Civil Court Bench Book

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CIVIL COURT BENCH BOOK

Justice College

This Bench Book has been compiled as a basic resource to be used in the training of magistrates, as a practical guide for those magistrates who are not experienced in civil-court work and as a ready reference for use in the courtroom.

While every effort has been made to ensure that the information in this Bench Book is correct, it remains the responsibility of each magistrate to refer to the original sources of the law and to stay abreast of developments in the law.

The Bench Book begins with an overview of the procedures applicable in the civil courts, then deals with the jurisdiction of the courts, issues relating to parties, and the law concerning service of court documents, before proceeding to a detailed examination of the law and procedure relating to trial actions and application proceedings.

Frequent references are made to –

The Magistrates' Courts Act 32 of 1944 as amended (referred to as the MCA)
The Magistrates' Courts Rules of Court of 1968 as amended

Jones & Buckle *The Civil Practice of the Magistrates' Courts in South Africa* 9ed
Volume I – The Act (abbreviated as 'Act') and Volume II – The Rules ('Rules')

Harms *Civil Procedure in Magistrates' Courts* 1st edition

Part 1 General Introduction

1.1 The function of civil courts

Civil courts hear matters in which one party claims relief against another party. The parties may be natural persons or juristic persons. The following are the most common forms of relief claimed: payment of money; delivery of property; ejectment from premises; the return of spoliated property; and interdicts. This type of relief is called substantive relief. Civil courts also hear applications in which procedural relief relating to the main claim for substantive relief is claimed.

1.2 Legal representation of parties

When a civil matter is called, the Magistrate should ascertain who appears for each party and record the details in writing on the case record.

1.2.1 Who may appear?

Natural persons may appear on their own behalf in civil matters or be represented by a legal practitioner – rule 52(1)(a). A local authority, company or other incorporated body may either be represented by a legal practitioner or nominate an officer of the body to appear on its behalf – rule 52(1)(b). A partnership or group of persons associated for a common purpose may either be represented by a legal practitioner or may nominate a member to appear on its behalf – rule 52(1)(c).

Every attorney who has been admitted as an attorney of the High Court and has not been struck off the roll of attorneys has the right of appearance in a Magistrate's Court. The attorneys' profession is regulated by Law Societies and every practising attorney is obliged by statute to be a member of a Law Society. Each provincial or regional Law Society maintains a roll of attorneys. A candidate attorney who has an LLB degree has right of appearance in the District Court, but a candidate attorney may not sign a summons or a pleading – refer to J & B Rule 52--2.

Every advocate who has been admitted by the High Court and is on the roll of advocates has the right of appearance in all courts. The conduct of practising advocates who are members of the constituent Bar Councils of the General Council of the Bar (GCB Bars) are strictly regulated by these Bar Councils, but advocates are not required by statute to be members of a Bar, and those who are not are not subject to any regulatory authority other than the High Court. There are over 8 000 people on the roll of advocates, but less than 2 000 of these are members of Bars. The Director-General of the Department of Justice and Constitutional Development keeps the complete roll of advocates. The Registrar of each High Court keeps a roll of advocates who have been admitted by that High Court. It has been held that an advocate, including an advocate who is not a member of a GCB Bar, may not act on behalf of a party without having been instructed by an attorney – *De Freitas and Another v Society of Advocates of Natal and Another* 2001 (3) SA 750 (SCA).

Advocates and attorneys are not merely 'agents' for their clients but have duties as officers of the court, which includes the duty of 'utmost good faith' and the duty to ensure the 'efficient and fair administration of justice' – *Cape Law Society v Vorster* 1949 (3) SA 421 (C), per De Villiers JP at 425.

1.2.2 Withdrawal of legal representatives

A legal practitioner does not need the leave of the court to withdraw from a civil case – see J & B Act 20. An attorney who withdraws should file a notice of withdrawal as attorney of record, unless the withdrawal is announced in court, in which case it may be done orally.

An attorney who has accepted instructions to act for a client is not at liberty simply to withdraw as attorney of record without good justification. The following are generally regarded as good grounds for withdrawal:

- insufficient funds received from the client, provided that the client has been requested well in advance to pay funds to the attorney;

- the failure of the client to issue instructions;
- deterioration of the attorney's relationship with the client;
- where the client has lied to the attorney or committed fraud and the position of trust between attorney and client has been destroyed as a result; or
- any other ground that would render it ethically unacceptable for the attorney to continue acting for the client.

In *MacDonald t/a Happy Days Café v Neethling* 1990 (4) SA 30 (N) it was held that an attorney must withdraw timeously so that the client can make other arrangements, failing which the attorney may incur liability for costs.

It may happen that, while a witness is testifying, the attorney discovers that the witness is materially deviating from his or her statement and is lying to the court. In such circumstances the attorney would seek a short adjournment to discuss the matter with the client. If the situation cannot be rectified, it may be appropriate for the attorney to return to court and withdraw without giving reasons. This will usually result in the client needing to seek a postponement in order to obtain other legal assistance.

1.3 Court protocol

The established protocol for civil courts is set out below.

It is regarded as a courtesy for legal practitioners to introduce themselves to a judicial officer prior to their first appearance before that judicial officer. Magistrates should accordingly make themselves available in chambers prior to commencement of court proceedings. Practitioners who are unknown to the presiding officer can be asked to produce evidence of their right of appearance in court.

Magistrates should always be robed when presiding in court. A Magistrate need not be robed when sitting in chambers. An advocate does not wear a robe in the Magistrates' Courts, but an attorney does.

Parties and legal practitioners should know at what time the court commences and be at court by this time, unless a special arrangement has been made with the judicial officer. Where the arrangement has been made between the parties, the judicial officer should be advised of this arrangement but is not bound by it.

Upon entering court, the presiding officer bows to the officers of the court who are present, and then sits down. The officers of court should acknowledge this courtesy by bowing back. If the court is in session when officers of the court enter, they bow to it. The presiding officer acknowledges this courtesy. Similarly, on leaving, a legal representative is expected to bow to the court.

