case.
(2) Briefly indicate when evidence may be taken down by way of affidavit, and when this will not be permitted.
(3) State the content of the list that a party must provide to the opposing party in terms of Uniform Rule 37(4).
(4) With reference to the given facts at the start of this study unit, set out which of the matters mentioned in Rule 37(6) must appear in a hypothetical set of minutes of a pre-trial conference.
(5) What are the consequences of failure to disclose in the magistrates' court?
(6) When is it necessary to submit to a medical examination in terms of magistrates' courts rule 24?
(7) Explain what the consequences are for a party who fails to comply with a request for further particulars for purposes of preparing for trial.

FEEDBACK

(1) The plaintiff will have to give notice of his intention to call expert witnesses and will also have to make summaries of their evidence available to the opposing party; notice will also have to be given of any plans, photographs, and so on, that will be used. (Remember, this was a collision and, in all likelihood, there will be a police plan and possibly even photographs of the scene of the accident.) The plaintiff will also request further details for trial purposes, will have to disclose documents, request inspection of the defendant's discovery and possibly also demand that the defendant specify documents that he is going to use in the trial. (Note that the steps will depend on the facts of the particular case and that not all the steps will necessarily be taken in every case.)
(2) The court will permit it if there is adequate reason. If the court believes that the opposing party has reason to want to cross-examine a witness, and the witness can be brought before court, evidence by way of affidavit will not be permitted.
(3) Uniform Rule 37(4) requires the list to indicate

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

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

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....
....
....
....

(5) In terms of rule 23(4), a document not disclosed may not be used for any purpose in the trial of the action by the party in whose possession or under whose control it is, without the court's leave on such terms as the court considers appropriate (e.g. relating

to adjournment and costs). However, the other party may call for and use such document in the cross-examination of a witness.

(6) A medical examination is relevant in the following instance: Any party to proceedings in which damages or compensation in respect of alleged bodily injury is claimed may require any party claiming such damages or compensation, whose state of health is relevant to the determination of such damages or compensation, to submit to an examination by one or more duly registered medical practitioners (rule 24(1)).

(7) A party who fails to deliver such particulars timeously or sufficiently, runs the risk of the opposing party applying to court for an order for their delivery or for the dismissal of the action or the striking out of the defence, as the case may be. The court may make such order as it deems fit (Uniform Rule 21(4); rule 16(4)).

STUDY UNIT

25

The trial and costs

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

OVERVIEW

25.1 CONDUCT OF THE TRIAL
25.2 RE-OPENING A CASE ALREADY CLOSED
25.3 JUDGMENT
25.4 COSTS
25.4.1 Attorney-and-client costs
25.4.2 Party-and-party costs
25.4.3 Costs *de bonis propriis*

LEARNING OUTCOMES

After studying this study unit, you should be able to

- describe the trial procedure
- discuss the principles that determine the granting or refusal of costs and apply them in practice
- distinguish between the different types of cost orders and identify the appropriate order in a given set of facts

COMPULSORY READING MATERIAL

Pete *et al Civil Procedure* 3ed (2017) 298–304; 307–309; 326–335

Uniform Rule 39; Magistrates' courts rule 29.

25.1 CONDUCT OF THE TRIAL

A reading knowledge of the compulsory reading material is sufficient.

The High Court and the magistrates' courts are of record, and a record must be kept of all evidence, arguments and judgments. This record of the court proceedings is usually mechanically recorded. However, the record is not transcribed unless the court so directs, or unless one of the parties requests a transcript.

25.2 RE-OPENING A CASE ALREADY CLOSED

Study Pete *et al* 304.

25.3 JUDGMENT

Study Pete *et al* 307–309.

No further comment is necessary, and the prescribed reading material is self-explanatory.

25.4 COSTS

We now return to the stage in the proceedings when the court has delivered its judgment on the main issues before it, and has to consider the question of costs.

A court has a wide discretion when awarding costs. That a party who loses a case will automatically be ordered to pay the winner's costs is by no means a foregone conclusion. Factors that play a role and are considered by the court are, for example, the conduct of the parties and any fact that may be relevant. The court is guided by the question as to what order regarding costs would be correct and equitable in the circumstances of a specific case.

