

Civil Litigation

Edition 4

CIVIL LITIGATION

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INTRODUCTION

Nature and scope of civil procedure

The law gives a citizen certain rights and remedies. If one of these rights is infringed, the aggrieved citizen can enforce his rights through the court system. The rules of civil procedure are concerned with the manner in which an aggrieved party may bring his case before the appropriate court for an authoritative decision that is enforced by the state.

In a matter involving a dispute, the first issue to be determined is whether the aggrieved party has a right and if so, whether that right has been infringed. If a right has been infringed then it follows that the injured party does have a remedy because there is a general rule that where there is a right there is a remedy (*ubi ius ibi remedium*).

The next step would be to determine which court is competent to grant the remedy. This involves the issue of jurisdiction. By jurisdiction is basically meant the competency of a court to hear an issue and give an authoritative decision. The issue of jurisdiction is addressed before commencement of proceedings and the selection of a competent court in turn influences the nature and conduct of proceedings.

The major courts with civil jurisdiction in South Africa are the following:

- the Supreme Court of Appeal;
 - the High Courts; and
- the magistrates' courts, consisting of the
- district magistrates courts, and
 - regional magistrates courts (of which there are 62 throughout South Africa).



The conduct of proceedings in each court is different, although there are similarities in many respects between the High Court and the magistrate's court procedure. As of the 15th of October 2010 the Magistrates Court procedures were amended to bring the procedures in line with the High Court procedures.

Sources

Most of our law of procedure has been introduced by legislation and is based on the English system of procedure, although some High Court Rules are based on common law, for example, the rules relating to provisional sentence. In the main, the rules regulating High Court procedure are to be found in the Supreme Court Act 59 of 1959 and the Rules of Court. The source of procedural rules relating to the magistrates' courts, on the other hand, is the statute responsible for their establishment, namely the Magistrates' Courts Act 32 of 1944 and the Rules promulgated in terms thereof.

Rules of court

The purpose of the rules of court is to allow litigants to address the issues in dispute between them as expeditiously and inexpensively as possible and at the same time ensure that the courts dispense justice uniformly and fairly.



The rules applicable to magistrate's courts were originally devised by the Rules Board established under the Magistrates' Courts Act, but are now also regulated by the Rules Board for Courts of Law.

Due to the amendment of the rules of court on the 15th of October 2010, those matters in which action was commenced prior to 15 October 2010 are still governed by the rules of the Magistrates Court that were applicable prior to 15 October 2010.

Causes of action

A party must have a legally recognised right which has been infringed before legal proceedings can be embarked on in order to enforce that right. In litigation this is commonly known as a 'cause of action'. In other words, a party must have a legally recognised cause or reason for the action he wishes to take.

The following are causes of action which frequently arise in practice:

- goods sold and delivered;
- work done and materials supplied;
- professional services rendered;
- professional services rendered and disbursements made;
- money lent and advanced;
- dishonoured cheques;
- acknowledgements of debt;
- motor collisions;
- overpayment; and
- instalment sale agreement.

EXAMPLE

Mr and Mrs X contract with Pleasure Pools for the construction of a swimming pool. Pleasure Pools complete the job and submit their account to Mr and Mrs X for payment. Mr and Mrs X fail to settle the account and despite various demands persist in their non-payment. Pleasure Pools decide to institute legal action. Their cause of action will be work done and materials supplied.

Jurisdiction

Once it has been ascertained that a party has a cause of action, it must be established in which court to institute the claim. Various factors play a role in a client's decision whether to sue in the magistrate's court (district or regional) or the High Court. The following factors are important considerations in deciding in which court to institute action:

- whether the magistrate's court (district or regional) has jurisdiction to hear the matter;
- costs;
- speed and urgency;
- convenience;
- complexity of the matter;
- importance of the case to the client; and
- quality of the justice dispensed.

The magistrate's court



Sections 46 and 29 of the Magistrates' Courts Act 32 of 1944 set the boundaries of jurisdiction of the district and regional magistrate's courts with regard to causes of action in respect of their value and their nature (see Annexure A).

Matters beyond jurisdiction: section 46

In terms of section 46, certain matters are beyond the jurisdiction of the magistrates' courts, regardless of the amount or value of the claim. Magistrates' courts do not have jurisdiction to hear the following types of cases (please study section 46 in Annexure A for a full description):

- matters in which the validity or interpretation of a will or other testamentary document are in question;
- matters in which the status of a person with respect to mental capacity are sought to be affected;
- matters in which the plaintiff seeks specific performance without an alternative of payment of damages, except in:
 - the rendering of an account in respect of which the claim does not at present exceed *;
 - the delivery or transfer of property, movable or immovable, at present not exceeding *;
 - the delivery or transfer of property, movable or immovable, where the consent of the parties has been obtained in terms of section 45; and
- matters in which a decree of perpetual silence are sought.

Therefore, these cases will have to be instituted in a High Court.

Jurisdiction in respect of causes of action: section 29

Once you have determined that the type of case is *not* beyond the jurisdiction of the magistrate's court in general, you will establish whether the magistrate's court has jurisdiction in terms of section 29. Section 29 deals with the cause of action and the value of the claim.

Causes of action, which are within the jurisdiction of the magistrate's court in terms of section 29, are (please read and study section 29 in Annexure A for a full description):

- actions in which is claimed the delivery or transfer of any property (movable or immovable) not exceeding * in value;
- actions for ejection against the occupier of any premises or land within the district or regional division, provided that, where the right against the occupier of any premises or land is in dispute between the parties, such right does not exceed * in clear value to the occupier;
- actions to determine a right of way (the 'value' of such right is not relevant);
- actions on or arising out of a liquid document or a mortgage bond, where the claim does not exceed *;
- actions on or arising out of any credit agreement, as defined in section 1 of the National Credit Act 2005;

- actions in terms of section 16(1) of the Matrimonial Property Act 1984, where the claim or the value of the property in dispute does not exceed*;
- actions including an application for liquidation, in terms of the Close Corporations Act, 1984;
- actions other than those already mentioned where the claim or the value of the matter in dispute does not exceed *.
- regional magistrates courts have jurisdiction to hear matters relating to the nullity of a marriage or a civil union and divorce matters between persons and to hear matters provided for in terms of the Recognition of Customary Marriages Act 1998.

* Not exceeding:

R 100 000 in the district courts.

R100 000 – R300 000 in the regional courts.

Abandonment of a portion of a claim: section 38

A plaintiff may abandon part of his claim in order to bring it within the jurisdiction of the magistrate's court (or regional court) with regard to value.

This will extinguish that part of the claim that is abandoned. If the plaintiff only proves part of his claim, then the abandonment takes effect upon that part of the claim that is not upheld.

EXAMPLE

The plaintiff claims	R 308 000 –	for work done
Less	<u>R 5 000 –</u>	<i>paid</i>
	R303 000 –	
Less	<u>R 3 000 –</u>	abandoned
	R300 000 –	limit of jurisdiction

If only an amount of R307 000 was proved and R5 000 paid, the R1 000 which was not proved must be deducted from the abandoned portion and judgment must be given for R300 000.



It may be advisable to abandon part of your claim in the following circumstances:

- if there is a small excess over the normal limit;
- if the case may take a long time and cost a great deal if heard in the High Court;
- if the claim is for damages and the plaintiff is uncertain whether the amount claimed is correct; and
- if there is a claim and a counter claim, as in the case of a motor collision, and there is a strong possibility that there may be an apportionment of damages.

Deduction of an admitted debt: section 39

A plaintiff, if he is indebted to the defendant in any amount, may admit his debt in his summons, or at any time thereafter, and deduct this amount from his claim.

The effect is that the plaintiff will be awarded the amount proved in court, less the amount admitted to as due to the defendant.

Consent to jurisdiction: section 45

Section 45 provides that the magistrate's court will have jurisdiction if the parties give their written consent thereto. (See section 45 in Annexure A.) It is also presumed that parties will be able to consent to the regional court in terms of section 45.

However, the court in which the matter is to be heard must have jurisdiction in terms of section 28. In other words, the defendant must reside, carry on business or be employed within the district concerned, unless the party's consent is given specifically with reference to particular proceedings already instituted or about to be instituted in such court.

EXAMPLE

Should a dispute arise in a mortgage bond of R 350 000, the parties consent to the jurisdiction of the magistrate's court.



A party cannot, prior to any dispute, consent to the jurisdiction of a particular magistrate's court, and parties cannot consent to the jurisdiction of the magistrate's court in a matter which is excluded in terms of section 46. For example, a person cannot consent to the jurisdiction of the Wynberg Magistrate's Court, but may consent to the jurisdiction of the magistrate's court. A person also cannot consent to the magistrate's court hearing a matter involving the validity of a will, as this is expressly excluded by section 46.

Jurisdiction in respect of persons: section 28

Each magistrate's court has jurisdiction over a limited geographical area. The plaintiff must institute proceedings in the particular magistrate's court that has jurisdiction over the defendant.

Section 28 deals with the jurisdiction of the magistrate's court in respect of persons and should be used to decide in which particular magistrate's court to institute action once it has been established that the magistrate's court generally has jurisdiction to hear the matter (see Annexure A).

The persons in respect of whom a court shall have jurisdiction are *inter alia* the following (please read and study section 28 in Annexure A for a full description):



The 'persons' referred to above must be the defendant. Also note that the word "person" refers to natural persons and juristic persons (such as close corporations and companies) and includes the State. A magistrate's court will not have jurisdiction based on where the plaintiff resides or works.

- any person (the defendant) who resides, carries on business or is employed within the district or regional division;
- any partnership (the defendant) which has business premises situated or any member whereof resides within the district or regional division;

- any person (the defendant), whether or not he resides, carries on business or is employed within the district or regional division, if the cause of action arose wholly within the district or regional division.



The words 'the whole cause of action arose within the district or region' mean that every material fact which the plaintiff has to prove at the hearing of the case in order to succeed, must have taken place within the district or region.

Where the plaintiff relies on this ground of jurisdiction, the summons must contain an averment that the whole cause of action arose within the district or region of the court, and set out the particulars in support thereof.

EXAMPLE

If the cause of action is based on a contract of sale, then the contract must have been concluded, the goods must have been delivered and the payment must have taken place within the district.

Any person (the defendant) who owns immovable property within the district or regional division in actions with respect to such property, or mortgage bonds on such property.



Where the plaintiff relies on this ground of jurisdiction, the summons must contain an averment that the property concerned is situated within the district or region of the court.

- For the purposes of actions relating to the nullity of a marriage or civil union or a divorce a regional court shall have jurisdiction if both or either of the parties is domiciled in the area of jurisdiction of the court on the date on which proceedings are instituted; or ordinarily resident in the area of jurisdiction of the court and has or have been ordinarily resident in the Republic for a period of not less than one year immediately prior to that date.



The decision as to whether to institute proceedings in the High Court, magistrate's or regional court is usually determined by the value or the nature of the claim. More than one court may have jurisdiction. In such cases, the plaintiff may choose whichever court is most convenient and take into consideration the other factors listed above. In some cases a special superior or lower court will have jurisdiction.

Parties to litigation

The usual action procedure involves a plaintiff and defendant (or plaintiffs and defendants). This basic principle has been extended to include other persons as parties to an action. The rules make provision for the joinder of a person as plaintiff or defendant, the intervention of a person as a plaintiff or defendant and the substitution of parties.

Capacity to litigate

The capacity to participate in legal proceedings is described by the phrase *locus standi in iudicio* and can be summarised as the right to sue or be sued. A minor under 7 years old has no *locus standi in iudicio* and the proceedings should be brought by or against his guardian, in his capacity as such. If a minor is between 7 years and 18 years, the guardian must assist.

Legal representation

Every natural person who is a party to legal proceedings is entitled to represent himself in person before a court. It is common practice, however, for a party to litigation to appoint an attorney to act as his or her representative for the purposes of conducting the suit.

Generally only an attorney who has been granted the right of appearance in the High Court in terms of section 4(2) of the Right of Appearance in Courts Act 62 of 1995 or a duly appointed advocate has the right to appear on behalf of a litigant before the High Court. An advocate may only appear on behalf of a litigant in a civil matter where he has been instructed by an attorney or requested by the court to appear *amicus curiae* or allowed to appear *pro amico*.

Adequate notice

It is a cardinal rule of South African civil procedural law that the opposite party be given adequate notice of process and proceedings and should be afforded an opportunity to present its own side of the matter. The well-known Latin maxim *audi alteram partem* refers to this rule of natural justice.

EXAMPLE

Service of a summons by the Sheriff on the defendant not only commences proceedings, but also gives notice to this effect to the defendant. If the defendant decides to contest the matter, all further pleadings and notices in the case must be served on either the party or his agents, that is, his attorneys.

The manner in which a summons is served is regulated. Every summons must also stipulate the prescribed period (known as the *dies induciae*) within which the defendant must answer the claim stated in the summons. Judgment by default may be granted against a defendant only after the time has expired within which he was permitted to deliver his notice of intention to defend the action but has failed to do so.

Not only must adequate notice of the commencement of proceedings be given to the defendant, adequate notice of the nature of an opponent's case must be given so that the party concerned may prepare adequately to meet it and not be taken by surprise at the trial. This is achieved by the exchange of pleadings.

Other procedural mechanisms, for example, medical examinations, inspections *in loco* and the discovery and inspection of documents, also serve to enforce this principle.

The rule of adequate notice applies equally to action proceedings as to application proceedings. For a distinction between the two see the next chapter.