When introducing the case, the legal representative commences by saying: 'May it please the court, I appear for the plaintiff'. A practitioner always stands to address the court, and only one party may address the court at a time. Therefore, if an attorney raises an objection while an adversary is leading a witness or cross-examining, the latter is obliged to take a seat until the objection has been fully stated. As an expression of courtesy, a practitioner addresses the court in the second person: eg 'Your worship will find the relevant document at page 14 of the bundle'. When a practitioner addresses the court or when witnesses are testifying, they should look at the magistrate and direct their address or answer to the court.

When the last case on the roll is being finalised, it is an expected courtesy that practitioners wait for the court to adjourn and then rise together with the court, unless excused by the court. It is a discourtesy for practitioners to robe or disrobe in a court while it is in session.

The administration of justice is founded not only on the power of the courts but also on the preservation of their dignity. For this reason, it is the duty of every practitioner to uphold the dignity of the court. Fortunately, cases of contempt of court are rare.

1.4 Record of proceedings

Section 4(1) of the MCA dictates that every court shall be a court of record. Section 6 of the MCA states that either of the then official languages (English or Afrikaans) may be used at any stage of the proceedings in any court and the evidence shall be recorded in the language so used. Section 6(1) of the Constitution of the Republic of South Africa, Act 108 of 1996 declares Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, isiNdebele, isiXhosa and isiZulu to be official languages of the Republic in addition to English and Afrikaans. Any of these eleven official languages may therefore be used in court.

Rule 33(7) requires a magistrate presiding over any civil proceedings which last for a quarter of an hour or longer to note on the record of the proceedings in respect of each day thereof the time of the day when the proceedings actually commenced and actually ended. The time of the day of the commencement and conclusion of each adjournment on that day must also be noted.

Rule 30(1) requires that minutes of record must be made of –

(a) any judgment given by the court;
(b) any viva voce evidence given in court;
(c) any objection made to any evidence received or tendered; and
(d) the proceedings of the court generally, including the record of any inspection in loco.

Rule 30(2) requires the court to mark each document put in as evidence and note such mark on the record. The procedure on receipt of documents handed up from the bar is to mark them with a letter of the alphabet, eg, ‘A’, ‘B’, ‘C’ etc. Failure to mark documents in this way does not reduce their evidentiary value, however -

Arthur v Bezuidenhout and Mieny 1962 (2) SA 566 (A). It is essential that Magistrates ensure that the case number is on each exhibit. It is also good practice to identify the exhibit by signing and dating it and noting the number of pages it contains.

Rule 30(3) and (4) make it clear that the presiding officer has the responsibility to ensure that these minutes and marks are made, but at the same time provides that the addresses of the parties, viva voce evidence given, any exception or objection taken in the course of the proceedings, the ruling and judgment of the court and any other portion of the proceedings may be noted in shorthand or by mechanical means.

The following guidelines for the correct recording of proceedings are set out in paragraphs 15 and 66 of the Judicial Manual:

15. With the exception of courts where evidence is recorded mechanically, magistrates must record evidence in ordinary handwriting on one side of the prescribed writing pads. Applications by legal representatives to employ casual stenographers or make use of mechanical recorders, at their expense, must be refused summarily as it could cause embarrassment to the Judiciary and may lead to serious problems in the event of any of the recordings being lost. If the applicant requires such facilities for his own private purpose, the decision to grant permission is in the discretion of the presiding magistrate. Magistrates must, however, bear in mind that the simultaneous use of two recording machines has an adverse effect on the quality of recordings.

66.1 The evidence must be recorded clearly and properly. Where the question and answer method in cross-examination is not used, the questions put must appear clearly from the answers which are recorded. It is the magistrate's duty to record in all respects the actual evidence given and for that reason a version in the third person is unacceptable.

Even though the proceedings are being mechanically recorded, Magistrates must keep notes for their own purposes and in order to help the Clerk of the Court reconstruct the case record in the case of a lost audiotape. These notes do not form part of the official record and should not be filed with the Clerk of the Court.

All orders made, including an order that the matter be postponed, must be recorded in writing on the case record.

1.5 Administration of the oath or affirmation

Section 112 of the MCA provides that the oath to be taken by any witness in any civil proceedings in any court shall be administered by the officer presiding at such proceedings or by the Clerk of the Court (or any person acting in his stead) in the presence of the said officer, or if the witness is to give his evidence through an interpreter, by the said officer through the interpreter or by the interpreter in the said officer's presence.

If the witness does not wish to give evidence under oath then s 40 of the Civil Proceedings Evidence Act 25 of 1965 (CPEA) applies. This provides:

> (1) In any case where any person who is or may be required to take an oath objects to do so, it shall be lawful for such person to make an affirmation in the words following:
>
> 'I do truly affirm and declare that……..' (here insert the matter to be affirmed or declared).
>
> (2) Any person authorized, required or qualified by law to take or administer an oath shall accept, in lieu thereof, an affirmation or declaration as aforesaid.
>
> (3) Such affirmation or declaration shall be of the same force and effect as if the person who made it had taken such oath, and the same penalties and disabilities which are respectively in force in respect of and are attached to any false or corrupt taking and subscribing of any oath administered in accordance with section thirty-nine, and any neglect or refusal in regard thereto, shall

apply and attach in like manner in respect of the false or corrupt making or subscribing respectively, of any such affirmation or declaration as in this section mentioned and any neglect or refusal in regard thereto.

If the witness does not understand the oath or the meaning of affirmation s 41 of CPEA applies, which provides:

(1) Any person who, from ignorance arising from youth, defective education or other cause, is found not to understand the nature or to recognize the religious obligation of an oath or affirmation, may be permitted to give evidence in any civil proceedings without being upon oath or affirmation, if, before any such person proceeds to give evidence, the person presiding at the proceedings in which he is called as a witness, admonishes him to speak the truth, the whole truth and nothing but the truth and administers or causes to be administered to him any form of admonition which appears, either from his own statement or from any other source of information, to be calculated to impress his mind and bind his conscience, and which is not, as being of an inhuman, immoral or irreligious nature, obviously unfit to be administered.