The purpose of awarding costs to a successful litigant is to ''indemnify'' (compensate) him or her for the expenses actually incurred for having been unjustly compelled to initiate or defend litigation, as the case may be. An award of costs seldom, if ever, fully compensates a litigant for such expenses. The ''successful party'' is not necessarily the party in whose favour judgment is given, and, therefore, the court will attempt to determine which of the parties has been substantially successful (*Swanepoel v Van Heerden* 1928 AD 15). However, it is also possible that, in exercising its discretion, the court deprives the successful party of his or her costs wholly or partly, should grounds exist to justify such an order.

The most important types of cost orders are now discussed.

25.4.1 Attorney-and-client costs

Study Pete *et al* 330–331; 333–334.

A court will not lightly grant attorney-and-client costs. The most common ground on which a court will order a party to pay the other party's attorney-and-client costs is where the former party has been guilty of dishonesty or fraud in conducting the suit, or where his or her motives have been vexatious, reckless or malicious, or where he or she has seriously misconducted himself or herself in the course of the proceedings.

25.4.2 Party-and-party costs

Study Pete *et al* 332–333.

Party-and-party costs are those costs that have been incurred by a party to legal proceedings and which the court orders the other party to pay him or her. These differ from attorney-and-client costs, in that they do not include all the costs that the party to litigation may have incurred, but only such costs, charges and expenses as were incurred in the actual litigation and are allowed by the Taxing Master. Generally, costs incurred before the issue of summons are not considered to be party-and-party costs, for example, the cost of obtaining counsel's opinion as to a party's prospect of success in a contemplated action.

25.4.3 Costs *de bonis propriis*

Study Pete *et al* 335.

This cost order is relevant only where a person acts in a representative capacity. This is an exceptional order, and, unless there are very good reasons, it will not be given.

ACTIVITY

(1) Briefly discuss in what two important ways attorney-and-client costs and party-and-party costs differ from each other.
(2) Re-read the set of facts at the beginning of the study unit. Identify the type of order as to costs applicable in these circumstances. Explain briefly.

FEEDBACK

(1) Attorney-and-client costs arise out of the contractual relationship between client and attorney and are not at all related to possible litigation. Party-and-party costs, however, are those costs that a party incurs on taking legal steps, and are payable by an opposing party in terms of a court order. However, these costs are only estimated costs and expenses, while attorney-and-client costs comprise remuneration for all professional services and expenses flowing from the attorney's mandate, and are not statutorily fixed. Party-and-party costs are taxed by the Taxing Master in accordance with a fixed, prescribed scale, thus ensuring that only such charges and costs actually incurred in the course of litigation are allowed. Attorney-and-client costs are a form of punitive measure for improper behaviour.
(2) Attorney-and-client costs. The actions of X and his attorney point to misconduct: the intentional non-disclosure of documents and the obstruction of access to a witness are unacceptable behaviour in the conduct of a trial.

PART

4

Variation of judgments, review and appeal

STUDY UNIT

26

The variation or rescission of judgments

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

OVERVIEW

LEARNING OUTCOMES

After studying this study unit, you should be able to

- explain why there are rescission or variation procedures
- discuss the grounds for the rescission or variation of judgments
- explain the procedure for rescission or variation of judgments in the magistrates' courts and the High Courts respectively
- apply the contents of this study unit to solve problems

COMPULSORY READING MATERIAL

Pete *et al Civil Procedure* 3ed (2017) 310–320

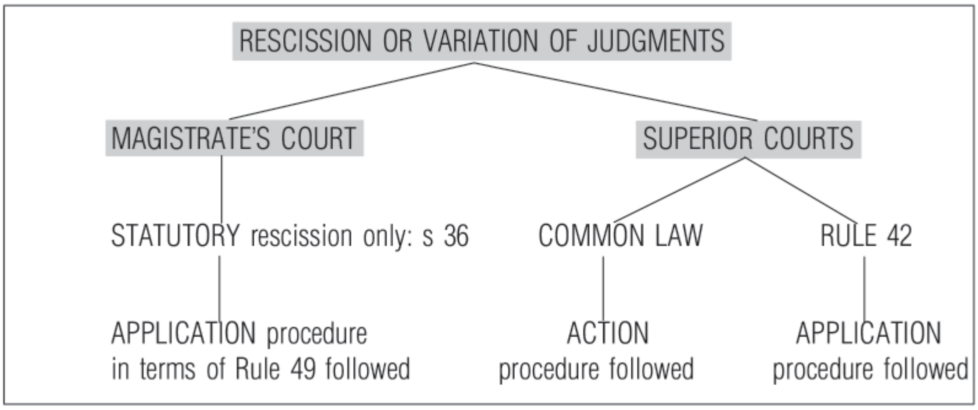
Uniform Rule 42; Magistrates' courts rule 49; Magistrates' Courts Act 32 of 1944 section 36.