CIVIL PROCEEDINGS IN THE MAGISTRATES' COURTS

Pre-trial procedure

Letter of demand (see Annexure B for an example)

It is not always a legal requirement to send a letter of demand before issuing a summons. However, it is normal practice for a registered letter of demand to be sent to the debtor before summons is issued.

A letter of demand is necessary in the following circumstances:

- To place the debtor *in mora* (in default). In many cases a party to a contract has to perform on or before a certain date fixed for performance.
-

EXAMPLE

The lessee of premises may neglect to pay the rent by the date stipulated in the contract. It is said that the debtor is *in mora* in respect of the obligation in question.

However, it sometimes happens that no definite time for performance is agreed upon. In these circumstances the debtor does not fall into *mora* if he fails to perform immediately or within a reasonable time. It is only once the creditor has demanded performance within a specified time and the debtor has failed to perform within that time, that he is regarded as being *in mora*. Once the debtor has been placed *in mora* interest on the outstanding amount will begin to run from the date of *mora*.

- To give a right of cancellation of an oral or written agreement where no cancellation right has been included in the agreement. The demand must request payment or performance of the obligation within a reasonable period of time. The notice must also state that if performance is not effected within the stated period, the agreement will be cancelled and legal proceedings taken. If the obligation is not performed then the agreement must be cancelled either by another letter or by a clause in the summons.
 - To complete the plaintiff's cause of action.
-

EXAMPLE

An acknowledgement of debt payable on demand. It will be necessary for the person in possession of the acknowledgement of debt to demand payment before action may be instituted.

The same principle applies to notice in terms of the National Credit Act, in terms of section 129. Failure to issue a section 129 letter of demand under the National Credit Act has become a defence to prevent further legal proceedings.

Although the plaintiff may have a complete cause of action it is advisable to send a letter of demand to the debtor before issuing summons. If no letter is sent and the debtor pays the amount claimed in the summons, the plaintiff is not entitled to the costs of the summons.

The letter of demand must contain particulars about the nature and amount of the claim. A letter of demand should therefore set out the following:

- the amount owing;
- particulars of the nature of the claim;
- the date by which payment is due; and
- the fees and costs prescribed in the rules for a registered letter of demand (in the event of the creditor wishing to recover those costs from the debtor).

Where the original cause of action is a credit agreement in terms of the National Credit Act, the letter of demand must allege that the legal requirements of sections 129 and 130 of the National Credit Act have been complied with and must deal with each one of the relevant provisions of the sections.

The summons

An action procedure is commenced by summons, either by means of a simple or combined summons.

You must try to identify the various parts to the summons listed below. Rule 5 sets out the following requirements for a summons:

Every person making a claim against any other person may, through the office of the registrar or clerk of the court, sue out a simple summons or a combined summons addressed to the sheriff directing the sheriff to inform the defendant among other things that, if the defendant disputes the claim and wishes to defend, the defendant shall:

- within the time stated in the summons, give notice of intention of defend; and
- if the summons is a combined summons, within 20 days after giving such notice, deliver a plea (with or without a claim in reconvention), or an exception, or an application to strike out.

Where the claim is for a debt or liquidated demand the summon may be a simple summons similar to the form prescribed (see Annexure C).

EXAMPLE

- a claim for the payment of the purchase price with regard to goods purchased and delivered;
- a claim for eviction of a person from specific property;
- a claim for delivery, for example, of a specific movable asset; and
- a claim for the registration of transfer of an immovable asset.

Where the claim is not for a debt or liquidated demand the summons shall be a combined summons similar to the form prescribed (see Annexure D). A pleading referred to as the plaintiff's particular of claim must be attached to the combined summons (see Annexure E). This is a statement of the material facts relied upon by the plaintiff in support of his claim. It must comply with the rules on pleadings generally.

EXAMPLE

- a claim for damages arising from a motor vehicle accident;
- a divorce action.

Every summons must be signed by the attorney acting for the plaintiff and must give the attorney's physical address, within 15 kilometres of the courthouse, the attorney's postal address and, where available, the attorney's facsimile address and electronic mail address.

If no attorney is acting for the plaintiff, the summons must be signed by the plaintiff, who must in addition give a physical address within 15 kilometres of the courthouse at which plaintiff will accept service of all subsequent documents and notices in the suit, the plaintiff's postal address and, where available, plaintiff's facsimile address and electronic mail address.

The summons must be signed and issued by the registrar or clerk of the court and give the date of issue by the registrar or clerk, as well as the case number allocated to the summons.

The plaintiff may indicate in a summons whether he or she is prepared to accept service of all subsequent documents and notices through any manner other than the physical address or postal address. If so the plaintiff must state the preferred manner of service.

Every summons must set out:

- the surname and first names or initials of the defendant by which the defendant is known to the plaintiff, the defendant's residence or place of business and, where known, the defendant's occupation and employment address and, if the defendant is sued in any representative capacity, such capacity; and
- the full names, gender (if the plaintiff is a natural person) and occupation and the residence or place of business of the plaintiff, and if the plaintiff sues in a representative capacity, such capacity

Every summons must include:

- a form of consent to judgement;
- a form of appearance to defend;
- a notice drawing the defendant's attention to the provisions of section 109 of the Act; and
- a notice in which the defendant's attention is directed to the provisions of sections 57, 58, 65A and 65D of the Act in cases where the action is based on a debt referred to in section 55 of the Act (namely, a liquidated sum of money due).

A summons must also show any abandonment of part of the claim under section 38 of the Act and any set-off under section 39 of the Act.

Where the plaintiff issues a simple summons in respect of a claim regulated by legislation, the summons may contain a bare allegation of compliance with the legislation. However the declaration, if any, must allege full particulars of such compliance:

Where the original cause of action is a credit agreement under the National Credit Act 2005, the summons must deal with each of the relevant provisions of sections 129 and 130 of the National Credit Act, and allege that each one has been complied with.

A summons in which an order is sought to declare executable immovable property which is the home of the defendant must contain a notice in the following form:

"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 eviction will infringe that right it is incumbent on the defendant to place information supporting the claim before the court.” In terms of Rule 6, every pleading must contain a clear and concise statement of the material facts upon which the pleader relies for his or her claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto.

If a party fails to comply with any of the prescribed provisions, the summons will be deemed to be an irregular step. The opposite party will be entitled to within ten days of becoming aware of the irregularity, give written notice to the other party to remove the cause of complaint within ten days. If the irregularity is not removed within this period, the aggrieved party may within fifteen days apply to court to set aside such step or proceeding. However, a party is not entitled to bring such application if he has already taken a further step in the cause. The court has a discretion to set aside, in whole or in part, the irregular or improper pleading or proceeding; to grant leave to amend in order to remove the irregularity or to make any other suitable order. A party against whom such an order is made may not take any further step in the cause until he has complied with the court order.

Service of legal process

The Rules provide (Rule 8) that the process of the court shall be served through the Sheriff, who shall issue what is commonly known as a 'return of service' (see Annexure R) setting out either that:

- service has been duly effected, and the date and manner of service; or
- he was unable to effect service, the reasons why and date of attempted service.

The sheriff can call upon the South African Police Services to assist. Service is to take place as soon as reasonably possible.

The plaintiff must deliver to the sheriff the original document plus as many certified copies as there are persons to be served with the summons or other document.

In accordance with Rule 9 no legal process may be served on a Sunday or public holiday. This rule also sets out the manner in which the sheriff may effect service, as follows:

- to the said person personally or to his duly authorised agent;
- at his residence or place of business to some person apparently not less than 16 years of age and apparently residing or employed there;
- at his place of employment to some person apparently not less than 16 years of age and apparently in authority over him, or in the absence of such person, to a person apparently not less than 16 years of age and apparently in charge at his place of employment;
- if the person to be served has chosen a *domicilium citandi* (a *domicilium citandi* is the place chosen by a person where judicial processes may be served on him), by delivering or leaving a copy thereof at the *domicilium* so chosen;
- in the case of a corporation or company, by delivering a copy to a responsible employee thereof at its registered office or its principal place of business within the court's jurisdiction, or if there is no such employee willing to accept service, by affixing a copy to the main door of such office or place of business, or in any manner provided by law;

- if the plaintiff or his authorised agent has given written instructions to the sheriff to serve by registered post, the process may be so served. Provided that a debt counsellor who makes a referral to court in terms of section 86(7) (c) or 86(8) (b) of the National Credit Act may cause the referral to be served by registered post or by hand.
- to any agent or attorney who is duly authorised in writing to accept service on behalf of the person upon whom service is to be effected in any applicable manner prescribed in this rule.
- in the case of a Minister in his official capacity, the State or provincial administration, at the Office of the State Attorney in Pretoria, or a branch of that Office which serves the area of jurisdiction of the court from which the process has been issued; and
- where the person to be served keeps his residence or place of business closed and thus prevents the sheriff from serving process, it is sufficient for the sheriff to affix a copy to the outer or principal door or security gate of such residence or place of business. He may also place a copy in the post box at the residence or place of business;
- where a local authority or statutory body is to be served, on the town clerk or assistant town clerk or mayor of such local authority or the secretary or similar officer or member of the board or committee of such body, or in any manner provided by law.
- where the person to be served with any document initiating application proceedings is already represented by an attorney of record such document may be served upon such attorney by the party initiating proceedings.

The sheriff must serve all process by which an action or an application is initiated. All other documents are served by the parties themselves or where they are represented by attorneys, by the attorneys.

Edictal citation and substituted service

If service by the Sheriff cannot be effected in any of the ways prescribed by the rules, for example because the person on whom service must be effected evades service or cannot be traced, the court must be approached for further directions as to how service must be effected. One of the means of service the court may prescribe is substituted service (see Annexure Q), for example, by means of a notice in a newspaper. An application for leave to sue by way of edictal citation is utilised where the process is served upon a person outside the Republic.

Judgement by consent

Except for actions relating to the nullity of a marriage or divorce actions, a defendant may consent to judgment by signing the form of consent endorsed on the summons and lodging it with the registrar or the clerk of the court, or by lodging a consent similar to that on the summons but having been witnessed by two persons whose name, address and telephone number are stated .

Where the claim is a liquidated one, the clerk of the court is competent to grant the judgment. Where the claim is an unliquidated one, the request for judgment has to be referred to the court and the plaintiff will have to lead evidence, orally or by affidavit, to prove the actual amount of his claim.

Security for costs

The defendant may, if the plaintiff is not resident within the Republic or is an unrehabilitated insolvent, or a company or close corporation, request the plaintiff to furnish security for the costs of the action, failing which the action may be dismissed.

Notice of intention to defend

The defendant will be allowed 10 days after service of summons to deliver a notice of intention to defend, either personally or through defendant's attorney. Provided that the days between 16 December and 15 January, both inclusive, shall not be counted in the time in which to deliver a notice of intention to defend.

Should the defendant decide to defend the action he must ensure that notice of intention to defend the action is lodged with the registrar or the clerk of the court and served upon the plaintiff. An action becomes defended the moment the defendant delivers a notice of intention to defend (see Annexure F).

If an action is defended the defendant may, at the written request of the plaintiff, deliver a consent in writing to the exchange or service of subsequent documents and notices by way of facsimile or electronic mail.

If the defendant refuses or fails to deliver such consent in writing, the court may, on application by the plaintiff, grant such consent, on such terms as to costs and otherwise as may be just and appropriate in the circumstances.

After appearance to defend has been delivered, any party may, for purposes of pleading, require any other party to make available for inspection within five days a clearly specified document or tape, electronic, digital or other form of recording in his or her possession, which is relevant and to allow a copy thereof.

Judgment by default

Default judgment is a judgment given in the absence of the party against whom it is given.

Judgment by default may be given in the following instances:

- where the defendant has failed to enter an appearance to defend the action within the time limit set out in the summons;
- where an appearance to defend has been entered but no plea has been filed within the five days after a notice of bar;
- where the defendant filed a defective entry of appearance to defend and failed to rectify it within five days after having been given notice to do so;
- where the defendant or his attorney failed to appear at the summary judgment application; and
- where the defendant consented to judgment being granted against him.

Documents to be lodged with the registrar or the clerk of the court when requesting default judgment (see Annexure K):

- the original summons;
- the original return of service;
- a written request for judgment in duplicate;
- in the case of an unliquidated claim the Registrar or clerk of the court must refer the request to court and the plaintiff must give evidence to court either orally or by affidavit to prove the extent and nature of the damages. For example, damages as a result of a motor collision (see Annexure L);
- in the case of an action based on a liquid document, the original liquid document must be attached to the request for judgment;

- if a claim is founded on any cause of action arising out of or regulated by legislation, then the plaintiff shall together with the request for default judgement file evidence confirming compliance with the provisions of such legislation to the satisfaction of the court.

EXAMPLE

Compliance with the National Credit Act: If the registered slip was not annexed to particulars of claim, this will be filed with the request for default judgement.

Actions based on the National Credit Act must be referred to court by the Registrar or the clerk of the court.

Summary judgment

As soon as the plaintiff has received notice of intention to defend from the defendant he may, under certain circumstances, apply for summary judgment under Rule 14. This procedure is followed where a plaintiff is of the opinion that the defendant has no *bona fide* defence and is merely defending in order to gain time.

A requirement is that the claim must be based on:

- a liquid document; or
- for a liquidated amount of money; or
- for the delivery of specified movable property; or
- for ejection ;

together with any claim for interest and costs.

The request takes the form of an application to court (see Annexure M) to which must be attached an affidavit signed by the plaintiff personally or by someone stating his capacity to sign on behalf of the plaintiff. The affidavit must state the following (see Annexure N).