(2) Any person to whom an admonition has been administered as aforesaid, who in evidence wilfully and falsely states anything which, if sworn, would have amounted to the offence of perjury or any statutory offence punishable as perjury, shall be deemed to have committed that offence, and shall upon conviction be liable to such punishment as is by law provided as a punishment for that offence.

The usual form of the oath or affirmation is as follows:

> Do you swear that the evidence you are about to give will be the truth, the whole truth and nothing but the truth?
>
> Do you truly affirm that the evidence you are about to give will be the truth, the whole truth and nothing but the truth?

The administration of an oath or affirmation to juvenile witnesses needs special attention. If a child, as a result of his or her youthfulness, on questioning by the presiding officer, is found not to understand the nature of an oath, he or she may be admonished to speak the truth and may then give unsworn evidence. (See s 41 of the CPEA.) Before the child gives unsworn evidence, the presiding officer has to establish whether he or she understands the difference between the truth and a lie. A child who is not able to make the distinction is not competent to give evidence. The testimony given under admonition is not necessarily less credible than testimony given under oath.

If a witness's testimony is interrupted by an adjournment, the Presiding Officer has to warn the witness not to discuss the case with anyone, including the legal representative leading his or her evidence. When the trial resumes, the Presiding Officer usually reminds the witness that he or she is still under oath. If the matter is adjourned for further evidence to another day and the witness is still giving evidence, the Presiding Officer administers the oath to the witness again.

1.6 Recusal of judicial officer

A judicial officer should recuse himself or herself from hearing a civil case in the following circumstances:

- he or she has a direct or indirect interest in the matter;
- he or she has a close relationship or friendship with one of the parties;
- a colleague from the same bench is involved as a party;

- he or she feels enmity or hostility towards a party;
- he or she had a prior professional interest in the matter;
- he or she can give material evidence in the case.

These grounds of recusal are discussed by Jones and Buckle Act 12. Where a judicial officer has been exposed to facts relating to the matter by reason of having heard a preliminary application, recusal in respect of the main hearing may be advisable if there is any perception that the judicial officer became privy to facts which may influence him or her – *Silwana and Another v Magistrate, District of Piketberg, and Another* 2003 (5) SA 597 (C).

A litigant may apply for a judicial officer to recuse himself or herself on any of these grounds or if there is any other reason to believe that the judicial officer is biased.

1.7 Overview of types of civil proceeding

There are three types of proceeding which may be used in civil cases:

- trial actions
- application or motion proceedings
- provisional sentence proceedings.

1.7.1 Trial actions

Trial action is the procedure which must generally be used in the Magistrates' Courts. The most striking feature of a trial action is that the procedures culminate in a hearing before a court during which witnesses appear in court to give oral evidence. Trial actions are always commenced by way of a summons. When the action is defended both parties are required to set out the facts on which they rely in documents called pleadings. The pleading stage is followed by a pre-trial period during which the parties prepare for trial. At the trial oral and documentary evidence is presented to the court. After all the evidence has been presented, the legal

representatives appearing for the parties present argument on the facts and the law to the court, and the court must then make a decision.

1.7.2 Application proceedings

Application or motion proceedings are very different in that generally the witnesses do not appear in court to give oral evidence. Instead the evidence is placed before the court in the form of written statements signed and sworn to by the witnesses, which are called affidavits. At the hearing of an application the legal representatives for the parties present argument to the court with reference to the facts disclosed in the affidavits and with regard to the relevant law. In the High Courts the application procedure may be used for any type of substantive claim, other than claims for damages or divorce, provided that no material dispute of fact is foreseen. If a dispute of fact is foreseen, then trial action must generally be used because when a court is required to decide which of two parties is telling the truth, it must have the opportunity of seeing and hearing the witnesses, particularly under cross-examination. In the Magistrates' Courts the application procedure is not generally available as it is in the High Courts and may be used only where the Magistrates' Courts Act 1944 (MCA) or a rule of court or other legislation authorizes the application procedure.

Almost all the applications specifically authorized by the MCA and the rules are procedural applications which are ancillary to a trial action by way of which the substantive relief is claimed. The only two substantive applications authorized by the MCA and the rules are applications for interdicts and applications for spoliation orders, both of which may be ancillary to trial actions but may also stand on their own. A list of all the applications which are authorized in terms of the MCA and the rules can be found in Jones and Buckle Act 55--2. An example of an application authorized by legislation other than the MCA or rules is an application for eviction in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998. There is no provision in the MCA or the rules authorizing a claim for eviction to be brought by way of application, and therefore any eviction claim other

than one brought in terms of PIE must be claimed by way of summons. In the High court eviction is almost always claimed by way of application.

When procedural relief ancillary to the main claim is sought, the application procedure will always be appropriate. Such applications are called interlocutory applications or, if brought before the claim for substantive relief has been instituted, preliminary applications.

In trial actions the parties are referred to as the plaintiff and the defendant. Action is instituted by way of service of a summons, which is followed by an exchange between the parties of documents called pleadings if the action is defended. In applications the parties are referred to as the applicant and the respondent. The applicant commences proceedings by means of a notice of application (notice of motion) which advises the respondent of his claim. The notice of application is usually accompanied by an affidavit (or affidavits) setting out the facts and evidence on which the claim for relief is based. Documentary evidence may be annexed to the affidavits and is proved by reference to the annexure in the affidavit.