26.1 INTRODUCTION

A court's judgment becomes final and unalterable by it under common law when the judgment is pronounced by the judicial officer. The judicial officer thereafter becomes *functus officio* (''having performed his or her office'': the court has exercised its jurisdiction fully and finally, and therefore, its authority over the matter has come to an end).

However, a judgment might on occasion not reflect the intentions of either of the parties to an action, or the judicial officer. To illustrate this, a judgment might be given in the absence of a party who is affected thereby; the judgment could be ambiguous; the judgment could contain a patent error; or the judgment could have been granted as a result of a common mistake. In such cases, a party to the action may request that the judgment be varied or set aside in terms of certain statutory provisions, or be set aside in terms of the common law.

The following is a schematic representation of this study unit:



26.2 THE RESCISSION OR VARIATION OF JUDGMENTS IN THE MAGISTRATES' COURT

Study Pete *et al* 315.

Judgments given by a magistrates' court may only be statutorily rescinded in terms of section 36. (The section is set out in full in Pete *et al* 315.)

Before commenting on section 36, you should note that decrees, orders and rules are also regarded as judgments in terms of the definition of a judgment. Also note the following:

(1) There are many instances in which a court may grant judgment in the absence of the defendant in terms of the provisions of subsection 36(1)(a). For example, judgment may be granted in the case of a failure to file appearance to defend (rule 12); the filing of consent to judgment (rule 11); failure to plead (rule 12(1)(b)); non-compliance with a court order regarding compliance with the rules of court (rule 60).

    The case of *De Allende v Baraldi t/a Embassy Drive Medical Centre* 2000 1 SA 390 (T) is instructive regarding section 36(1)(a). The court found that, if a practitioner represents a natural or artificial person who is a party to litigation, that person, even if he or she is not physically present in court, is not regarded as ''absent''. That is what is usually understood by legal representation. Therefore, when a judgment is granted against a litigant who is not physically present but who is represented at the proceedings by a practitioner, the court is not authorised in terms of section 36(1)(a) to thereafter vary or rescind the order for this reason.

(2) The provisions of subsections (b) and (c) are clear and require no further comment.

(3) To determine which judgments may, in terms of subsection (d), be rescinded or varied, one must first determine whether an appeal lies from such a judgment. The judgments affected by the subsection are those that do not have the effect of a final judgment.

26.3 THE RESCISSION OR VARIATION OF JUDGMENTS IN THE HIGH COURT

Study Pete *et al* 310–313 in broad outline only.

A judgment may be set aside in terms of the common law, or varied in terms of Rule 42 in the High Court.

The grounds upon which a judgment will be set aside in terms of the common law are the following:

- **Fraud:** a judgment procured by one of the parties cannot be allowed to stand. However, it must be shown that the successful party was a party to the fraud or perjury.
- **New documents:** if new documents come to light that, had they been available at the trial, would have entitled the party claiming relief to judgment in his or her favour, the judgment may be set aside in certain circumstances. For example: where judgment was given on a particular will, and a later will is discovered.
- **Error:** where fraudulent misrepresentation gives rise to such error.
- **Irregularities in procedure:** judgment given in the absence of a party (e.g. due to lack of service) may be set aside

Statutory provisions governing rescission and variation are contained in Uniform Rule 42. The provisions are clear and require no further comment.

26.4 THE PROCEDURE FOR THE RESCISSION OR VARIATION OF JUDGMENTS

In the **magistrates' courts,** a party wishing to have a judgment rescinded or varied must, in terms of rule 49, bring a substantive **application on notice** to the other parties. In addition to these provisions, rule 49 contains special provisions governing applications to set aside judgments. **Read** rule 49.