- that he has personal knowledge of the facts stated in the summons and, if he is acting on behalf of the plaintiff, that he is duly authorised to make the affidavit on behalf of the plaintiff;
- that he confirms the facts stated in the summons and the amount due; and
- that he is of the opinion that the defendant has no *bona fide* defence to the claim and that he has entered an appearance to defend merely for the purpose of delay.

If the action is based on a liquid document a copy of the liquid document must be attached to the affidavit.

The plaintiff must deliver notice of the summary judgment application to the defendant within 15 days of receipt of the defendant's notice of intention to defend the action, and such notice must give the defendant not less than 10 days notice of the application.

At the hearing of the summary judgement application the defendant may:

- give security to the plaintiff to the satisfaction of the Registrar or clerk of court for any judgement and costs which may be given; or

- satisfy the court by filing an affidavit setting out his defence to the claim. The defendant's answering affidavit has to be delivered before noon on the day but one preceding the day on which the application is to be heard.

In practice more often than not the defendant files an opposing affidavit in which he sets out his defence to the claim. In the affidavit he must allege the following:

- that he has a *bona fide* defence to the claim;
- sufficient details of his defence as proof of his *bona fides*; and
- he must deny that he entered an appearance to defend for the purpose of delaying the plaintiff's action.

The purpose of an application for summary judgment is to:

- test the decision of the defendant to defend the matter in that he has to set out under oath the basis for his defence;
- obtain judgment if there is no possible defence on the law applicable to the admitted facts; and
- obtain the affidavit of the defendant in order to use it at the trial for purposes of cross-examination.



In the event of the defendant furnishing security for the plaintiff's claim or satisfying the court on affidavit that he does have a *bona fide* defence, the court must then give the defendant leave to defend the action and the case will proceed as if the application for summary judgment had never been made.

Liquid or provisional sentence summons (see Annexure O)

The liquid or provisional sentence summons is only used where the cause of action relies on a liquid document. A liquid document is a written acknowledgement of unconditional liability for payment of a fixed sum of money, signed by the defendant or his agent. This is a quicker and therefore cheaper procedure that allows the creditor to obtain judgment (although it may only be provisional) when the creditor has sufficient documentary proof. It affords *prima facie* proof of indebtedness, which in the absence of proof to the contrary, will result in judgment and will allow the creditor to execute on the judgment, subject to giving security to the defendant.



Do not confuse a 'liquid document' with the concept 'liquidated claim', which is a claim for something specific, for example, for ejection or payment of R10 000 (a claim for damages is usually not a liquidated claim because the court has to determine the quantum thereof). Examples of a liquid document include a cheque, a written acknowledgement of debt and a judgment.

The wording to be used in a provisional sentence summons is prescribed. Copies of all documents related to the liquid claim or the liquid document must be attached to the summons and the original document must be handed into court at the hearing of the matter.

There are two dates mentioned in the provisional sentence summons. The one date is the date of the hearing, which may not be less than 10 days after service of the summons on the defendant. The second date is the last date upon which the defendant may deliver an affidavit setting forth the grounds of his defence. The affidavit must be filed not less than three days before the hearing. The defendant may file an answering affidavit within the time prescribed in the summons and may appear at the hearing personally or be represented by an attorney in order to argue his case. There are four ways in which the defendant might respond, namely:

- admitting liability;
- disputing the liquidity of the document (for example, by disputing the authenticity of his or her signature to the document, the authority of his or her agent to sign the document on the defendant's behalf or the authenticity of the signature of the defendant's agent);
- raising a defence that is not related to the liquid document; and
- doing nothing at all.

At the hearing, the court may:

- grant final judgment; or
- grant provisional sentence – being provisional, the defendant may still proceed with his defence and enter into the principal case if he satisfies the amount of the judgment and costs, delivers a notice of intention to defend within two months, failing which the judgment becomes final; or
- refuse provisional sentence, in which case the defendant is ordered to file his plea within a stated time.

Declaration

In all actions in which the plaintiff has issued a simple summons and the defendant has delivered a notice of intention to defend, the plaintiff must, within 15 days after receipt of the notice of intention to defend, deliver a declaration. The declaration must set out the plaintiff's claim and relief sought. If he does not do so, the defendant will then request that he do so within five days. If the plaintiff fails to respond to this request, he will be in default and automatically barred from doing so later. If the defendant so desires he may proceed to set the matter down for hearing on not less than 10 days notice, and apply for absolution from the instance (the effect of which will be to leave the parties in the same position as they would have been in had the action never been brought) or he may adduce evidence and apply for judgement.

Plea

Within 20 days after the plaintiff's declaration or defendant's notice of intention to defend in respect of a combined summons, the defendant must file a plea on the merits, signed by the defendant or his attorney. The defendant must deal with each material fact alleged in the declaration or combined summons separately and either:

- admit it;
- deny it;
- confess and avoid (the defendant admits the facts, but advances new facts which neutralise the allegations of the plaintiff, or the defendant wants to put the plaintiff's particulars in a different light); or
- state that he does not have knowledge of the plaintiff's allegation, that he does not admit the same and puts plaintiff to the proof thereof.

He must also clearly and concisely state the nature of his defence and all the material facts upon which it is based.

Every allegation of fact in the combined summons or declaration which is not dealt with, will be deemed to be admitted.

The purpose of the plea is to inform the plaintiff of the defence of the defendant (see Annexure G).

If the defendant fails to comply with any of the provisions of the rules on pleadings, the plea shall be deemed to be an irregular step and may be dealt with as described above under the summons.

The purpose of pleadings generally is to outline the disputes between the parties.

Exceptions and applications to strike out

Where any pleading is vague and embarrassing (when a party has not pleaded with sufficient particularity to enable the opponent to determine what the cause of action is based upon) or lacks averments which are necessary to sustain an action or defence, the opposing party may, within the period allowed for filing any subsequent pleading, deliver an exception thereto and may set it down for hearing in provided that where a party intends to take exception on the basis that the pleading is vague and embarrassing he must first give the other party notice to remove the cause for complaint within 15 days.

Where any pleading contains averments which are scandalous, vexatious, or irrelevant, the opposite party may, within the period allowed for filing any subsequent pleading, apply for the striking out of the matter , and may set such application down for hearing. The court shall not grant the order for striking out unless it is satisfied that the applicant will be prejudiced in the conduct of his claim or defence if it is not granted.

Special plea

The defendant may file a special plea. Examples of special pleas are that:

- the court has no jurisdiction;
- the plaintiff's claim has become prescribed; or
- the defendant or the plaintiff has no locus standi.

Counterclaim (Claims in Reconvention)

The defendant who counterclaims must do so simultaneously with the plea, unless the plaintiff agrees or the court allows it to be delivered at a later stage.

EXAMPLE

If the cause of action is a motor vehicle collision, and the defendant's car was also damaged, the defendant may be of the opinion that the collision was caused by the plaintiff's negligence and may wish to claim against the plaintiff for the damages he has suffered. The defendant will then in his plea set out his counterclaim and the material facts on which it is based

Reply to plea and plea to claim in reconvention

Once the defendant has served his plea on the plaintiff, with or without a counterclaim, the plaintiff may within 15 days reply to the plea or plea to a claim in reconvention. Where there is no reply to the plea, the pleadings will be regarded as closed after a period of 15 days after the delivery of the plea. A failure to file a plea to a claim in reconvention will enable the court to grant judgement in terms of such claim in reconvention.

Close of pleadings

Pleadings are considered closed if:

- either party has joined issue without alleging any new matter, and without adding any further pleading;
- the last day allowed for filing a replication or subsequent pleading has elapsed and it has not been filed;
- the parties agree in writing that the pleadings are closed and such agreement is filed with the registrar or the clerk of the court; or

- the parties are unable to agree as to the close of pleadings, and the court upon the application of a party declares them closed.

Other points to note

Amendment of pleadings in terms of Rule 55A

Either party wanting to make amendments to their pleadings (not affidavits) must notify all other parties of their intention to do so and must furnish the particulars of the amendment. The notice must state that unless written objection to the proposed amendment is received within 10 days of delivery, the amendment will be effected. If the other party objects, the party wanting to make the amendment must, within 10 days, lodge an application for leave to amend.

If no objection is delivered, the party who gave notice of the proposed amendment may, within 10 days, effect the amendment. A party who is entitled to amend shall effect the amendment by delivering each relevant page in its amended form. Any party affected by an amendment may make adjustments to his or her documents filed within 15 days of the amendment.

The party giving notice of amendments will be liable for the costs occasioned thereby by any other party.

A court can at any stage before judgement grant a party leave to amend its pleadings.

Set-down for trial

Once pleadings have closed the plaintiff may deliver a notice to the defendant informing him that the matter has been set-down for trial on a day or days approved by the clerk of the court. If the plaintiff fails to do so within 15 days of close of pleadings then the defendant may do so (see Annexure H).

Preparation for trial

Once pleadings have closed, the parties to a dispute begin their preparation for the trial. This includes not only complying with the relevant Rules of Court and the exchange of various notices, but also practical preparation of their client's case (for example, arranging the file for easy reference, consulting with witnesses, and conducting inspections).

Discovery

Each party is entitled to know which documents and tape, electronic, digital or other forms of recordings, that tend to prove or disprove either party's case, will be used by the other side. The application of this principle ensures that the parties are not taken by surprise at the trial by their opposition introducing such items, about which they have no knowledge. Both the manner of applying for and the manner of furnishing the information are prescribed in the rules (see Rule 23 and Annexure I).

Either party can require from the other party by notice to disclose on affidavit all documents and tape, electronic, digital or other forms of recordings relating to the action, which are or have at any time been in the possession or control of the other party.

A party required to make discovery must within twenty days on affidavit specify separately:

- such items in his possession or that of his agent, other than those stated below;

- such items in respect of which he has a valid objection to produce; and
- such items which he or his agent had, but no longer has in his possession.

Statements of witnesses taken for purposes of the proceedings, communications between attorney and client and between attorney and advocate, pleadings, affidavits and notices in the action are to be omitted from the schedules.

EXAMPLE

Privilege may be claimed for those documents which contain communications between attorney and client and between attorney and advocate, witness statements and advice to client. The opposing party is not permitted to have sight of these documents on the grounds of privilege

If any party believes that there are, in addition to the items disclosed, other documents, copies, tape, electronic, digital or other forms of recordings which may be relevant, he may give notice to the other party requiring the other party to make them available for inspection, or to state on oath within 10 days that such documents are not in his possession. If so, their whereabouts, if known, must be given.



If no discovery is requested and no discovery is made, a party may use any documents at the trial. If a party has been requested to discover and has failed to do so, or failed to discover a particular document, he may not unless the court grants permission introduce any documents or that particular document at the trial.

A party may request sight of and/or copies of the documents specified in the other party's discovery affidavit.

Medical examinations and documents

Where the matter is one in which damages are claimed as a result of bodily injury, the opposing party may, in terms of Rule 24, require the injured party to submit to an examination by one or more duly registered medical practitioners.

The party requiring the examination must deliver a notice to the party who is to be examined, which must state the following:

- the nature of the examination required;
- the person or persons who are to conduct the examination;
- the place, date and time of the examination;
- that such party must submit themselves to the examination; and
- that they may have their own medical adviser present.

The defendant may also require the plaintiff to provide copies of relevant medical reports, hospital records, X-ray photographs and the like.

Condition of an object

If the state or condition of any object whether movable or immovable, may be relevant to any issue in an action, any party may at any stage, but at least 15 days before trial, require the party having possession thereof to make it available for inspection or examination.

The rule is suitable for inspections of motor vehicles damaged in a collision and disputes in which the issue is whether work was performed without defects.

Expert notices

No party may call an expert witness unless he has served on the other party two notices in terms of Rule 24(9) (the notices may be combined into one). The first notice must be served 15 days before the trial and must specify the name of the expert to be called, and the second notice must be served 10 days before trial and must contain a summary of the expert's opinions and his reasons therefore (see Annexure J).

Photos, plans, models and sketches

A party intending to use photos, plans, diagrams, models or sketches at the trial, must give 10 days notice of his intention to do so. If no objection is made then they may be used.

Witnesses

Witnesses who are required to give evidence in the trial should be subpoenaed to appear by the party wishing them to testify. A subpoena is issued by the registrar or the clerk of the court and served by the sheriff of the magistrate's court and must be served within a reasonable period of time prior to the hearing. Failure to appear constitutes contempt of court.

It may not be necessary to subpoena all the witnesses. Some may have an interest in the case (for example, the wife or the husband of the plaintiff or defendant) and often expert witnesses such as doctors and accountants need not necessarily be subpoenaed because they have agreed to be expert witnesses and are remunerated for their services.

Request for further particulars

After the close of pleadings any party may, not less than 20 days before trial, deliver a notice requesting only such further particulars as are necessary to enable him to prepare for trial. Such request shall be complied with within 10 days after receipt thereof.

File preparation

Your office file should be arranged preferably in the following way:

- All pleadings (summons, request for further particulars, further particulars, and pleas) should be arranged in date order and bound together.
- Formal notices and applications should be bound separately, for example, applications to compel compliance with the rules, and notice of intention to defend.
- Correspondence should be separated into those which are to be used in the trial and those that are not.
- The documentary evidence should be bound in chronological order. Documentary exhibits must be copied so that there are copies for the magistrate, the other party and you, while the witness will have the original.
- Witness statements should be bound together.

The plaintiff must, not later than ten days before the hearing, bind, index and paginate the court file.

Consultations with witnesses (including expert witnesses)

It is essential that a party consult with their witnesses prior to the trial. This is in addition to the consultations already held during the exchange of pleadings.