1.7.3 Provisional sentence proceedings

The third type of procedure, provisional sentence, is often referred to as a hybrid procedure because it is a mixture of trial and application procedure. The parties are referred to as the plaintiff and the defendant. The plaintiff issues a provisional sentence summons that calls upon the defendant to appear in court on a certain day to admit or deny the plaintiff's claim. A defendant who denies the plaintiff's claim is required to file an affidavit setting out a defence, and the plaintiff may then file an affidavit in reply. On the day named in the summons the parties appear before the court for a hearing that is in the nature of an application hearing. After considering the papers and hearing argument the court must –

(a) grant a final judgment if the defendant admits the plaintiff's claim, or

(b) if the defendant denies liability, decide on the basis of the facts disclosed in the papers whether to grant or refuse provisional sentence.

When provisional sentence is refused, the summons stands as a combined summons and the matter proceeds to trial in the usual way. When provisional sentence is granted, the defendant has to pay the plaintiff's claim but may, after paying the judgment amount plus costs, give notice of intention to take the matter to trial (enter into the principal case). In that event, the plaintiff has to furnish security for the repayment of the amount that the defendant has paid should the defendant succeed in the trial (security de restituendo). If a defendant does not give such notice within two months of the judgment, then the provisional judgment becomes final.

It is important to note that provisional sentence procedure can be used only for money claims and then only if the claim is based on a liquid document. A liquid document is a document on the face of which it appears that the defendant is indebted to the plaintiff in a fixed amount of money – for example an acknowledgement of debt, a suretyship for a fixed amount or a dishonored cheque. Such a document raises a presumption of indebtedness. It is for this reason that the plaintiff is given the benefit of a special procedure in terms of which the matter comes before the court in a relatively short space of time and the defendant bears the onus of establishing that there is a good reason why the court should not order payment of the amount reflected in the document on a provisional basis. A copy of the document must always be annexed to the summons.

1.8 Service of documents in civil proceedings

1.8.1 Service of a process of court

A process of court (in the case of Magistrates' Courts) is a document that needs to be issued by the Clerk of the Court in order to be valid. Examples of processes are: summonses, warrants of arrest, warrants of execution, and orders of court. In each case the validity of the process is dependent on the document being issued by a Clerk of the Court – rule 4(2).

The sheriff of the court carries out the service of process of court. The sheriff who must serve is the sheriff appointed for the area of court within which service must take place. Service of a process carried out by a sheriff who does not have jurisdiction is invalid – *Barclays National Bank v Wentzel* 1978 (3) SA 976 (O).

Rule 9 sets out the manner in which the sheriff must serve processes.

The following manners of service are authorized in terms of rule 9:

1. Personal service on the party or on the party's duly authorized agent (there being no requirement that the agent's authorization be in writing). Personal service need not be carried out at the address in the summons. It can be carried out anywhere the party to be served is found.

2. At the party's residence or place of business, provided that the person accepting service appears to be 16 years of age or older and lives or is employed there. In a building complex or block of flats, service must be made at the actual flat or room where the party to be served resides.

3. At the person's place of employment, on a person who appears to be 16 years of age or older and apparently in authority over the litigant or, in the absence of such person, on a person apparently in charge.

4. At the party's chosen domicilium citandi et executandi. Where the party to be served has given a postal address as a domicilium, the sheriff must physically put the process in the post-box. It was held in *Amcoal Collieries Ltd v Truter* 1990 (1) SA 1 (A) at 6A-D that it is well-established practice that if a defendant has chosen a domicilium citandi et executandi, service of process at that place will be good, even though it be a vacant piece of ground, or the defendant is known to be resident abroad, or has abandoned the property, or

cannot be found. Service at the address chosen is good service, whether or not the addressee is present at the time.

5. Where one is dealing with a body corporate, at its local office or principal place of business within the area of the court's jurisdiction.

6. Where a plaintiff has given written instructions to the sheriff to serve by registered post, the process may be served in this way – rule 9(15)(a). The dies induciae starts running on the on which the process is posted and not on the day on which it is received by the other party.

7. Where the defendant is a Minister, Deputy Minister, the State, or a provincial authority, at the State Attorney's office in Pretoria, or a branch of the State Attorney's office having jurisdiction.

8. Where a sheriff is unable to carry out service in terms of 1 or 2 above, it is sufficient for a copy of the process being served at a place of residence to be placed in the post-box or attached to an outer or principal door or security gate – *Barens en 'n Ander v Lottering* 2000 (3) SA 305 (C) at 311.

9. Where the relief claimed is limited to an order for rental or for eviction from premises or land, and it is not possible to carry out service as set out above, it is sufficient for a copy to be attached to the outer or principal door of the premises that are the subject matter of the action – rule 9(7). The provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) may also apply.

10. In rule 44(2) interpleader proceedings, the process may be served upon the attorney of record, if any, of the party to be served – rule 9(8).

11. If two or more persons are to be served with the same process, both or all of them are to be served, provided that:

- in the case of a partnership, service may be carried out at the partnership office or place of business or, failing this, according to either 2 or 3 above;

- where two or more persons are sued in their capacities as trustees, liquidators, executors, curators or guardians, service may be carried out in any manner prescribed in rule 9; and

- in the case of a syndicate, unincorporated company, club, society, church, public institution or public body, if service cannot be carried out at the local office or place of business, the chairperson or secretary may be served, in any manner prescribed in rule 9.

Judicial officers should note that returns of service must be properly checked to determine whether service was carried out properly. Consequences of invalid service or non-service are illustrated in *First National Bank of SA Ltd v Schweizer Drankwinkel (Pty) Ltd and Another* 1998 (4) SA 565 (NC). There is a rebuttable presumption that the contents of the return of service are *prima facie* correct – s 17.

It is also important to note that where service is effected as described in 2, 3 or 4 above, and the Magistrate or Clerk of the Court has reason to doubt that the process served has come to the knowledge of the person served, and there is no evidence to the contrary, the service may be regarded as invalid. The Magistrate or Clerk should, in such cases, address a query about the matter to the party serving the process or that person's attorney. The attorney or relevant litigant may then provide proof that process has indeed come to the attention of the other party. If the response does not satisfy the Magistrate, he or she is entitled to refuse an application for default judgment.