In the **High Court** the procedure to be followed differs, depending on whether setting aside in terms of the common law or variation in terms of Uniform Rule 42 is sought. The correct procedure to be followed when setting aside a judgment in terms of the **common law**, is by means of the **action procedure**. **Rule 42** specifically provides that, where variation of a judgment is sought in terms of this rule, the **application procedure** must be followed. The provisions of Uniform Rule 6, which govern the application procedure in general, must be complied with.

ACTIVITY

Re-read the set of facts at the beginning of this study unit, and then answer the following questions:

(1) What procedure must Thomas follow to set aside the judgment?
(2) Name the procedure to be followed when variation of judgment is sought in terms of Uniform Rule 42.
(3) Name the procedure to be followed when variation of judgment is sought in terms of the common law.

FEEDBACK

(1) Thomas must apply to court for rescission of the judgment in terms of rule 49.
(2) The application procedure must be followed.
(3) The action procedure must be followed.

STUDY UNIT

27

Review

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

OVERVIEW

27.1 THE MEANING OF THE TERM "REVIEW"
27.2 THE DISTINCTION BETWEEN APPEAL AND REVIEW
27.3 GROUNDS FOR REVIEW
27.3.1 Grounds for reviewing proceedings of lower courts
27.3.2 Grounds for reviewing proceedings of quasi-judicial bodies
27.4 PROCEDURE ON REVIEW
27.5 POWERS OF THE COURT ON REVIEW

LEARNING OUTCOMES

After studying this study unit, you should be able to

- explain the concept of ''review''
- distinguish between appeal and review
- discuss the grounds for review in the lower courts
- set out the grounds for reviewing the proceedings of quasi-judicial bodies
- discuss the procedure pertaining to review
- apply the contents of this study unit to solve problems
- discuss the powers of the courts on review

COMPULSORY READING MATERIAL

Uniform Rule 53; section 22(1) of the Superior Courts Act, 2013

Note: For purposes of this module, a thorough knowledge of the content of this study unit is deemed sufficient for examination purposes.

27.1 THE MEANING OF THE TERM "REVIEW"

The meaning of the term ''review'' was laid down as follows by Innes CJ in the leading case of *Johannesburg Consolidated Investment Company Ltd v Johannesburg Town Council* 1903 TS 111:

> In its ... most usual signification it denotes the process by which, apart from appeal, the proceedings of inferior Courts of Justice, both Civil and Criminal, are brought before this Court in respect of grave irregularities or illegalities occurring during the course of such proceedings ... . But there is a second species ... Whenever a public body has a duty imposed upon it by statute disregards important provisions of the statute, or is guilty of gross irregularity or clear illegality in the performance of the duty, this Court may ... review the proceedings complained of ... . Then ... the third signification ... . The Legislature has ... conferred ... a power of review (of certain statutory bodies).

The Promotion of Administrative Justice Act 3 of 2000 (PAJA) creates, as it were, a fourth situation where review may occur. This Act was passed to give effect to section 33 of the Constitution, 1996, which requires administrative actions to be lawful, reasonable and procedurally fair. Because ''administrative action'' refers to a decision taken or a failure to take a decision by (a) an organ of state, or (b) a natural or juristic person when exercising a public power or performing a public function in terms of an empowering provision that adversely affects a person's rights, review in terms of this Act falls outside the scope of this module. In this regard, you are referred to the course on Administrative Law, which you will encounter during your studies. Suffice it to point out that the grounds for review in terms of this Act are contained in section 6, and the procedure for review in section 7.

For purposes of this module, only the first two meanings will be discussed. As far as the third meaning is concerned, suffice it to state that, in addition to review under the common law, various statutes also make provision for the review of decisions taken by tribunals or officials. The provisions of these statutes vary and will not be dealt with here.

In general terms, it can be said that review is essentially concerned with the decision-making process (as opposed to the decision *per se*). Therefore, the question is whether the procedure followed is regular and valid.

27.2 THE DISTINCTION BETWEEN APPEAL AND REVIEW

Traditionally, appeal and review may be distinguished as follows:

(1) An appeal is aimed at the result of the trial, whereas a review is aimed at the method by which the result is obtained. This does not appear to be a very satisfactory distinction, because the ultimate aim of both forms of proceedings is to reverse the judgment of the court *a quo*. However, the distinction lies rather in the methods employed to achieve this end.