Each witness should be questioned in detail and should be cross-examined. Special attention must be given to the weak points in your case.

Pre-trial conference

The court may, at any stage of the proceedings in its discretion *suo motu* or upon the written request of either party, direct the parties or their representatives to appear before it in chambers for a conference with a view to simplifying the issues, deciding whether any amendments should be made to the pleadings, obtaining admissions in order to avoid unnecessary proof, limiting the number of expert witnesses to be called and any other matters which may aid the disposal of the matter in the most expeditious and least costly manner.

Should either party request such a conference, the written request must be directed to the clerk of the court and must indicate generally the matter or matters that are to be discussed. The judicial officer will decide whether to call a conference.

The trial

The trial takes place in open court at the court from which the summons was issued. The party upon whom, in accordance with the pleadings, the burden of proof rests, must adduce evidence first and thereafter the other party will have their turn. Normally the burden of proof rests on the plaintiff.

The court may order a witness who is not a party to an action, to leave the court until his evidence is required or to leave or to remain after it has been given. Any witness may be examined by the court as well as by the parties.

The proceedings are recorded and filed with the record of the case. Copies may be made available to the parties concerned.

It is possible to adjourn or postpone a trial. This is done either on the initiative of one of the parties or of the court itself.

The judgment of the court

- It is possible for the plaintiff to apply for summary judgment where he is of the opinion that the defendant does not have a proper defence or desires to gain time, and default judgment may be obtained in certain circumstances.
- As a result of the trial of an action, the court may grant judgment for the plaintiff, in so far as he has proved his claim, or for the defendant, in so far as he has proved his defence. If it appears to the court that the evidence does not justify judgment for either party then it may grant absolution from the instance. The effect of absolution is that the parties are left in the same position as if the case had never been heard.
- In addition to deciding the issue in dispute the court may make an order as to costs as it deems just. There are three types of costs:

Costs

Party and party costs

These are the costs which the losing party owes to the winning party and do not include the costs which a client owes his attorney. Party and party costs represent the official costs incurred by a party to a trial, which include only the costs for items (such as service) specifically provided for in terms of the Rules of Court and measured according to the tariff.

Attorney and client costs

These are the costs that a client owes to his attorney for all the work done on his behalf. These costs follow the tariff in general and are always equal to or more than the party and party costs.

Attorney and own client costs

These are costs which are determined in terms of an agreed tariff or cost structure between the attorney and his client. This agreed tariff may make provision for a rate per hour which may be higher or lower than the attorney and client tariff and both parties are bound by it.

EXAMPLE

Attorney and client fees would be where the attorney consults four times with a witness while the clerk of the court would only allow one consultation on a party and party bill. The client would be responsible for the cost of these consultations.

An attorney and own client tariff would be where the attorney and client agree on a special tariff per hour, such as R450,00 which includes VAT

In the magistrate's court a distinction is made between defended and undefended matters when it comes to costs. If the matter is defended all three kinds of costs are possible. In an undefended matter the option of attorney and own client costs does not exist. Normally a court will only grant costs on a party and party scale to the winning party. The party so entitled to their costs would then have to draw up a bill of costs in accordance with the tariff, setting out their costs and expenses, and have the matter set down for taxation on notice to the other party. The parties may agree on the costs and expenses prior to taxation, failing which the taxation officer (normally the clerk of the court) will decide which costs and expenses to allow. Once the bill has been taxed the losing party has to pay the other his taxed costs.

Application for rescission of judgment

Section 36 of the Act authorises the amendment or rescission of judgments in general and sets out what judgments may be rescinded, namely:

- any judgment granted in the absence of the person against whom it was granted;
- any judgment that was obtained by fraud or by mistake common to the parties; and
- any judgment in respect of which no appeal lies.

Rule 49 deals with the procedure for rescission and variation of judgments, namely:

- Rule 49(3): Where an application for rescission of a default judgment is made by a defendant who wishes to defend the action, the application must be supported by affidavit setting out the reasons for his default and grounds of the defendant's defence to the claim.
- Rule 49(4): Where an application for rescission of default judgment is made by a defendant who does not wish to defend the proceedings, the applicant must satisfy the court that he was not in wilful default and that the judgment was satisfied, or arrangements were made to satisfy the judgment, within a reasonable time after it came to his knowledge.
- Rule 49(5): Where a plaintiff in whose favour a default judgment was granted has agreed in writing that the judgment be rescinded or varied, either the plaintiff or the defendant may, by way of application, request the court to rescind or vary the default judgment, which request shall be accompanied by written proof of the plaintiff's consent.

Execution of judgment (see Rules 36 to 48, as well as sections 61 to 79)

Execution is the process by which a successful litigant enforces the court's judgment. A Warrant of Execution must be prepared, addressed to the Sheriff and must be issued and signed by the clerk of the court. The Sheriff must serve the Warrant on the judgment debtor and demand settlement of the judgment debt. In the event of the judgment debtor not being able to settle the debt the Sheriff must demand that the debtor point out property belonging to him that may be attached. In practice what happens is that the Sheriff makes an inventory of the property and assigns a value to each item. The debtor is not allowed to sell or otherwise dispose of the property so attached.

If, on demand, the judgment debtor pays the judgment debt and costs, the Sheriff must endorse the amount paid and the date of payment on the original and copy of the warrant. Both the Sheriff and the debtor must sign the endorsements.

A Warrant of Execution is first issued against movable goods. However, in certain circumstances a warrant may be issued against immovable property (for example, land):

- Where the Sheriff has rendered a return of a Warrant of Execution against movables that he was unable to find sufficient goods to satisfy the debt. In most cases he would render a *nulla bona* return. A *nulla bona* return means that the sheriff spoke to the debtor personally, asked him to pay the debt or point out movables, and the debtor informed the sheriff that he has no money nor movables. The Clerk of the Court re-issues the warrant against immovable property if shown a *nulla bona* return. The same warrant must be used but the warrant must be re-issued.
- Where the court on good ground has authorised a Warrant of Execution against immovable property of the debtor. This can happen where the plaintiff in his summons requested an order that the immovable property subject to the bond be declared immediately executable.

On 8 October 2004 in Jaftha v Schoeman and others CCT 74/03, the Constitutional Court held that the process of execution against immovable property is unconstitutional in that it allows an execution against a debtor's home to be sold where the circumstances may not justify it.

In the circumstances the court held that the ideal remedy would be a judicial process in order that the court can determine whether the sale of the immovable property is justifiable in the circumstances.

Accordingly, section 66(1)(a) of the Magistrates' Courts Act was found to be unconstitutional in that it did not provide for the judicial oversight of the sale of immovable property.

In order to provide a remedy for the perceived defect, the court ordered that the section, namely section 66(1)(a), must be read as if the words 'a court after consideration of all relevant circumstances', could order execution against immovable property.

In the circumstances, prior to moving to execute against immovable property, judicial supervision would have to take place. In the past this has been unnecessary, as you could proceed after a return of insufficient movables had been received, or you had exhausted the attachment of the movable assets.

Each magistrate's court will interpret the judicial process against the circumstances of the case. At present this has been interpreted as requiring an application to be brought for property which is the execution debtor's home to be declared executable. In this manner a court can determine the reasons for the attachment.

The above applications will have to be supported by an affidavit, which sets out the grounds for the attachment of the immovable property.

In terms of section 67 certain property is exempt from execution:

- the necessary beds, bedding and clothing of the execution debtor and his family;
- the necessary furniture and household utensils; *
- stock, tools and agricultural implements of a farmer; *
- the supply of food and drink in the house sufficient for the needs of such debtor and of his family for one month;
- tools and implements of trade; *
- professional books, documents and instruments necessarily used by the debtor in his profession; and *
- such arms and ammunition as the debtor is required by law to have in his possession as part of his equipment.

*** not exceeding R2 000,00 in value**

The amounts which must appear on the warrant are as follows:

- capital or balance of capital of the claim;
- judgment costs, which must be taxed costs or the judgment costs of an undefended matter;
- interest – the amount thereof, the rate and the starting date; and
- warrant costs.

Sometimes the attorney wishes the Sheriff not only to attach the goods of the debtor, but also to remove the attached goods immediately. In such a case the attorney should endorse the warrant with the words 'attach and remove immediately'. The cost of removal and storage is high and may run into hundreds of rands. If a third party lodges a valid claim against the goods which have then to be released without any sale taking place, the plaintiff loses a great deal of money. On the other hand, the risk of the goods remaining on the premises of the debtor is the chance that the debtor may move suddenly and take the goods with him to an unknown destination. However, the removal of the goods usually forces the debtor to make payments or arrangements.

After the Sheriff has delivered his return of service together with an inventory of the goods, the attorney may request the Sheriff to name a date, time and place for the sale of the goods. The Sheriff will reply, specifying the required details in a letter.

The attorney must then draft the notice of sale and the required number of copies must be delivered to the Sheriff not less than 10 days before the sale. A further copy must be sent to the newspaper in which an advertisement must be placed not less than 10 days before the sale.

The attorney must also draft a detailed statement of account showing the balance owing by the debtor. The Sheriff will pay this amount provided the goods are sold for a sufficient amount.

Interpleader proceedings (see Rules 39 and 44)

Interpleader proceedings may be used where two or more persons lay claim to goods or money in possession of a third party. This party does not know to whom the goods or money must be delivered. An interpleader summons is therefore issued by the third party against the two or more parties laying claim to the goods. The third party attaches an affidavit to the summons in which he sets out the circumstances and that he has no claim to the goods. If money is involved it must be paid into court.

EXAMPLE

The seller of property or his attorney is in possession of the estate agent's commission and two agents lay claim to the commission

Another instance in which interpleader proceedings are used is when a third party lays claim to property that has been either attached or attached and removed by the Sheriff; or the third party makes claim to the proceeds of property attached and sold in execution.

The claimant must file an affidavit in triplicate with the Sheriff. In this affidavit his claim must be set out and the grounds on which it is based, substantiated by evidence. The Sheriff provides one copy to each, the execution creditor and the execution debtor. Within ten days of receiving the affidavit, the execution creditor must advise the Sheriff in writing whether he admits or rejects the claim. If the claim is admitted, the Sheriff may withdraw the property from his possession. Should the claim be rejected, the Sheriff must issue an interpleader summons within ten days, calling on the claimant and the execution creditor to appear in court on a date specified, to have the claim heard.

Applications

There are two types of procedures, namely:

- the action procedure (which we have considered above), where pleadings are exchanged between the parties in order to define the issues in dispute and the parties thereafter present their evidence at a trial; and
- the application procedure (also known as motion procedure).

The parties to an application procedure are known as the applicant and the respondent.

Application proceedings are commenced on notice by means of notice of motion, to which the applicant must attach the founding affidavit by the applicant, together with such further affidavits by other persons as may be required to support his case. If the respondent wishes to oppose the application, he must give notice of his intention to do so by filing a notice to oppose. Thereafter the respondent must file an opposing affidavit, failing which the matter may be enrolled for hearing. The applicant may reply with a replying affidavit. When the application is heard the court will be in possession of written material equivalent to the pleadings, as well as the evidence in an action.

All the court does is hear the legal argument of the litigant's legal representatives. There is no distinction or separation between the pleading and the evidence stages. The affidavits that are incorporated in the application formulate the issues of fact between the parties, as well as embody the evidence which the respective parties adduce in proof of their factual averments.

Generally, it may be said that an application by way of notice may be brought if there is no real dispute on any material question of fact or where, if there is such a dispute of fact, it can be satisfactorily determined without the aid of oral evidence.

The application procedure may be used where it is prescribed by the Rules, for example, an application for summary judgment (already covered under the heading 'Summary judgment'), or as a means to enforce a party to action proceedings to abide by the Rules. This is known as an interlocutory application. For example, if the defendant fails to deliver his discovery affidavit timeously, the plaintiff may bring an application for the court to order the defendant to respond.

EXAMPLE

Where the plaintiff has served a notice on the defendant to discover and the defendant fails to do so, the plaintiff may bring an application for an order compelling the defendant to discover.

Specific applications

Interdicts

Interdicts are granted to protect a person against the wrongful violation of their rights. There are three types of interdicts:

- Prohibitive interdicts – these prohibit a person from committing an act which infringes the rights of others or which threatens to infringe them.
-

EXAMPLE

A woman may obtain an interdict against a man prohibiting him from following her, assaulting or abusing her in any way.

- Commanding interdicts – these require positive conduct on the part of the wrongdoer to determine the continuing wrongfulness of an act that has been committed.
- Restoring interdicts – where a person has been wrongfully deprived of their property, they are entitled to immediate re-possession by means of a spoliation order.

Interdicts may be temporary or final. A temporary interdict is granted pending the outcome of an action in which the rights of the parties are to be determined. A final interdict is granted without attaching a time limit to it.

There are three requirements for a final interdict:

- the applicant must have a clear right;

- there must be an infringement of his rights or at least a threatening infringement thereof; and
- no other remedy must be available to the applicant.

Final interdicts are usually obtained by way of action and temporary interdicts by way of motion.

Urgent applications

In cases of urgency the relief may be requested by way of an *ex parte* application. In such cases a *rule nisi* will be granted in which the respondent is called upon to show cause why a final interdict should not be granted on the return day.