1.8.2 Service of notices and other documents not being a process of court

Notices, requests, statements or any other documents that are not process of court do not need to be served by the sheriff. Examples of such documents are: requests for further particulars, the defendant's plea, expert notices, and discovery notices. Service is carried out in two ways: delivery by hand or by registered post, at the address for service given in the summons or appearance to defend. Delivery means service on the opposite party and filing with the Clerk of the Court – rule 2. This is the logical sequence of the interpretation of rule 2 – *Thornhill v Gerhardt* 1979 (2) SA 1092 (T).

Where the court is uncertain that delivery by hand has occurred, the court may address a query to the litigant or the litigant's attorney. The litigant or the attorney may then file an affidavit confirming how and upon whom service was carried out. If there was no one to receive the document and sign for it, or if the document was pushed under or pinned to the door, an affidavit explaining the manner of service will be required. If the opponent refused to accept service, an affidavit to that effect is also required.

Service by registered post may be carried out only at the given postal address in terms of rule 6(2)(b) or rule 13(4)(b) - see *Thornhill* above. In practice this relates mainly to pleadings, notices or documents served by attorneys on each other in preparation for trial. These documents are usually physically served by the attorney's clerk or messenger on the opposing attorneys. The recipient must sign the acknowledgement of receipt, if possible.

An exception to the general rule applies to subpoenas. Although these are issued by the Clerk of the Court, and therefore rank as a process of court, rule 9(10) states that the sheriff need not serve subpoenas. In practice, however, the sheriff usually does. The only disadvantage in having the sheriff serve a subpoena is the increased service costs for the litigant. The increased costs would not be recoverable on taxation if the litigant succeeded in obtaining a costs order.

Summonses, notices and documents may not be served on a Sunday or public holiday except where the court orders otherwise. However, warrants of arrests, interdicts and attachments of property or person may be issued and served on any day – rule 9(2)(b).

1.8.3 Substituted service - rule 9(12)

Substituted service is used when a defendant is believed to be in the Republic but normal service cannot be carried out. For example, a defendant is believed to be resident somewhere in the province of Gauteng in the Pretoria district, but no specific details about his or her residence are known. Alternatively, the defendant may deliberately be avoiding service. The court could, in such circumstances, and on application, order alternative forms of service, such as the placement of a summons in a local newspaper circulating in that district, fax, e-mail, service on another person, etc – rule 9(12). The summons or notice can be e-mailed or faxed to the defendant if the court is satisfied that it will come to the attention of the defendant.

The Magistrate must be satisfied that service cannot be carried out in the normal manner provided by rule 9 and that the action is within the court's jurisdiction. Where the Magistrate orders substituted service, the normal time limits for service of the notice of intention to defend in terms of the MCA apply. However, the court has a discretion to change any time limits and must be guided by reasonableness.

1.8.4 Service where a defendant is outside the Republic

In the High Courts where a defendant is outside the Republic the plaintiff has to bring an application for leave to sue by edictal citation. If leave is granted, a shortened form of summons called an edict may be served on the defendant. In the Magistrates' Courts there is no provision for service by way of an edict, but s 30*bis*

provides that where a Magistrate's Court grants an order of attachment to found or confirm jurisdiction, it may grant an order allowing service of any process in the action to be effected in such manner as may be stated in the order.

1.9 Costs

The general rule with regard to costs in civil proceedings is that the losing party is ordered to pay the party-and-party costs of the winning party. The winning party is required to draw up a bill of costs which itemizes all the attendances in the matter according to the tariff set out in a schedule to the rules of court. The bill must then be presented to the taxing master of the court for approval at a hearing at which the losing party is entitled to be present and to present argument as to the correctness of the costs reflected in the bill. Once a bill has been taxed it has the status of a liquid document which evidences the indebtedness of the losing party for costs in the amount approved, and provides a basis for enforcement of payment.

Party-and-party costs are those costs necessarily incurred by a party for the purpose of the litigation, charged according to the tariff. Costs incurred prior to institution of proceedings, such as an opinion from counsel as to the prospects of success in the case, are generally not recoverable. Costs include both the fees charged by the legal practitioner/s and disbursements paid by the practitioner on behalf of the client, such as sheriff's fees and photocopying expenses.

Legal practitioners almost always charge their clients at rates which are considerably higher than the tariff. This means that a party in whose favour an award of costs is made will generally recover only a percentage of the fees which he or she is obliged to pay to his or her own lawyers. The general rule of thumb used to be that the winner was likely to recover about 75% of actual cost, but, in order to promote access to justice, the tariffs have been kept low, with the result that today it is not unusual to recover only about 50% of one's costs, or sometimes even less.

The costs that a practitioner is entitled to recover from his client are referred to as attorney-and-client costs. Sometimes a court will make an order against a party on the attorney-and-client scale in order to penalize that party for unacceptable conduct during the course of the litigation. This will entitle the party to recover fees paid to his or her own legal representative at rates higher than those laid down in the tariff.

An even more punitive award of costs, sometimes made to mark the court's extreme displeasure at the way in which a party has conducted the litigation, is an order of costs on the attorney-and-own-client scale. This would authorize recovery of all reasonable costs. An order of costs de bonis propriis obliges the practitioner to pay the costs on behalf of the client and may be made when a court believes that the practitioner's conduct is unacceptable.

In some kinds of case, such as constitutional, labour and family-law cases, legislative authorities and courts are moving towards the rule that each party should pay its own costs, unless there is good reason to order otherwise. This is the general rule in the USA. See, for example, Divorce Court rule 41(1).

1.10 Assessors

Section 34 of the MCA provides that in any action the court may, upon application of either party, summon to its assistance one or two persons of skill and experience in the matter to which the action relates who may be willing to sit and act as assessors in an advisory capacity. The words 'who are suitable and available and' are to be substituted for the words 'of skill and experience in the matter to which the action relates' by s 1 of the Magistrates Courts Amendment Act 67 of 1998, but this amendment has not been brought into operation.