    In an appeal, the appellant accepts that the record correctly reflects the proceedings in the lower court (if he or she does not, and still wishes to appeal, he or she must have the record amended), and that the proceedings were conducted properly. He or she alleges, however, that the presiding officer made false deductions and findings of fact on the evidence (although acting perfectly properly), or that his or her legal conclusions were incorrect. The very object of a review is to show that the proceedings were improperly conducted, and it seeks to have the judgment set aside on these grounds without being concerned with the merits of the case.

(2) The second distinction (which is simply another facet of the first) is that, in the case of an appeal, the parties are restricted to the record of the proceedings and may not go beyond it, whereas in the case of a review, the parties may, by virtue of the nature of review, go beyond the record.
(3) The third distinction is that the rules governing civil appeals usually provide that an appeal must be noted within a stipulated number of days, and that the steps to prosecute it must be taken within a further limited period. In regard to reviews, however, there is generally no fixed period within which the proceedings must be brought, but this must be done within a ''reasonable time''. What is ''reasonable'' will depend upon the facts of each case. The reason for there being no fixed period is that an irregularity might come to light months or even years after the case has been tried.
(4) The final (and most obvious) distinction is that the procedure differs. An appeal must be noted and prosecuted according to statutory provisions, supplemented by the rules of court. Reviews, on the other hand, are brought on notice of motion.

27.3 GROUNDS FOR REVIEW

27.3.1 Grounds for reviewing the proceedings of lower courts

Section 21(1)(b) of the Superior Courts Act, 2013, authorises the divisions of the High Court to review the proceedings of lower courts, and section 22 of this Act lays down uniform grounds for reviewing the proceedings of any lower court. **Study** these carefully.

The following grounds for review are mentioned in section 22(1):

(a) absence of jurisdiction on the part of the court
(b) interest in the cause, bias, malice or corruption on the part of the presiding judicial officer
(c) gross irregularity in the proceedings
(d) the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence

The provisions of subsection (c) require some clarity. All the other grounds are clear and require no further comment.

The meaning of "gross irregularity"

The term ''gross irregularity'' refers not only to incidents in the courtroom, but also to any irregularity that prejudices any of the parties. To illustrate this, if a court makes a ruling against a party without giving him or her the opportunity to present his or her case, then this will lead to a gross irregularity in the proceedings. Similarly, if a court conducts an inspection *in loco* in the absence of the parties, the court's conduct will amount to a gross irregularity. A gross irregularity must be prejudicial before review proceedings will proceed.

27.3.2 Grounds for reviewing the proceedings of quasi-judicial bodies ("review in terms of the common law")

As was stated earlier, superior courts have inherent jurisdiction to entertain all causes arising within their areas of jurisdiction. If a statutory body (e.g. a liquor licensing board, which is not a court in the usual sense of the word) does not conduct its proceedings in a fair and reasonable manner, a superior court will have the inherent jurisdiction necessary to correct such shortcomings. This type of review is, therefore, often termed a ''review under the common law'', as opposed to a review of inferior court proceedings authorised by statute.

A superior court has jurisdiction to review the proceedings of any body or tribunal empowered to perform statutory duties, as well as to review the proceedings of quasi-judicial bodies.

27.4 PROCEDURE ON REVIEW

The procedure pertaining to review is set out in Uniform Rule 53. This Rule provides that motion proceedings must be used when the review of a decision of any inferior court or quasi-judicial body is sought. **Read** this Rule attentively.

27.5 POWERS OF THE COURT ON REVIEW

If review proceedings are successful, the High Court will set aside the decision or the proceedings that it has reviewed, and remit the matter to the particular body to decide in accordance with the correct procedure. However, the court will not substitute its own discretion for that of the body or official whose decision it has reviewed, unless there are exceptional circumstances (see *Roopsingh v Rural Licensing Board for Lower Tugela and Others* 1950 4 SA 248 (N)). It should also be noted that the court will not remit the matter to the particular body whose proceedings are reviewed, in the following circumstances:

- when the end result is clear and referring it back will merely waste time
- when a remittance will be futile
- when there are valid reasons why the court should exercise its discretion in favour of the applicant and substitute its own decision for that of the respondent

ACTIVITY

Re-read the set of facts at the beginning of this study unit, and then answer the following questions:

(1) Should Peter appeal against the judgment or take it on review in terms of the requirements of section 22 of the Superior Courts Act, 2013? Explain.
(2) Depending on your answer to (1) above, state the procedure that must be used.
(3) Name two instances when a court will interfere with a decision taken by a quasi-judicial body.