EXAMPLE

Where a lessor evicts his lessee and prohibits him access to the leased premises, the lessee may approach the court by way of an *ex parte* application for urgent relief, requesting an interdict compelling the respondent (the lessor) to place the applicant (the lessee) in undisturbed possession of the property and to prohibit the respondent from further disturbing the applicant in his undisturbed possession of the property. Should the applicant in his verifying affidavit satisfy the court that he is entitled to possession and undisturbed use of the property (for example, by stating that there is a valid lease agreement and that he has properly fulfilled all his duties in terms thereof), then the court will grant a temporary interdict and a *rule nisi* which will be confirmed or discharged on the return date.

Appeals

An appeal is based on the grounds that the decision of the trial court was either wrong in law or wrong in fact. Leave to appeal has to be granted by the trial court.

An appeal lies to the High Court and there are strict procedural requirements to be observed.

CIVIL PROCEEDINGS IN THE HIGH COURT

Civil jurisdiction

The High Court has *inherent jurisdiction* as opposed to the magistrates' or regional courts, which are creatures of statute and can only hear matters which fall within the jurisdictional limits set by the Magistrates' Courts Act.

The jurisdiction of the High Court is limited by certain statutes, for example, income tax appeals must be heard by the special income tax court.

Territorial limits

The jurisdiction of the High Court is territorially limited to the boundaries of the relevant High Court's seat. In order to determine whether a particular High Court has jurisdiction, there must be a link between the persons over which the legal competence is exercised and the geographical area over which the jurisdiction of the court is valid.

- In cases of contractual claims the link is in the fact that the contract in dispute was concluded within the court's jurisdiction and that the breach must have occurred there.
- In cases of claims that result from a delict the delict has to have been committed in the geographical area of the court.
- In cases concerning relief with regard to a real right or an immovable property right, the court will have jurisdiction if such real right or property is situated within the court's territorial limits.
- If none of the above-mentioned requirements are met, the court in general will still have jurisdiction if the defendant is domiciled or resident within the particular court's territory (*actor sequitur forum rei*).

Officials of the court

Judges

Judges are usually appointed from the ranks of senior advocates, senior attorneys or senior academics. The procedure governing their appointment is set out in section 174 of the Constitution.

The registrar

The Registrar is a senior official in the Department of Justice and is the head of the court administration. A registrar is appointed for each provincial division of the High Court.

All pleadings are issued from his office, the originals of which are filed in the respective court files.

The registrar must issue every summons. Under normal circumstances a summons will only be issued on a court day, that is, weekdays from 09h00 to 13h00 and from 14h00 to 15h00. No process may be issued or filed after 15h00 except for a notice of intention

to defend but then before 16h00. The registrar may issue process and accept documents at any time and shall do so when directed by a judge.

The sheriff

Sheriffs are executive officers of the court and are responsible for the service of process through which an action is instituted or motion proceedings are launched, as well as the execution attachments and removal orders that are made by the court.

The taxing master

The taxing master is an officer of the court in the office of the registrar who must see to it that the bills of costs of all practitioners, where costs are awarded, properly comply with the provisions of the rules with regard to costs. The taxing master must allow all costs and expenses as appear to him to have been necessary or proper for the attainment of justice or to defend the rights of any party.

The family advocate

After the institution of a divorce action or the lodging of an application for the variation, rescission or suspension of an order with regard to custody or guardianship of, or access to a child made in terms of the Divorce Act, the family advocate shall conduct an inquiry and report to the court on the welfare of each minor or dependent child of the marriage concerned.

Interpreters

Any witness is entitled to speak in his mother tongue in court. As English and Afrikaans are the only languages used in court, interpreters are often used.

The court orderly

The court orderly is an officer in the registrar's office who assists the court in the orderly progress of proceedings. He will, for example, call out witness names, swear witnesses in, and hand documents to the judge handed into court by counsel.

Judge's clerks

Every judge has a clerk who assists him in a variety of ways, for example, making personal arrangements, and collecting law reports and reference works from the library. A practitioner will not be able to see a judge in chambers without being accompanied by the judge's clerk.

The court stenographer

They are entrusted to record the proceedings in court and are employed by a private organisation.

The Master of the High Court

A Master of the High Court is an official in the Department of Justice appointed to each seat of the High Court. Although he does not deal directly with the court on a regular basis, his position involves submitting reports to court periodically. The office of the Master deals mainly with deceased and insolvent estates.

Attorneys and advocates

Both are officers of the High Court. Advocates are briefed by attorneys to appear in the High Court or magistrate's court on behalf of their clients. Advocates do not only appear in court, they also draft and prepare pleadings, provide written legal opinions, draft contracts, and so on, at the request of attorneys.

When briefing an advocate, whether it be to draft the particulars of a claim in a matter, appear in motion court in an application, for example, for summary judgment or an application to compel, or to provide a written legal opinion, it is important to provide him with all the necessary details and documents he may require.

EXAMPLE

The following documents must be included in counsel's brief when appearing for the plaintiff in a summary judgment application:

- a copy of the summons;
- a copy of the return of service;
- a copy of the notice of intention to defend;
- a copy of the application for summary judgment together with the founding affidavit; and a copy of the answering affidavit, if one has been filed

By briefing an advocate, the attorney is not handing the matter over to the advocate, he is merely requesting his specialist assistance.

The form of civil proceedings

The form of civil proceedings in the High Court and the magistrate's court are, for our purposes, very similar, especially with regard to the action procedure. Students should note however that the proceedings in the magistrate's court are regulated by the Magistrates Courts Act and Rules and the proceedings in the High Court are regulated by the Supreme Court Act and Rules.

Also note that the time periods allowed in proceedings differ in the High Court and the magistrates court.

The application procedure in the High Court is more extensive than in the magistrate's court and there are certain applications that are exclusive to the High Court.

EXAMPLE

- Application for sequestration:
Provision is made for the application for the sequestration of an individual's estate or for the liquidation of a company.
- Application for the appointment of a curator:
Provision is made for an application to court for an order declaring a person to be of unsound mind, and as such incapable of managing their affairs, or by reason of some disability, mental or physical, incapable of managing their affairs, and appointing a *curator bonis* over their affairs. Before this can be done an application must be brought for the appointment of a *curator ad litem* for such patient to represent him in the proceedings. (see Annexure P)

Civil Litigation Annexures

Edition 3

CIVIL LITIGATION ANNEXURES

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NOTES

Annexure A

- Sections 28, 29, 45 and 46 of the Magistrates' Courts Act 32, 1944, as amended, are attached. You must study these sections.

Annexure B to Annexure R

- These annexures provide you with a practical example of the preparation of pleadings and the use of precedents in civil litigation.
- You must read the relevant annexures as a practical illustration of the notes (they have been cross-referenced).
- You must not study the substantive content of these annexures, but should familiarise yourself with the use of prescribed forms or precedents. The notes outline the required forms or content of these documents, in terms of the Magistrates' Court Act and Rules.

Annexure S

- In this annexure you will find a flow chart of pre-trial proceedings in the magistrates' court.

You are not expected to read up sections or Rules not reproduced in the annexures.

**ANNEXURE A: EXTRACTS FROM THE MAGISTRATES' COURTS
ACT 32 OF 1944**

Extracts from the Magistrates' Courts Act 32 of 1944

28 Jurisdiction in respect of persons

1. Saving any other jurisdiction assigned to a court by this Act or by any other law, the persons in respect of whom the court shall, subject to subsection (1A), have jurisdiction shall be the following and no other:

- (a) any person who resides, carries on business or is employed within the district or regional division;
- (b) any partnership which has business premises situated or any member whereof resides within the district or regional division;
- (c) any person whatever, in respect of any proceedings incidental to any action or proceeding instituted in the court by such person himself or herself;
- (d) any person, whether or not he or she resides, carries on business or is employed within the district or regional division, if the cause of action arose wholly within the district or regional division;
- (e) any party to interpleader proceedings, if:
 - i. the execution creditor and every claimant to the subject matter of the proceedings reside, carry on business, or are employed within the district or regional division; or
 - ii. the subject matter of the proceedings has been attached by process of the court; or
 - iii. such proceedings are taken under [**subsection (2) of section sixty-nine**] section 69(2) and the person therein referred to as the 'third party' resides, carries on business, or is employed within the district or regional division; or
[Sub-para. iii. added by s 12 (b) of Act 40 of 1952.]
 - iv. all the parties consent to the jurisdiction of the court;
[Sub-para. iv. added by s 12 (b) of Act 40 of 1952.]
- (f) any defendant (whether in convention or reconvention) who appears and takes no objection to the jurisdiction of the court;
- (g) any person who owns immovable property within the district or regional division in actions in respect of such property or in respect of mortgage bonds thereon.

[Sub-s (1) amended by s 12 (a) of Act 40 of 1952.]

(1A) For the purposes of Section 29 (1B) a court for a regional division shall have jurisdiction if the parties are or if either of the parties is -

- i domiciled in the area of jurisdiction of the court on the date on which proceedings are instituted; or

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

(2) 'Person' and 'defendant' in this section include the State.

29 Jurisdiction in respect of causes of action

(1) Subject to the provisions of this Act and the National Credit Act, 2005,(Act No. 34 of 2005) a court, in respect of causes of action, shall have jurisdiction in:

- (a) actions in which is claimed the delivery or transfer of any property, movable or immovable, not exceeding in value the amount determined by the Minister from time to time by notice in the *Gazette*;
- (b) actions of ejectment against the occupier of any premises or land within the district or regional division: Provided that, where the right of occupation of any such premises or land is in dispute between the parties, such right does not exceed the amount determined by the Minister from time to time by notice in the *Gazette** in clear value to the occupier;
- (c) actions for the determination of a right of way, notwithstanding the provisions of section 46;
- (d) actions on or arising out of a liquid document or a mortgage bond, where the claim does not exceed the amount determined by the Minister from time to time by notice in the *Gazette*;
- (e) actions on or arising out of any credit agreement, as defined in section 1 of the National Credit Act 2005 (Act No. 34 of 2005) where the claim or the value of the property in dispute does not exceed the amount determined by the Minister from time to time by notice in the *Gazette*;
- (f) actions in terms of section 16 (1) of the Matrimonial Property Act, 1984(Act No. 88 of 1984), where the claim or the value of the property in dispute does not exceed the amount determined by the Minister from time to time by notice in the *Gazette*;
- (fA) actions, including an application for liquidation, in terms of the Close Corporations Act, 1984 (Act 69 of 1984):
[Para. (M) inserted by s 2 of Act 157 of 1993.]
- (g) actions other than those already mentioned in this section, where the claim or the value of the matter in dispute does not exceed the amount determined by the Minister from time to time by notice in the *Gazette*.*

(1A) The Minister may determine different amounts contemplated in subsection (1) (a), (b), (d), (e) , (f) and (g) in respect of courts for districts and courts for regional divisions.

(1B) (a) A court for a regional division in respect of cause of action, shall, subject to section 28(1A), have jurisdiction to hear and determine suits relating to the nullity of a marriage or a civil union and relating to divorce between persons and to decide upon any question arising therefrom, and to hear any matter and grant any order provided for in terms of the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998).

- (b) A court for a regional division hearing a matter referred to in paragraph (a) shall have the same jurisdiction as any High Court in relation to such a matter.
 - (c) The presiding officer of a court for a regional division hearing a matter referred to in paragraph (a) may, in his or her discretion, summon to his or her assistance two persons to sit and act as assessor in an advisory capacity on questions of fact.
 - (d) Any person who has been appointed as a Family Advocate or Family Counsellor under the Mediation in Certain Divorce Matters Act, 1987 (Act No. 24 of 1987), shall be deemed to have also been appointed in respect of any court for a regional division having jurisdiction in the area for which he or she has been appointed.
- (1C) Jurisdiction conferred on a court for a regional division in terms of this section shall be subject to a notice having been issued under section 2(1) (1A) in respect of the place of holding, and the extent of the civil adjudication, of such court.
- (2) In subsection (1) 'action' includes a claim in reconvention.

*** presently not exceeding:
R100 000 in the district courts
R100 000 – R300 000 in the regional courts.**

[S 29 amended by s 13 of Act 40 of 1952, by s 39 of Act 68 of 1957 by s 3 of Act 19 of 1963 and by s 10 of Act 53 of 1970 substituted by s 27 of Act 94 of 1974, amended by s 1 of Act 56 of 1984 and by s 35 of Act 88 of 1984 and substituted by s 3 of Act 25 of 1987.]

29A Jurisdiction in respect of appeals against decisions of Black chiefs, headmen and chiefs' deputies

- (1) If a party appeals to a Magistrates' Court in terms of the provisions of section 12 (4) of the Black Administration Act, 1927 (Act 38 of 1927), the said court may confirm, alter or set aside the judgment after hearing such evidence as may be tendered by the parties to the dispute, or as may be deemed desirable by the court.
- (2) A confirmation, alteration or setting aside in terms of subsection (1), shall be deemed to be a decision of a magistrates' court for the purposes of the provisions of Chapter XI.

[S29A inserted by s 2 of Act 34 of 1986.]

45 Jurisdiction by consent of parties

(1) Subject to the provisions of section *forty-six*, the court shall have jurisdiction to determine any action or proceeding otherwise beyond the jurisdiction, if the parties consent in writing thereto: Provided that no court other than a court having jurisdiction under section *twenty-eight* shall, except where such consent is given specifically with reference to particular proceedings already instituted or about to be instituted in such court, have jurisdiction in any such matter.

(2) Any provision in a contract existing at the commencement of the Act or thereafter entered into, whereby a person undertakes that, when proceedings have been or are about to be instituted, he will give such consent to jurisdiction as is contemplated in the proviso to subsection (1), shall be null and void.