This section applies to civil proceedings, since s 93ter of the Act makes provision for assessors in criminal matters. The words 'in an advisory capacity' make it clear that the assessor has no voice in the actual determination of the dispute – J & B Act 142.

Part 2 The Civil Jurisdiction of the Magistrates' Courts

2.1 General

The concept of "jurisdiction" refers to the power and competence of a court to hear and determine issues between parties – Gr*aaff-Reinet Municipality v Van Ryneveld's Pass Irrigation Board* 1950 (2) SA 420 (A). As a Magistrate's Court is a creature of statute, it has no jurisdiction beyond the jurisdiction that the MCA or other statutes confer on it. There are, however, situations where jurisdiction may be implied or understood – *Van Der Merwe v De Villiers* 1953 (4) SA 670 (T).

Jurisdiction is determined on the date on which the summons is served, not on the date on which it is issued. Once a court is seised with jurisdiction, it retains that jurisdiction until the suit is concluded – *Mills v Starwell Finance (Pty) Ltd* 1981 (3) SA 84 (N).

High Courts generally have concurrent jurisdiction with Magistrates' Courts, but if a plaintiff initiates proceedings in the High Court in an action that is properly, and less expensively, justiciable in a Magistrates' Court, the High Court will usually penalize the successful plaintiff by awarding costs only on the Magistrate's Court scale - *Standard Credit Corporation Ltd v Bester and Others* 1987 (1) SA 812 (W) at 819.

Jurisdiction is limited in three respects: type of claim
value of claim
area of jurisdiction (territorial).

A judgment given in a case in respect of which the court lacks jurisdiction is void. A Magistrate should always ensure that the court has jurisdiction in respect of type and value of claim and, where there is a problem in either respect, should raise the issue

if neither party raises it. With regard to territorial jurisdiction, if the defendant has filed a plea and has not raised the objection that the court does not have territorial jurisdiction, the defendant is deemed to have consented to the court's jurisdiction: MCA s 28 (1)(f); therefore the Magistrate should not raise the issue. In undefended matters the Magistrate should raise the issue of lack of territorial jurisdiction.

A defendant will usually raise the issue of lack of jurisdiction by way of a special plea, but may take exception instead if the lack of jurisdiction is apparent ex facie the summons – *Viljoen v Federated Trust Ltd* 1971 (1) SA 750 (O) at 759--760. Where the issue of lack of jurisdiction is raised, the onus is usually on the plaintiff to establish that the court has jurisdiction – *Malherbe v Britstown Municipality* 1949 (1) SA 281 (C), but the way in which a defendant pleads lack of jurisdiction may shift the onus on to the defendant.

2.2 Type of claim

Magistrates' courts have jurisdiction to hear substantive claims for:

2.2.1 Payment of money

Magistrates' courts have jurisdiction to hear almost all claims for payment of money, whether liquidated or unliquidated, including actions arising from a liquid document, mortgage bond or credit agreement: MCA s 29(1)(d), (e) and (g). In *Tuckers Land and Development Corporation (Edms) Bpk v Van Zyl* 1977 (3) 1041 (T) it was held that it has always been taken for granted that Magistrates can hear money claims. One kind of claim sounding in money that a Magistrate's Court would not have jurisdiction to hear, unless otherwise provided by legislation (Constitution s 170), would be a claim for damages in respect of the infringement of a constitutional right.

2.2.2 Delivery of movable property or transfer of immovable property

MCA s 29(1)(a) gives Magistrates the power to grant such orders, provided that the market value of the property does not exceed the value limit on the court's jurisdiction, or that there is a valid consent to jurisdiction (see below).

2.2.3 Ejectment

Consideration must always be given to the provisions of the Extension of Security of Tenure Act 62 of 1997 and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) – see *Bergboerdery v Makgoro* 2000 (4) SA 575 (LCC). The MCA does not authorize applications for ejectment. Therefore, claims for ejectment or eviction must be made by way of summons, unless the application procedure allowed by s 4 or 5 of PIE is used. In *Jordan and Another v Penmill Investments CC and Another* 1991(2) SA 430 (E) it was held that a Magistrate may, in certain limited situations, grant an interlocutory order for an eviction on application but may grant a final order for eviction only where action was instituted by way of a summons. The reasoning of the court was that an order of eviction is a type of interdict and therefore the court could grant it in terms of s 30 of the MCA and rule 55(9). In the *Bergboerdery* case, in which an order of eviction was granted in terms of an ex parte application, it was held that the failure to serve the application for eviction on the respondent prior to the hearing amounted to a miscarriage of justice. (Paragraphs [11] to [13] at 582C--583G.). MCA s 29(1)(b) provides the formula for calculating the value of a claim for ejectment (see below).

2.2.4 Specific performance

Magistrates have jurisdiction to hear claims for specific performance, provided that where the claim is for specific performance of an act in terms of a contract there must be an alternative claim for damages, except where the performance is in respect of the rendering of an account or the delivery of property: MCA s 46(2)(c) – see the note below on claims for specific performance in respect of which Magistrates' Courts do not have jurisdiction.

2.2.5 Actions for determination of a right of way

This refers to a right of way across land. MCA s 29(1)(c) specifies no value limit for this type of action.

2.2.6 Actions in terms of s 16(1) of the Matrimonial Property Act 88 of 1984

This refers to an action requesting the court to grant consent where a person married in community of property is unable to obtain the consent of his or her spouse for a transaction, as is required by s 15 or s 17 of the Matrimonial Property Act 88 of 1984. MCA s 29(1)(f) provides that this jurisdiction is subject to the usual value limit. The value of the subject matter of the transaction should not exceed R100 000.