FEEDBACK

(1) In determining which procedure is appropriate, one should begin by enquiring what one's grounds of complaint are. Generally, if one complains about the reasoning employed by the court in coming to a decision, one will proceed by way of appeal. But if one complains about the process which led to the decision of the magistrate, one will proceed by way of review. From the facts, it seems that Peter should take the judgment on review in terms of section 22(1)(b) of the Superior Courts Act, 2012. Section 22(1)(b) provides that a court will interfere with the judgment where there is interest in the cause, bias, malice or corruption on the part of the presiding judicial officer. Peter should use the above review procedure, because the magistrates' comments display bias and/or malice.

(2) Motion proceedings must be used, because review of a decision of a magistrates' court is being sought.
(3) The court will interfere in the following instances:

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

STUDY UNIT 28

Appeals

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

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

OVERVIEW

LEARNING OUTCOMES

After studying this study unit, you should be able to

- explain what is meant by ''appeal''
- explain how one can appeal against a magistrates' court decision
- discuss appeals from decisions of superior courts
- discuss the effect of noting an appeal against judgments in the magistrates' courts and the higher courts respectively
- identify the various courts of appeal
- discuss procedure on appeal
- apply the contents of this study unit to solve problems

COMPULSORY READING MATERIAL

Pete *et al Civil Procedure* 3ed (2017) 362–365

Section 83 of the Magistrates' Courts Act 32 of 1944; rule 51 of the magistrates' courts rules. Section 16; 17 and 18 of the Superior Courts Act, 2013.

Note: For purposes of this module, a thorough knowledge of the content of this study unit is deemed sufficient for examination purposes. Read Pete *et al* for information purposes only as indicated.

28.1 INTRODUCTION

Before dealing with this topic in greater detail, a few preliminary points must be made.

A litigant who is not satisfied with the decision of a court of first instance may appeal against such decision to a higher court.

Note that, in respect of the decisions of magistrates' courts, an aggrieved litigant is allowed one appeal as of right. No appeal as of right is available to an aggrieved litigant in respect of decisions of the High Court, and leave to appeal from the court concerned (or failing that, leave from the Supreme Court of Appeal) must be obtained.

You should also note the meanings attached to the following phrases:

- "court of first instance" – the court before which a matter was first heard
- "court *a quo*" – the court against whose decision an appeal is noted
- "full court" – a court consisting of three judges of the relevant division

28.2 APPEALS FROM MAGISTRATES' COURT DECISION

28.2.1 When can an appeal be noted?

A party's right to appeal from a magistrates' court entails that leave to appeal need not be obtained. This right to appeal may, however, be excluded by a written agreement by the parties before the trial commences that the decision of the court will be final (s 82). In terms of section 83, the right of appeal accrues only to a party to a civil suit or proceeding, and this section also provides that appeals may be brought only against the following three types of decision:

(1) any judgment described in section 48
(2) any rule or order having the effect of a final judgment, including an order relating to execution in terms of Chapter IX of the Act and on an order as to costs
(3) in certain circumstances, any decision overruling an exception

The second type of decision requires further attention.

What is meant in section 83(b) by a rule or order "having the effect of a final judgment"? The leading case here is *Pretoria Garrison Institute v Danish Variety Products (Pty) Ltd* 1948 1 SA 839 (A), in which it was held that the test for determining whether a rule or order has this effect is whether it disposes of any issue, or any portion of any issue, in the main action, or irreparably anticipates or precludes some of the relief that would, or might, be given at the main hearing.

If the effect of a rule or order is final, this means that the matter has ended for one of the parties. Therefore, he or she can appeal against that order or rule. This differs from an interim order, in that the granting of an interim order does not mean that a party has lost the case. Thus the party may not appeal against a provisional or interim order.