46 Matters beyond the jurisdiction

- (1) [Sub-sec (1) repealed by S8 of Act 31 of 2008.]
- (2) A court shall have no jurisdiction in matters–
- (a) in which the validity or interpretation of a will or other testamentary document is in quest on;
 - (b) in which the status of a person in respect of mental capacity is sought to be affected;
 - (c) in which is sought specific performance without an alternative of payment of damages, except in–
 - (i) the rendering of an account in respect of which the claim does not exceed the amount* determined by the Minister from time to time by notice in the *Gazette*:

[Sub-para. (i) substituted by s 4 of Act 25 of 1987.]
 - (ii) the delivery or transfer of property, movable or immovable, not exceeding in value the amount* determined by the Minister from time to time by notice in the *Gazette*; and

[Sub-para. (ii) substituted by s 4 of Act 25 of 1987.]
 - (iii) the delivery or transfer of property, movable or immovable. exceeding in value the amount* determined by the Minister from time to time by notice in the *Gazette*. where the consent of the parties has been obtained in terms of section 45;

[Sub-para. (iii) substituted by s 4 of Act 25 of 1987.]
- [Para. (c) amended by s 5 of Act 19 of 1963 and substituted by s 28 of Act 94 of 1974 and by s 2 of Act 56 of 1984.]
- (d) in which is sought a decree of perpetual silence.

*** presently not exceeding:
R100 000 in the district courts
R100 000 – R300 000 in the regional courts.**

ANNEXURE B: LETTER OF DEMAND

Markgraaff & Partners

Attorneys Conveyancers and Notaries

12 March 2010

Mr J.D. Phillips
PO Box 23
Pinelands
7405

Dear Mr Phillips

Re: Motor vehicle collision 23 February 2010

Our reference: AM/sd/D045/97

PER REGISTERED POST

We act on instructions of Miss Ima Hurt, the owner of Toyota Corolla motor vehicle registration number CA 234567.

Our client has instructed us that on 23 February 2010 and at the intersection of Moore and Connor Roads, Wynberg, a collision occurred between our client's vehicle and a vehicle being driven by you, BMW registration number CA 987654.

As a result of the collision our client's vehicle was damaged and our client has consequently suffered loss and damages. The fair and reasonable cost of repairing such damages is the sum of R34 000,00.

From the information in our possession, it would appear that the sole cause of the said collision was your negligent driving. We are instructed to demand from you as we hereby do, the aforesaid sum of R34 000,00 payable to our offices within 10 days of receipt of this letter, failing which further legal action will be taken against you.

You are further advised that in terms of section 56 of the Magistrates' Courts Act you are liable for the costs of this letter in the sum of R11,00.

Yours faithfully

Markgraaff & Partners

2nd Floor, Louis Luyt Building, 99 Visagie Street, Cape Town, 8000
Tel (021) 46 8989 Fax (021) 46 8990

ANNEXURE C: SIMPLE SUMMONS

IN THE MAGISTRATES COURT FOR THE DISTRICT OF SOMERSET WEST

HELD AT SOMERSET WEST

CASE NUMBER: 1/11

In the matter between:

FUN FURNISHERS (PTY) LTD

Plaintiff

and

P GREEN

Defendant

SUMMONS

TO: The Sheriff or his/her deputy
CAPE TOWN

INFORM: **P GREEN**, an adult male plumber whose full and further particulars are to the plaintiff unknown residing at **15 Smith Street, Somerset West**, which address is the Defendant's chosen *domicilium citandi et executandi*. (hereinafter called "the Defendant")

THAT: **FUN FURNISHERS (PTY) LTD**, a company with limited liability, duly registered in accordance with the Company laws of the Republic of South Africa, of **12 Hope Road, Woodstock** (hereinafter called the "Plaintiff")

Hereby institutes action against him in which the Plaintiff claim/s:

1. Payment of the sum of R 30 500.00 (THIRTY THOUSAND AND FIVE HUNDRED RAND), being the amount which is due, owing and payable by the Defendant to the Plaintiff for goods sold and delivered by Plaintiff to Defendant at the latter's special instance and request in and during June 2010, which amount despite demand defendant fails and / or neglects to pay and which said sum, despite demand, remains unpaid;
2. Interest thereon at the rate of 15.50% from a tempore morae;
3. Costs of suit;
4. further and/or alternative relief.

To the sheriff or his/her deputy:

INFORM: the Defendant further that if the defendant disputes the claim and wishes to defend the action he or she shall:

- (I) within 10 days of the service upon him or her of this summons file with the registrar or clerk of this court at Somerset West, 33 Caledon Street, Somerset West notice of his or her intention to defend and serve a copy thereof on the plaintiff or plaintiff's attorney, which

notice shall give an address referred to in rule 13(3) for the service upon the defendant of all notices and documents in the action.

(II)

INFORM the defendant further that if he or she fails to file and serve notice as aforesaid, judgment as claimed may be given against him or her without further notice to him or her. And immediately thereafter serve on the defendant a copy of this summons and return the same to the registrar or clerk of the court with whatsoever you have done thereupon.

DATED at this day of 20.....

Clerk of the Court

Plaintiff's Attorney

Name

Address

CAPE TOWN

TEL:

FAX:

E-MAIL:

Service Address:

Defendant must take notice that

- (a) in default of defendant paying the amount of the claim and costs within the said period or of defendant delivering a notice of intention to defend he or she will be held to have admitted the said claim and the plaintiff may proceed therein and judgment may be given against defendant in his or her absence;
- (b) if defendant pays the said claim and costs within the said period judgment will not be given against defendant herein and he or she will save judgment charges. Defendant will also save judgement charges if, within the said period, he or she lodges with the clerk of the aforesaid Court a consent to judgment;
- (c) if defendant admits the claim and wish to consent to judgment or wish to undertake to pay the claim in instalments or otherwise, defendant may approach the plaintiff or plaintiff's attorney.

Notice:

- (i) Any person against whom a court has, in a civil case, given judgment or made any order who has not, within 10 days, satisfied in full such judgment or order may be called upon by notice in terms of section 65A(1) of the Act to appear on a specified date before the court in chambers to enable the court to inquire into the financial position of the judgment debtor and to make such order as the court may deem just and equitable.
- (ii) If the court is satisfied that -

(aa) the judgment debtor or, if the judgment debtor is a juristic person, a director or officer of the juristic person has knowledge of the abovementioned notice and that he or she has failed to appear before the court on the date and at the time specified in the notice; or
 (bb) the judgment debtor, director or officer, where the proceedings were postponed in his or her presence to a date and time determined by the court, has failed to appear before the court on that date and at that time; or
 (cc) the judgment debtor, director or officer has failed to remain in attendance at the proceedings or at the proceedings so postponed, the court may, at the request of the judgment creditor or his or her attorney, authorise the issue of a warrant directing a sheriff to arrest the said judgment debtor, director or officer and to bring him or her before a competent court to enable that court to conduct a financial inquiry. [Section 65A(6) of the Act]

- (iii) Any person who
 - (aa) is called upon to appear before a court under a notice in terms of section 65A(1) or 65A(8)(b) of the Act (where the sheriff, in lieu of arresting a person, hands to that person a notice to appear in court) and who wilfully fails to appear before the court on the date and at the time specified in the notice; or
 - (bb) where the proceedings were postponed in his or her presence to a date and time determined by the court, wilfully fails to appear before the court on that date and at that time; or
 - (cc) wilfully fails to remain in attendance at the relevant proceedings or at the proceedings so postponed, shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding three months. [Section 65A(9) of the Act]
- (iv) On appearing before the court on the date determined in the notice in terms of section 65A(1) or (8)(b) of the Act in pursuance of the arrest of the judgment debtor, director or officer under a warrant referred to in section 65A(6) of the Act or on any date to which the proceedings have been postponed, such judgment debtor, director or officer shall be called upon to give evidence on his or her financial position or that of the juristic person and his or her or its ability to pay the judgment debt. [Section 650 of the Act]
- (v) Any person against whom a court has, in a civil case, given any judgment or made any order who has not satisfied in full such judgment or order and paid all costs for which he or she is liable in connection therewith shall, if he or she has changed his or her place of residence, business or employment, within 14 days from the date of every such change notify the clerk or register of the court who gave such judgment or made such order and the judgment creditor or his or her attorney fully and correctly in writing of his or her new place of residence, business or employment, and by his or her failure to do so such judgment debtor shall be guilty of an offence and liable upon conviction to a fine or imprisonment for a period not exceeding three months. [Section 109 of the Act]

(2) Consent to judgment.

I admit that I am liable to the plaintiff as claimed in this summons (or in the amount of R..... and costs to date) and I consent to judgment accordingly.

Dated at this day of 20 ,

.....

Defendant

(3) Notice of intention to defend .

To the Registrar/Clerk of the Court.

Kindly take notice that the defendant hereby notifies his or her intention to defend this action.

Dated at this day of , 20

.....

Defendant/Defendant's attorney

Address

.....

Postal address

.....

Facsimile (fax) number (where available)

Electronic mail (e-mail) address (where available),,

(Give full address for acceptance of service of process or documents within 15 kilometres from the Court-house and also the postal address.)

* The original notice must be filed with the registrar or clerk of the court and a copy thereof served on the plaintiff or plaintiffs attorney.

Costs if the action is undefended will be as follows:

Summons.....	R
Judgement.....	R
Attorney's charges.....	R
Sheriff's fees.....	R
Sheriff's fees on re-issue.....	R
Total.....	R

ANNEXURE D: COMBINED SUMMONS

**IN THE MAGISTRATE'S COURT FOR THE DISTRICT OF PORT ELIZABETH
AT CIVIL COURT, DE VILLIERS STREET, NORTH END, PORT ELIZABETH**

Case No:

In the matter between:

XXXXXXXXXXXXXXXXXXXX

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

To the sheriff or his/her deputy:

INFORM the **ROAD ACCIDENT FUND**, established in terms of Section 2(1) of the Road Accident fund Act of 1996 (Act No.56 of 1996), within the area of jurisdiction of the abovementioned Honourable Court at 26 abc Road, Port Elizabeth (hereinafter called the defendant), that **XXXXXXXX**, an adult female person, currently residing at 121 abc Road, Mill Park, Port Elizabeth (hereinafter called the plaintiff), hereby institutes action against it in which action the plaintiff claims:

The relief claimed on the grounds set out in the particulars annexed hereto.

INFORM the defendant further that if defendant disputes the claim and wishes to defend the action it shall-

- (i) within 10 days of the service upon him of this summons file with the registrar of this court, at **New Law Courts, De Villiers Street, North End, Port Elizabeth**, notice of his intention to defend and serve a copy thereof on the plaintiff or plaintiff's attorney, which notice shall give an address referred to in rule 13(3) for the service upon the defendant of all notices and documents in the action;

Notice of intention to defend

To the Registrar /Clerk of the Court.

Kindly take notice that the defendant hereby notifies his or her intention to defend this action.

Dated at this day of , 20 ,

Defendant/Defendant's attorney

Address

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

Postal address

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

Facsimile (fax) number (where available)

Electronic mail (e-mail) address (where available)

(Give full address for acceptance of service of process or documents within 15 kilometres from the Court-house and also the postal address.)

* The original notice must be filed with the registrar or clerk of the court and a copy thereof served on the plaintiff or plaintiffs attorney.

Costs if the action is undefended will be as follows:

SummonsR 552.90

Judgment.R 465.12

Attorney's charges.....R

Sheriffs fees.....R

Sheriffs fees on re-issue R

Total: R

ANNEXURE E : PARTICULARS OF CLAIM

IN THE MAGISTRATE'S COURT FOR THE DISTRICT OF PORT ELIZABETH
HELD AT CIVIL COURT, DE VILLIERS STREET, NORTH END, PORT
ELIZABETH

CASE NO:

In the matter between:

XXXXXXXXXXXXXXXXXXXXX1

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

PARTICULARS OF CLAIM

1. The Plaintiff is xxxxxxxxxxxx1, a adult female person, currently residing at 12 ABC Road, Mill Park, Port Elizabeth.

2. The Defendant is the Road Accident Fund, established in terms of Section 2(1) of the Road Accident Fund Act of 1996 (Act No.56 of 1996) with its principal place of business at 26 ABC Road, Port Elizabeth.

3. On or about the 5th of September 2006 and at or near Mati Road, New Brighton, Port Elizabeth, within the jurisdiction of the above Honourable Court, a collision occurred between a minibus taxi which registration letters and number are unknown to the plaintiff and driven by Pieter at the time and a bus with registration letters and number

CWV630EC. At the time of the collision the Plaintiff was a passenger in the minibus taxi.

4. At all times material to the collision, the said minibus taxi with unknown registration letters and numbers was driven by Pieter, herein referred to as the Insured Driver.
5. The aforesaid collision was caused solely due to the negligence of the Insured Driver, having been negligent in one or more of all of the following respects:
 - 5.1 he failed to keep a proper look-out;
 - 5.2 he drove at an excessive speed under the circumstances;
 - 5.3 he failed to apply the brakes of the insured vehicle timeously, adequately or at all;
 - 5.4 he failed to have and to keep the insured vehicle under proper control'
 - 5.5 he failed to avoid the collision when by the exercise of reasonable care and skill and the taking of reasonable precautions he could and should have done so.
6. In and as a result of the aforesaid collision, the said Plaintiff sustained severe bodily injuries, more particularly injuries to her upper and lower limbs.

7. By reason of the aforesaid injuries, the Plaintiff suffered damages in the amount of R25000.00 which amount is calculated as follows:

7.1 General damages in respect of pain and suffering, loss of amenities
life, scarring and disfigurement R250000.00

7.2 Special damages in respect of past medical expenses R0.00

8. Plaintiff has complied with the provision of Section 24 of Act 56 of 1996 more particularly in connection with the submission of a claim form to the Defendant with complete annexures.