2.2.7 Applications in terms of the Close Corporations Act 69 of 1984

MCA s 29(1)(fA) makes it clear that the court's jurisdiction to hear applications in terms of the Act includes applications for liquidation of a close corporation.

2.2.8 Interdicts

MCA s 30(1) authorizes applications for interdicts. See below section 7.5; J & B Act 79 – 82, 87 – 102 and Harms 27.1 – 27.21. An interdict may be prohibitory or mandatory, but where a claim for a mandatory interdict amounts to a claim for specific performance of an act in terms of a contract, there must be an alternative claim for damages, as required by s 46(2)(c), which is discussed above under the heading 'Specific performance'. Some cases, such *Jordan and Another v Penmill Investments CC and Another* 1991(2) SA 430 (E), have created uncertainty as to whether Magistrates have the power to grant permanent final interdicts, but there are a considerable number of cases in which final interdicts have been granted. In Jones and Buckle it is stated that '[a] magistrate has the power to grant both interlocutory and final interdicts…' – see J & B Act 81 and the cases cited in footnote 3.

2.2.9 Spoliation orders

MCA s 30(1) authorizes applications for spoliation orders. See section 7.6; J & B Act 102 – 114 and Harms 27.22 – 27.28.

2.2.10 Maintenance of children and spouses

In terms of the Maintenance Act 99 of 1998 every District Magistrate's Court is a maintenance court.

2.2.11 Domestic violence

Specific jurisdiction is derived from the Domestic Violence Act 116 of 1998.

2.2.12 Child-care matters

In terms of the Child Care Act 74 of 1983, Magistrates sit as Commissioners of Child Welfare in Children's Courts, which are housed in the District Magistrates' Courts. New child-care legislation will probably be enacted during 2004.

2.2.13 Applications for administration orders

Section 74 of the Act gives the Magistrates' Courts the power to grant an administration order, which is a modified form of insolvency designed to deal with small insolvent estates in respect of which High Court sequestration proceedings would be too expensive and would consume all the assets in the estate. Administration orders may be applied for in respect of judgment debtors who cannot satisfy a judgment debt or debtors against whom no judgment has been taken, but who are unable to meet their financial obligations – s 74(1)(a). Administration orders are dealt with in detail in section 7.11 below.

2.2.14 Insolvency inquiries in terms of the Companies Act 61 of 1973

Section 418 of the Companies Act 61 of 1973 provides that every Magistrate is a Commissioner for the purpose of taking evidence or holding any inquiry in terms of the Act in connection with the winding-up of a company. While an application for insolvency of a company must be brought in the High Court, magistrates are often called upon to conduct inquiries in terms of s 417 of the Act.

Matters <u>not</u> within the jurisdiction of magistrates' courts

2.2.15 Divorce claims

MCA s 46(1) excludes divorce claims from the jurisdiction of the Magistrates' Courts. The Divorce Courts which often sit in Magistrate's Court buildings are established in terms of s 10 of the Administration Amendment Act 9 of 1929 [short title, previously 'Black Administration Act, 1927, Amendment Act 9 of 1929']. Magistrates do not have jurisdiction to sit as presiding officers of such courts unless they have been appointed in terms of the Divorce Court legislation.

2.2.16 Determination of validity or interpretation of a will or other testamentary document

MCA s 46(2)(a) excludes jurisdiction where the validity or interpretation of a will is in issue. This does not mean that a Magistrate cannot exercise jurisdiction in any matter which involves a will. For example, if an heir claims payment in terms of the will and there is no dispute as to the validity or the interpretation of the will, a magistrate's court can hear the matter.

2.2.17 Determination of the status of a person with regard to mental capacity

The power to grant such an order is excluded by MCA s 46(2)(b).

2.2.18 Claims for specific performance of an act in terms of a contract without an alternative claim for damages

J & B Act 190 – 199; Harms 2.23.

This type of claim is excluded by MCA s 46(2)(c), except where the claim for specific performance is for:

- a claim for the rendering of an account under R100 000,00
- the delivery or transfer of movable or immovable property, either where the value is under R100 000,00 or there is consent in terms of MCA s 45.

It has been held that *specific performance* means a claim for performance of an act in terms of a contract – *Olivier v Stoop* 1978 (1) SA 196 (T). A claim for payment of money is not a claim for specific performance in this context – *Tuckers Land and Development Corporation (Edms) Bpk v Van Zyl* 1977 (3) SA 1041 (T). An example of a claim for the rendering of an account would be where plaintiff is the author of a published book and wants to claim royalties from the publisher, but needs first to ask the court to order the publisher to furnish an account showing the number of books that have been sold and the amount of the royalty which accordingly is owed to the plaintiff.

2.2.19 Decree of perpetual silence

This is excluded by MCA s 46(2)(d). A decree of perpetual silence is an order stipulating that a party who has threatened legal action should institute the action or refrain from continued threats of litigation.

2.2.20 Pronouncement on the validity of legislation

MCA s 110 precludes Magistrates' Courts from making decisions as to the validity of legislation. This section is in accordance with s170 of the Constitution, but goes further, prohibiting pronouncement on the validity of legislation on any basis, not only a constitutional basis. A Magistrate is not precluded from expressing the opinion that a piece of legislation is invalid, but may make no order with regard to its validity.

The court must assume validity, but may allow evidence to be adduced regarding the alleged invalidity so that validity may be determined by the High Court if the matter goes on appeal.

2.2.21 Constitutional issues

In terms of s 170 of the Constitution, Magistrates' Courts may decide any matter determined by an Act of Parliament, except matters concerning the constitutionality of legislation or an act of the President. The following Acts have given specific constitutional jurisdiction to those Magistrates' Courts which have been designated as a court having jurisdiction in terms of the Act:

- Promotion of Access to Information Act 2 of 2000;
- Promotion of Administrative Justice Act 3 of 2000;
- Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

The Magistrates' Courts have been given no general jurisdiction to determine constitutional issues. Harms 2.24.1-2.