Examples of orders that are final and definitive are the granting or refusal of a final interdict, the granting of a summary judgment, the upholding of a special plea that the court lacks jurisdiction, and the upholding of a defence of prescription. In *Makhetha v Libamba*1998 2 All SA 496 (W); 1998 4 SA 143 (W), it was held that the granting of provisional sentence in a manner that would render it pointless to go into the principal case, had the effect that the provisional sentence order was final in effect and accordingly appealable.

Examples of orders that are interlocutory with no final effect are: a refusal to grant absolution from the instance at the end of the plaintiff's case, or an order for (or refusal to order) further particulars.

28.2.2 The effect of noting an appeal

The noting of an appeal automatically suspends execution of the judgment, pending the outcome of the appeal. Upon application, however, the court may order that the judgment be put into effect (see, generally, s 78 of the Magistrates' Courts Act). Therefore, the onus rests on the successful party who is now seeking to execute, to approach the court for an order allowing execution despite the noting of an appeal.

28.2.3 The court hearing the appeal

In terms of section 83, a party may appeal to the "provincial or local division" of the High Court having jurisdiction to hear the appeal. However, the Superior Courts Act, 2013 no longer makes this distinction, and reference is made to a "Division" only. The Act further distinguishes between a "local seat" and a "main seat" of a Division, where this is applicable.

28.2.4 The procedure on appeal

An appeal may be noted either by an appellant in person or by his or her duly authorised legal representative. The appeal procedure can be divided into two phases: the first is governed by rule 51 and refers to the procedure in the magistrates' court, while the second is governed by Uniform Rule 50 and refers to the procedure in the High Court.

The procedural steps to be taken in an appeal from a magistrates' court decision consist of (a) the appellant in writing requesting the judicial officer against whose judgment he or she wishes to appeal, reasons for the judgment; (b) the noting of an appeal, in which is stated whether the judgment as a whole, or only part of the judgment or order is being appealed against (if in part, which part), as well as the grounds of appeal, specifying the findings of fact or rulings of law appealed against; (c) the delivery of the reasons for judgment from the judicial officer; and (d) the prosecution of the appeal, starting with a setdown for hearing.

28.3 APPEALS IN SUPERIOR COURTS

28.3.1 General

There is no right of appeal against a decision of a High Court, and leave to appeal is required each time, either from the court that gave the judgment, or from the Supreme Court of Appeal.

It is important to note that leave to appeal will only be given if the judge(s) concerned is/are of the opinion that

- the appeal would have a reasonable prospect of success, or that there is some compelling reason why the appeal should be heard
- it cannot be said that the issues are of such a nature that the decision will have no practical effect or result, and
- the appeal would lead to a just and prompt resolution of the real issues between the parties (s 17(1)).

28.3.2 Appeals from High Courts

Section 16 of the Superior Courts Act, 2013 refers to an appeal against "any decision", whereas its predecessor (s 20 of the Superior Courts Act of 1959) referred to "a judgment or order". The latter terminology was considered by the courts on various occasions, and the current terminology makes it clear that what is referred to, is the decisive answer given by a court in connection with the relief claimed by a party in litigation (see *Holland v Deysel* 1970 1 SA 90 (A) 92–93).

28.3.2.1 The effect of noting an appeal

Section 18(1) provides that unless there are exceptional circumstances, the "operation and execution" of a decision is suspended pending the decision of the application for leave to appeal or the appeal. In addition to proving exceptional circumstances, the party approaching the court to order otherwise, must prove that he or she will suffer irreparable harm if the court does not order otherwise (while the other party will not) (s 18(3)).

28.3.2.2 Courts hearing the appeal

A court of first instance is usually constituted before a single judge, and a full court hearing an appeal against the judgment of a single judge comprises three judges (s 1 of the Superior Courts Act, 2013). No judge whose judgment is appealed against may sit at a hearing of such an appeal (s 14(8)).

An appeal lies upon leave being granted in the following instances:

- *against a decision of a Division as a court of first instance*
  - if the court consisted of a single judge, the appeal lies either to the full court of that Division, or to the Supreme Court of Appeal (s 16(1)(a)(i)).
  - If the court consisted of more than one judge, the appeal lies to the Supreme Court of Appeal (s 16(1)(a)(ii)).