9. In the premises Defendant is liable to the Plaintiff in the sum of R25000.00, which amount Defendant refuses, neglects and/or fails to pay to Plaintiff, which amount, despite demand, is now due and payable.

10. The whole cause of action arose within the area of jurisdiction of the above Honourable Court.

WHEREFORE the Plaintiff prays for judgment against the Defendant as follows:-

1. Payment of the amount of R25000.00;
2. Payment of interest on the amount of R25000.00 at the legal rate of 15.5% per annum from date of judgment to date of final payment;

ANNEXURE F: NOTICE OF INTENTION TO DEFEND

**IN THE MAGISTRATE’S COURT FOR THE DISTRICT OF PORT ELIZABETH
AT CIVIL COURT, DE VILLIERS STREET, NORTH END, PORT ELIZABETH**

CASE NO:-

In the matter between:

XXXXXXXXXXXXXXXXXX

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

NOTICE OF INTENTION TO DEFEND

BE PLEASED TO TAKE NOTICE THAT the Defendant in the above action hereby gives notice of intention to Defend the action and appoints the Offices of Attorneys, **DEF**, 128 ABC Road, Walmer, Port Elizabeth, as the address at which they will accept Service of all documents, notices and pleadings in the action.

DATED at _____ on this the _____ day of _____ **2011.**

Defendant/Defendant's attorney

Address

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

Postal address

.....
.....

.....

fax number (where available)

.....

E-mail address (where available)

**TO: THE CLERK OF THE COURT
MAGISTRATE COURT
PORT ELIZABETH**

AND TO: RICHARD LAWRENCE ATTORNEYS

1st Floor, MGE Building

128 Heugh Road, Walmer

PORT ELIZABETH

6001

(Our Ref: RJL/bt/C1003005)

Received:	
Date:	
Time:	

ANNEXURE G: PLEA

**IN THE MAGISTRATE'S COURT FOR THE DISTRICT OF PORT ELIZABETH
AT CIVIL COURT, DE VILLIERS STREET, NORTH END, PORT ELIZABETH**

CASE NO:-

In the matter between:

Xxxxxxxxxxxxxxxxxx

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

DEFENDANT'S PLEA

The Defendant pleads as follows to Plaintiff's Summons and Particulars of Claim as amplified by the Further Particulars thereto:

1. AD Paragraph 1 thereof:

Defendant notes Plaintiff's name and gender, has no knowledge of the remaining allegations contained herein, does not admit the same and Plaintiff is put to the proof thereof.

2. AD Paragraph 3 and 4 thereof:

- 2.1 Defendant admit that on the 5th of September 2006 and at or near Mati Road, New Brighton, Port Elizabeth, within the area of jurisdiction of the above Honourable Court, a collision occurred between a mini bus taxi with registration letters and numbers unknown and driven by Pieter at the time and a bus bearing registration letters and numbers CWV630EC.

2.2 Save as aforesaid the remaining allegations contained herein are denied.

3. AD Paragraph 5 thereof:
Defendant does not admit that the said Pieter was negligent and Plaintiff is put to the proof thereof.
4. AD Paragraph 6 and 7 thereof:
Defendant has no knowledge of any of the allegations herein contained makes no admissions thereto and Plaintiff is put to the proof thereof.
5. AD Paragraph 8 thereof:
Defendant does not admit that Plaintiff has complied with the provisions of the said Act and Plaintiff is put to the proof thereof.
6. AD Paragraph 9 thereof:
Defendant admits demand and its refusal to pay but denies being liable to pay the amount claimed or at all.
7. AD Paragraph 10 thereof:
The contents hereof are admitted.

WHEREFORE the Defendant prays that the Plaintiff's claim be dismissed with costs.

DATED at on this the day of **2011.**

Defendant/Defendant's attorney
Address
.....
.....
.....

Postal address
.....

.....
.....

fax number (where available)

.....

E-mail address (where available)

**TO: THE CLERK OF THE COURT
MAGISTRATE COURT
PORT ELIZABETH**

AND TO: RICHARD LAWRENCE ATTORNEYS

1st Floor, MGE Building

128 Heugh Road, Walmer

PORT ELIZABETH

6001

(Our Ref: RJL/bt/C1003005)

Received:	
Date:	
Time:	

ANNEXURE H: NOTICE OF SET DOWN

IN THE MAGISTRATES' COURT FOR THE DISTRICT OF CAPE TOWN HELD AT CAPE TOWN

Case No.:

In the matter between:

J. W. Smith

Plaintiff

and

J. M. Jones

Defendant

NOTICE OF SET DOWN

BE PLEASED TO TAKE NOTICE that the above matter has been set down for hearing in the above Honourable Court on THURSDAY 16 May 2010 at 9.00 am in the forenoon or as soon thereafter as the matter can be heard.

Kindly place the matter on the Roll accordingly.

DATED AT CAPE TOWN this 4th day of FEBRUARY 2010.

C. SMITH & COMPANY

per:

C. SMITH
14 South Road
CAPE TOWN
8001

TO: The Clerk of the Court
The Magistrates' Court
CAPE TOWN

AND TO: Good & Litigant Attorneys
Park Building
Plein Street
WOODSTOCK

c/o Churchills Inc.
125 Short Road
CAPE TOWN

ANNEXURE I: DISCOVERY AFFIDAVIT

**IN THE MAGISTRATE'S COURT FOR THE DISTRICT OF PORT ELIZABETH
AT CIVIL COURT, DE VILLIERS STREET, NORTH END, PORT ELIZABETH**

CASE NO:-

In the matter between:

XXXXXXXXXXXXXXXXXX

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

DISCOVERY AFFIDAVIT

I, the above-named plaintiff,

XXXXXXXXXXXXXXXXXX

make oath and say:

1.

I have in my possession or power the documents relating to the matters in question in this suit set forth in the First and Second Part of the First Schedule hereto.

2.

I object to produce the said documents or recordings set forth in the Second Part of the said Schedule hereto.

3.

I do so for the reason that these documents are privileged and therefore not discoverable.

FIRST SCHEDULE

FIRST PART:-

No	Date	Description	Original	Copy
1.	17/12/04	Statutory medical report from Livingstone Hospital		X
2.		Medical records from Livingstone Hospital		X
3.		Out patient card and copy of ID		X
4.	19/12/04	OAR Form		X
5.	17/10/06	RAF Form 1	X	
6.	31/07/07	Confirmation certificate iro motor vehicle	X	
7.	24/10/07	Registered letter slip to RAF	X	
8.	19/05/08	Letter from SAPS stating that the criminal case was withdrawn	X	
9.	17/07/09	Letter from attorney requesting extension of time		X
10.	14/08/09	Letter from attorney regarding statements from the owners of motor vehicle		X
11.	10/09/09	Letter to attorney regarding the correct registration number		X
12.	01/12/09	Sketch plan of incident and letter attached thereto	X	
13.		Number Plate	X	
14.	07/01/10	Letter from attorney requesting more info		X
15.	20/01/10	Letter to attorney in response to letter dated 07/01/2010		X

FIRST SCHEDULE

SECOND PART:

- 1 Correspondence between Attorney and Client containing communications of a confidential nature with the object of obtaining Legal advice in relation to the matters in question in this action prior to, in contemplation of and during the continuance of these proceedings.

- 2 Statements of witnesses and reports brought into existence prior to, in contemplation of and during the continuance of these proceedings, and correspondence and documents in relation to information which might lead to the obtaining of such evidence or otherwise to enable the Defendant's Case in this action to be conducted, which statements, reports, correspondence and documents are by their nature privileged.

- 3 All other documents and correspondence brought into existence to enable the Defendant's case in this action to be conducted, which are by their nature privileged, in respect of the proceedings between the parties.

ANNEXURE J: EXPERT NOTICE AND SUMMARY

IN THE MAGISTRATES' COURT FOR THE DISTRICT OF PRETORIA HELD AT PRETORIA

In the matter between:

CASE NO.: 3386/91

XXXXXXXXXXXX

Plaintiff

and

THE MINISTER OF DEFENCE

Defendant

NOTICE AND SUMMARY IN TERMS OF RULE 24 (9)(a) and (b)

BE PLEASED TO TAKE NOTICE that the Plaintiff intends calling as an expert witness, at the trial of the above matter, MR XXXXXXXXXXXXXXX.

MR XXXXXXXXXXXXXXX WILL STATE THAT:

1. He is presently employed as an Assessor of damage to motor vehicles by IGI Assurance Company Limited, Pretoria, and has been employed in such capacity for the past seven years. Prior to taking up employment with IGI Insurance Company Limited, he was self-employed as a panel beater for approximately eight years. Altogether he has 35 years experience in the motor trade.
2. On 4 September 1990 he was instructed to inspect a certain 1984 Ford Sierra motor vehicle bearing registration number NFM 306 T in order to assess the nature and extent of the damage thereto, his having been informed that the vehicle had been damaged in a collision.
3. He inspected the aforesaid vehicle at the premises of Jock's Panel beaters CC, Gemsbok Street, Koedoespoort, and found it to be in a damaged condition. The damage was consistent with having been occasioned in a recent collision.
4. At the premises of Jock's Panel beaters CC, Gemsbok Street, Koedoespoort, he was furnished with a quotation numbered 12120 which detailed the repairs necessary to restore the said motor vehicle to its pre-collision condition.
5. After having assessed the damage to the said motor vehicle against the aforementioned quotation, he was of the opinion that the fair and reasonable cost of effecting the repairs necessary to restore the said motor vehicle to its pre-collision condition amounted to R9 182,09 (inclusive of GST).
6. In his opinion the aforementioned sum is not greater than the difference between the fair and reasonable market value of the said motor vehicle immediately prior to the said collision and immediately thereafter.
7. His opinion is based on his knowledge, training and experience in the field of assessing damage to motor vehicles and the cost of repairing such damage.

ANNEXURE K: REQUEST FOR DEFAULT JUDGMENT

IN THE MAGISTRATES' COURT FOR THE DISTRICT OF CAPE TOWN HELD AT CAPE TOWN

In the matter between: Case No.:
and Plaintiff
Defendant

REQUEST FOR DEFAULT JUDGMENT IN TERMS OF RULE 12(1)(a)

The Plaintiff hereby applies that:

1. the Defendant having been duly served;
2. the time for entering appearance to defend having expired;
3. the Defendant not having entered an appearance to defend;

judgment be given against the Defendant as claimed in the Summons for:

- a) payment of the sum of R (Rand);
- b) payment of interest thereon at the agreed rate of % (percent) per month a *tempore morae* from to date of payment;
- c) costs of suit in an amount of R (Rand) made up as follows;

Attorney charges: Summons	R
Judgment	R
Court fees	R
Messengers fees	R
Total	R

DATED at CAPE TOWN this day of

TO:

THE CLERK OF THE CIVIL COURT
Magistrates' Court

PER

Attorneys

CAPE TOWN

ATTACHED:
Original Summons
Original Messenger's Return

ANNEXURE L: DAMAGES AFFIDAVIT

**IN THE MAGISTRATES' COURT FOR THE DISTRICT OF HELD AT
.....**

In the matter between
and

Case No.:

Plaintiff

Defendant

AFFIDAVIT IN TERMS OF RULE 12 (4)

I, the undersigned,
do hereby make oath and say:

1. I am an adult male panel beater and have been employed at ENDEE PANEL SHOP, 66 Waterkant Street, Cape Town for the last twelve years
2. I served an apprenticeship and am the holder of a Diploma in panel beating from the Cape Technical College. I have eighteen years of experience in the assessment of damage to, and repair of motor vehicles
3. On the 2nd of December 1992 I inspected a Mercedes Benz motor vehicle bearing the registration number CA 568 461 after it had been involved in a collision. I found the reasonable and necessary cost of repairs to the vehicle including parts and labour to be R37 620,96 (thirty seven thousand, six hundred and twenty Rand and ninety six Cents) as per my written quotation, a copy whereof is attached hereto marked 'X'.

ANNEXURE M: APPLICATION FOR SUMMARY JUDGMENT

IN THE MAGISTRATES' COURT FOR THE DISTRICT OF HELD AT

In the matter between

Case No.:

and

Plaintiff

Defendant

NOTICE OF APPLICATION FOR SUMMARY JUDGMENT (RULE 14)

KINDLY TAKE NOTICE THAT application will be made to the abovementioned court onday of.....2011, at (time), for summary judgment against the Defendant for:

1. Payment of the sum of R_____;
2. Interest thereon at the rate of% p.a. from..... to date of final payment;
3. Costs of suit;
4. Further and/or alternative relief.

KINDLY TAKE FURTHER NOTICE THAT the document on which the claim is based or the affidavit of(copy to serve herewith) will be used in support of such application and that defendant may reply thereto by affidavit.

DATED at (place/town) on thisday of

ANNEXURE N: AFFIDAVIT IN SUPPORT OF APPLICATION

IN THE MAGISTRATES' COURT FOR THE DISTRICT OF HELD AT

In the matter between:

Case No.:

Plaintiff

and

Defendant

AFFIDAVIT IN SUPPORT OF AN APPLICATION FOR SUMMARY JUDGMENT

I, the undersigned,

do hereby make oath and say that:

1.

I am the Plaintiff in this matter and I am as such duly authorised to make this affidavit, the facts herein deposed to being within my own personal knowledge.

2.

I confirm that the Defendant is indebted to the Plaintiff in the amount of R and on the grounds as set out in the Plaintiff's summons.