  Leave to appeal may be granted by the judge(s) against whose decision is being appealed (s 17(2)(a)), or if refused, by the Supreme Court of Appeal on application (s 17(2)(b)).

If the leave to appeal is granted against a decision of a single judge sitting as a court of first instance, the judge(s) granting such leave must direct that the appeal be heard by a full court of that Division (s 17(6)), unless the decision (a) involves a question of law of such importance that it requires a decision by the Supreme Court of Appeal, or (b) that the administration of justice requires the Supreme Court of Appeal to consider it (s 17(6)(i)–(ii)).

- *against a decision of a Division as court of appeal*

  The appeal lies to the Supreme Court of Appeal upon special leave to appeal granted by the Supreme Court of Appeal (s 16(1)(b)).

- *against a decision of a court of a status similar to that of the High Court*

  The appeal lies to the Supreme Court of Appeal upon leave to appeal granted by that court of by the Supreme Court of Appeal (s 16(1)(c)).

Should a Division have one or more *local* seats, the main seat of that Division has concurrent appeal jurisdiction over the area of jurisdiction of any such local seat, and the Judge President of the Division may direct that an appeal against a decision of a single judge or of a magistrates' court within that area of jurisdiction may be heard at the main seat of the Division (s 6(4)(a)).

28.3.2.3 Procedure on appeal

28.3.2.4 Procedure on appeal to full court

Read Pete *et al* 362–363 in broad outline.

28.3.2.5 The procedure on appeal to the Supreme Court of Appeal

Read Pete *et al* 363–365 in broad outline.

28.3.3 Position of the Supreme Court of Appeal

Section 168 of the Constitution, 1996 provides that this court may decide appeals in any matter arising from the High Court of South Africa, or from a court of a status similar to that of the High Court. Appeals in respect of labour and competition matters are expressly *excluded* in this regard. Section 168(3)(b) makes it clear that this court may decide the following only: appeals, issues connected with appeals and matters referred to it in terms of an Act of Parliament.

Should the Supreme Court of Appeal make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, such an order of constitutional invalidity will have no force unless it is confirmed by the Constitutional Court (s 172(2)(a) of the Constitution, 1996).

28.3.4 The position of the Constitutional Court

As the highest court of the Republic, the Constitutional Court may decide not only constitutional matters, but also any other matter, *provided* it grants leave to appeal on the grounds that "the matter raises an arguable point of law of general public importance which ought to be considered" by the Court. At this point the precise meaning of this phrase is unclear, but it will no doubt in due course be clarified by the Constitutional Court.

This Court also makes the final decision whether a matter is within its jurisdiction (s 167(3) of the Constitution, 1996). When it is in the interests of justice, *and* the Constitutional Court has given leave, a person may bring a matter *directly* to the Court, or appeal directly to the Court from any other court (s 167(6)).

ACTIVITY

Go back and read through the second set of facts at the beginning of this study unit, and then answer the following questions:

(1) What procedure must Fanie follow to apply to appeal to the Supreme Court of Appeal?
(2) If leave to appeal is granted, what is the next step that Fanie must take?
(3) What essential information must be included in a notice of appeal?
(4) What is meant by the term “heads of argument”?
(5) Suppose that Fanie is unsuccessful in his appeal. Can he now apply to the Constitutional Court?

FEEDBACK

(1) An application for leave to appeal must be lodged in triplicate with the Registrar of the Supreme Court of Appeal within the time limits prescribed by the law.
(2) A notice of appeal must be lodged with the Registrar of the Supreme Court of Appeal and with the Registrar of the court *a quo* within one month after the date of the granting of leave to appeal.
(3) The notice of appeal must state what part of the judgment or order is appealed against and state the particular respect in which the variation of the judgment or order is sought.
(4) The “heads of arguments” comprise the main points to be made in counsel’s address to court as well as a list of the authorities to be quoted in support of each point. The heads of argument will also define the form of order sought from the Court.
(5) Only if the matter raises an arguable point of law of general public importance, which ought to be considered by the Constitutional Court, *and* if the Constitutional Court grants leave to appeal (see section 167(3) of the Constitution, 1996). Purely on the given facts the answer is probably “no”.