3.

I verily believe that the Defendant has not a bona fide defence to the claim and that appearance has been entered solely for the purposes of delay.

Signed and sworn to at this day of the Deponent having acknowledged that he knows and understands the contents of this affidavit.

Commissioner of Oaths

ANNEXURE O: PROVISIONAL SENTENCE SUMMONS

**IN THE MAGISTRATE'S COURT FOR THE DISTRICT/REGION OF *
HELD AT ***

Case No:

In the matter between:

*

Plaintiff

and

*

Defendant

To the sheriff or his/her deputy:

You are hereby summoned to pay to the plaintiff herein immediately after service of this summons and amount of R* together with interest thereon at the rate of * % per annum as from *.

Plaintiff's claim against defendant for payment of the above-mentioned amount is for:
(set out the cause of action) *

And a copy of which document is annexed hereto;

- (2) By failing such payment, you are hereby called upon to appear before this court personally or by a practitioner at * (place and court if necessary) on the * day of * 20* at * (time) in the forenoon (or as soon thereafter as the matter can be heard) to admit or deny your liability for the said claim and to state why the mortgaged property should not be declared executable.
- (3) If you deny liability for the claim, you shall not later than the * day of * 20* file an affidavit with the registrar or clerk of this court, and serve a copy thereof on the plaintiff or (his) plaintiff's attorney at the address indicated for service on the summons, which affidavit shall set forth the grounds of your defence to the said claim, and in particular state whether you admit or deny your or your agent's signature which appears on the said * and if it is your agent's signature whether you admit or deny the signature or authority of your agent.

**ANNEXURE P: APPLICATION FOR APPOINTMENT FOR CURATOR
BONIS**

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE PROVINCIAL DIVISION)**

In the *ex parte* application of:

.....

for the appointment of a curator *ad litem*
and a curator *bonis et personae*

to ('the patient')

CASE NO.:

Applicant

NOTICE OF MOTION
(APPLICATION IN TERMS OF RULE 57)

BE PLEASED TO TAKE NOTICE that application will be made on behalf of above named Applicant to the above Honourable Court on, at 10:00, or as soon thereafter as the matter may be heard for an order in the following terms:

1. That Advocate be appointed as curator *ad litem* to the patient in this application to have her declared to be of unsound mind as such incapable of managing her own affairs or be declared incapable of her own affairs by reason of a mental or physical disability and appointing a curator *bonds et personae* to the patient.

AND THEREAFTER:

2. That ('the patient') be declared to be of unsound mind and as such incapable of managing her own affairs or be declared incapable of managing her own affairs by reason of a mental or physical disability;
3. That ('the Applicant') be appointed as curator *bonis et personae* to the patient with such powers as this Honourable Court or the Master thereof may direct;
4. That the curator *bonds et personae* be exempt from furnishing security to the Master of this Honourable Court;
5. That the costs of this application and the curatorship be paid from the estate of the patient;
6. Further and /or alternative relief

TAKE NOTICE FURTHER THAT the Affidavits of, Dr, Dr will be used in support of this application.

KINDLY PLACE THE MATTER ON THE ROLL FOR HEARING ACCORDINGLY

DATED at CAPE TOWN this _____ day of _____ 19_____

.....&
ASSOCIATES

ANNEXURE Q: APPLICATION FOR SUBSTITUTED SERVICE

APPLICATION FOR SUBSTITUTED SERVICE

NOTICE OF MOTION

TAKE NOTICE THAT Application will be made on behalf of the above-named Applicant on Friday the 4th August 1995 at 10h00 or as soon thereafter as Counsel can be heard for an Order:

1. Authorising substituted service of process which Applicant intends to issue against the Respondent for:
 - a. a decree of divorce;
 - b. implementation of the donations in favour of Applicant contained in the Antenuptial Contract entered into between the parties;
 - c. an order compelling Respondent to pay Applicant maintenance in the amount of R200,00 per month until her death or remarriage;
 - d. an order awarding sole custody and sole guardianship of the children born of the marriage to the Applicant;
 - e. an order that Respondent pay maintenance to Applicant in respect of the aforesaid children in the amount of R100,00 per month per child;
 - f. alternative relief;
 - g. costs of suit.
2. Directing that service be effected upon the Respondent by means of publication of the citation in one edition of the Cape Argus.
3. Calling upon Respondent to give notice of his intention to oppose the proceedings within 21 days after such publication if he intends to oppose the relief set out above.

BE PLEASED to set the matter down for hearing accordingly.

DATED at CAPE TOWN etc.

The supporting affidavit could read as follows:

AFFIDAVIT

I, the undersigned,

SUSAN BROWN (born **GREEN**)

do hereby make oath and say:

1. I am an adult housewife presently residing at No. 15 St. James Street, Somerset West and I am the Applicant in this application. The facts set out herein fall within my personal knowledge save where otherwise stated and are true and correct.
2. The Respondent is JOSEPH BROWN whose present address is unknown to me.
3. I married the Respondent at Somerset-West on the 9th December 1977 and the marriage still subsists. Prior to the marriage the Respondent and I executed a duly registered Antenuptial Contract excluding community of property and the Respondent's marital power and containing also certain donations in my favour which have not been implemented.
4. Two children were born of the marriage, namely, a son named James, presently 10 years of age, and a daughter, Margaret, aged 8.
5. The Respondent was born in England but immigrated to South Africa some time before our marriage and at the time of our marriage was and still is domiciled in South Africa.
6. The marriage was reasonably happy until 1985 when the Respondent deserted me at Paarl where we were then living and only returned after a period of three months. Upon his return the Respondent indicated that he had gone to Cape Town to look for fresh employment but on reconsideration had decided to return to Paarl. He asked me to accept him back.
7. We continued living together at Paarl for a further eight months whereafter the Respondent again suddenly, without prior notice to me, left me and the children.
8. The only subsequent contact which I have had with the Respondent since he thus deserted me consisted of a letter which he addressed to me a month after he left me and a copy whereof I attach hereto marked A. It will be noticed that he gave no indication therein as to his future intentions. The letter was posted from Cape Town where he was presumably at the time. Since then nothing further has been heard from him.
9. At the time of his disappearance the Respondent worked for the Apex Building Company as a building inspector at Paarl. I enclose herewith a copy of a letter (marked 'B') which I addressed to his employers requesting their assistance in tracing him. As will be observed from their reply (Annexure 'C') the Respondent left their employ without prior notice on the day that he deserted me and their attempts to trace him have proved fruitless.

10. Particulars of the Respondent's family connections are the following:
 - a. His father is deceased.
 - b. His mother is Mrs D. Brown who lives at 19 Church Street, Wellington. Respondent apparently visited his mother for three days immediately after he deserted me but according to a letter which I subsequently received from her (a copy whereof I attach hereto marked 'D') he thereupon left her home without telling her anything about his movements. Like me, she has had no further contact with him.
 - c. Respondent has a brother, one Captain Frederick Brown, who is with the South African Defence Force, and my attorneys addressed a letter to him requesting his assistance in tracing the Respondent. A copy is attached marked 'E'. From his response (Annexure 'F') it will be noticed that he likewise has had no news of the Respondent's movements
 - d. The Respondent has a sister, one Mrs Jean L. Black, whose address is 11 Oakdale Road, Durban. My attorneys wrote a similar letter to her and in response received a letter (copy whereof is attached marked 'G') in the ultimate paragraph whereof she says 'I am very sorry to say that neither I nor my husband have any idea as to his whereabouts nor have we heard by word or letter anything since he deserted my sister-in-law'.
 - e. The Respondent has no other brothers or sisters or indeed any other near relatives or friends who one could approach in order to obtain particulars of his movements and whereabouts. I suspect that the Respondent is at or near Cape Town and my attorneys accordingly addressed a letter to the Station Commander of the South African Police at Cape Town enquiring as to his whereabouts From the Station Commander's reply (Annexure 'H'), it will be observed that the South African Police cannot be of any assistance in tracing him.
11. While we lived together the Respondent regularly used to read the Cape Argus and I consider that publication of the citation in that newspaper will come to his notice.
12. Since our marriage has clearly broken down irretrievably I am anxious to institute proceedings out of the above Honourable Court against Respondent for:
 - a. decree of divorce.
 - b. implementation of the donations in my favour captured in the Antenuptial Contract entered into between us.
 - c. an order awaiting sole custody and sole guardianship of the children born of the marriage to me. I would point out in regard to this prayer that it is essential that I should obtain full custody and sole guardianship as this will preclude difficulties which I might otherwise have in future in regard to their affairs I add that the Respondent has taken no interest in the children and has in particular defaulted in paying any maintenance since he left us:
 - d. an order compelling Respondent to pay maintenance to me in the amount of R200,00 per month. In regard to this prayer I do realise than an amount for maintenance may well be academic but the possibility exists that Respondent may be found in later years and I consider he should then be compelled to effect payment of such maintenance.
 - e. an order compelling Respondent to pay maintenance to me in respect of the two minor children at the rate of R100,00 per child.

f. alternative relief.

g. costs of suit.

14. I accordingly pray for an order in terms of the relief set out in my Notice of Motion herewith.

(SGD) S. BROWN

I certify that this affidavit was signed and sworn to etc.

ANNEXURE R: RETURN OF SERVICE

Magistrates' Court for the District of
Held at

[SAAK NR. / CASE NO.]

In the matter between:

Plaintiff

and

Defendant

Return in accordance with the provision of the Magistrates' Court
Act 32 of 1944, as amended.

RETURN OF SERVICE of SUMMONS (ORDINARY) on 15th day of November 2002 at 15:26

On this 15th day of November 2002 at 15:26, I served the SUMMONS (ORDINARY) upon, THE PERSON IN CHARGE, ostensibly a responsible person and not less than 16 years of age, and in control at the place of residence of, the last mentioned being temporarily absent, and by handing to the first mentioned a copy thereof after exhibiting the original and explaining the nature and exigency of the said process.

RULE 9(3) (b).

BALJUGELDE SHERIFF FEES	DATUM DATE		FAKTUUR NR. INVOICE NO.				
			<u>Description</u>	<u>Qty</u>	<u>Vat</u>	<u>Amount</u>	Deputy Sheriff Sheriff Magistrates' Court Tel: Fax:
			SERVICE*Over 12 km VAT (Nil)	1	0.00	0.00 0.00	
BTW REG. NR. VAT REG. NO.		U KAN VEREIS DAT HIERDIE REKENING VOOR VEREFFENING GETAKSEER EN GESTAAF WORD YOU MAY REQUIRE THIS ACCOUNT TO BE TAXED AND VOUCHERED BEFORE PAYMENT.		TOTAAL TOTAL			
			Rekeningnommer / Account Number U Verwysing / Your Reference My Verwysing / My Reference RetNo:				
			To the clerk of the court:				

**ANNEXURE S: FLOW-CHART – PRE-TRIAL PROCEEDINGS
IN THE MAGISTRATES' COURT**

PLAINTIFF

May, and sometimes must, send a **LETTER OF DEMAND** with:

- amount owing;
- nature of claim;
- date payment due; and
- prescribed fees and costs.

DEFENDANT

- Admits debt and pays;
- OR**
- denies or ignores particulars of claim.

SUMMONS: ISSUED BY THE CLERK / REGISTRAR OF THE COURT

Must comply with **Rule 5 and 6**.

Rule 8: Stipulates service by sheriff and return of service.

Rule 9: Outlines manner of service.

CAN:

- ask for security if plaintiff is:
 - an unrehabilitated insolvent;
 - not resident in S.A.; and
 - a company or CC;

OR

- consent to judgment and lodge the form with the clerk of the court;

OR

- serve notice of intention to defend on plaintiff and file same with clerk/registrar of the court;

OR

- fail to enter appearance to defend, or fail to rectify defective notice.

PLAINTIFF

DEFENDANT

If defendant:

- fails to enter appearance to defend; **OR**
- fails to file a plea within five days after notice of bar; **OR**
- fails to rectify defective appearance to defend after notice given; **OR**
- fails to appear at summary judgment application; **OR**
- consents to judgment.

May get

JUDGMENT BY DEFAULT

and must lodge with clerk of the court:

- original summons;
- proper return of service;
- written request for judgment in duplicate;
- if illiquid claim, must give evidence orally or by affidavit to prove nature and extent of damages;
- if liquid claim, then liquid document must be attached;
- if based on National Credit Act, then compliance with NCA must be lodged.

- If defendant enters notice of intention to **defend**.

Plaintiff can apply for

SUMMARY JUDGMENT

In terms of Rule 14 – when thinks defendant has no *bona fide* defence and is delaying:

- must be based on:
 - liquid document; **OR**
 - liquidated sum of money; **OR**
 - delivery of specified movable; **OR**
 - for ejectment and costs.

PLAINTIFF

DEFENDANT

SUMMARY JUDGMENT (CONTINUED)

– application to court with:

- liquid document(if applicable)
- affidavit declaring no *bona fides* by defendant
- must be delivered to defendant within 10 days of receiving notice of intention to defend
- must give defendant at least 10 days notice of application

Responds by:

- paying claim and costs; **OR**
- filing affidavit supporting *bona fides*.

If affidavit is satisfactory, defendant gets leave to defend the action and may:

- take exception;
- file a plea on the merits in which must admit, deny, confess and avoid, or claim no knowledge and request proof;
- file counterclaim with plea;

- may reply to plea; **OR**
- pleading closed with 10 days of receiving plea.

Plaintiff may deliver notice of set down;

OR if plaintiff fails to do so within 15 days of pleadings closing, the defendant can do so.