2.2.22 Review of administrative action

The MCA does not exclude this type of matter but it has always been accepted at common law that only High Courts have this jurisdiction. The magistrates' courts accordingly do not have jurisdiction to review administrative action except where they do so in terms of one of the three Acts listed under 'Constitutional issues' above.

2.2.23 Declaratory orders

The High Courts are given authority to make declaratory orders by section 19(1)(a)(iii) of the Supreme Court Act 59 of 1959. There is no similar provision in the MCA and it is accepted as a matter of practice that Magistrates do not have jurisdiction to make declaratory orders of a substantive nature. A declaratory order is an order which declares what a party's legal rights are without granting any other relief. For many years there was uncertainty as to whether any court should grant

this form of relief because of the general principle that courts do not exist in order to decide academic questions of law. For this reason, s 19 of the Supreme Court Act and s 38 of the Constitution specifically authorize superior courts to grant declaratory orders. Legislation which confers specific jurisdiction in respect of constitutional and other issues on Magistrates' Courts may authorize them to grant declaratory orders. An example is s 8(1)(d) of the Promotion of Administrative Justice Act 3 of 2000.

2.2.24 Matters in respect of which legislation directs the use of a specialist court or tribunal or the High Court

There are a number of pieces of legislation which establish specialist tribunals to deal with certain types of matter. If these tribunals are given exclusive jurisdiction, or if their jurisdiction is made concurrent only with that of the High Court, the Magistrates' Courts have no jurisdiction to deal with that type of matter. Examples are labour-related claims and land-restitution claims. Other pieces of legislation specifically give the High Court jurisdiction to hear matters brought in terms of that Act. Examples of this type of matter are insolvency applications and applications made in terms of the Companies Act.

2.3 Jurisdiction in respect of value

2.3.1 General

Section 29 of the MCA was designed to allocate different value limits to different types of claim, but it has become anomalous because the Act was amended to allow the Minister of Justice to prescribe the value limits and the Minister has prescribed a limit of R100 000 in respect of all claims. This value limit applies whether the claim is brought by way of summons or application, and also applies to claims in reconvention.

In claims for delivery of movable or immovable property, the market value of the property at time of institution of action is relevant to the determination of the value of the claim for the purpose of determining whether the court has jurisdiction. With a

claim for eviction it is much more difficult to put a value to the claim. Section 29(1)(b) of the MCA gives a court jurisdiction in actions for eviction against the occupier of any premises or land within the district: provided that, where the right of occupation is in dispute between the parties, this right does not exceed R100 000 in clear value to the occupier.

The value to the occupier of a right of occupation is the economic advantage which he enjoys from the exercise of that right (*Jordaan v De Beer Scheepers and Another* 1975 (3) SA 845 (T)). In the *Jordaan* case it was held that the words 'clear value to the occupier' referred to the difference between the value of the occupation to the occupier and the rent payable by him for it. The test, said the court, related to the true net value to the defendant of what was in dispute. The clear value of the right of occupation is therefore the value to the individual occupier of his right of occupation. This amount must be assessed at the date of institution of proceedings (J & B Act 69). Thus, when the defendant occupies property in terms of a lease, one calculates the clear value by asking what period the lease still has to run, and then taking the difference between the rent due under the existing lease and the rent that the tenant will have to pay for comparable premises over that period if he moves out. The court in *Jordaan* indicated that, in addition to this difference in rent, it may also take into account the loss of profit and loss of goodwill which the defendant will suffer if he conducts a business from the leased premises. In *Executor Estate Cragg v Gordon* (1885) 6 NLR 70 the court took into account the fact that the defendant, if ejected, would have lost crops of a value exceeding the jurisdiction of the court.

Other types of claim which are not easily quantifiable are claims for interdicts and claims for specific performance of an act. The authors of Jones and Buckle discuss the difficulty of assessing the value to be placed on an interdict under s 30 (Act 81). They state that 'the position appears to be that if nothing appears to the contrary either ex facie the summons or from the evidence, or if the plaintiff alleges that the claim is under the monetary jurisdictional limit and the defendant does not dispute it, the magistrate has jurisdiction'. This is not helpful where there is a dispute. It is

suggested that the only way in which an interdict can be quantified is with reference to the damage that will be suffered if the interdict is not granted.

In claims for specific performance of an act, s 46(2)(c) obliges the plaintiff to claim damages in the alternative, which has the advantage of quantifying the claim.

2.3.2 Incidental jurisdiction

Section 37 of the Act has the effect of enabling a court to assume jurisdiction as long as the capital amount claimed is within the court's jurisdiction. It does not matter that the transactions or circumstances giving rise to the claim involve much larger amounts. (See the examples cited in Jones & Buckle Act 157--9.)

Section 37(3) provides that in considering whether or not a claim is within the jurisdiction, no prayer for interest on the principal sum claimed, for costs or for general or alternative relief shall be taken into account.

In *Walker v Stadsraad van Pretoria* 1997 (4) SA 189 (T) it was held that a court did not have jurisdiction to decide a constitutional issue merely because the constitutional issue was incidental to the main relief claimed.

In *Fourie v Fourie* 1998 (1) SA 509 (C) it was argued that the court had jurisdiction to make a decision with regard to the validity or interpretation of a will if this was incidental to the main relief claimed. This argument did not succeed – the court held that s 46(2)(a) is not qualified by s 37(2).

2.3.3 Splitting of claims

Section 40 of the MCA provides that a substantive claim exceeding the jurisdiction may not be split with the object of recovering the relevant amount in more than one action if the parties to all such actions would be the same and the point at issue in all such actions would also be the same.

As long as the claims are based on different causes of action, however, there will not be an improper splitting. Thus, if an acknowledgement of debt provides for payment by instalments on specified dates, then the failure to pay each instalment gives rise to a separate cause of action.

In *Badenhorst v Alum Konstruksie en 'n Ander* 1986 (2) SA 225 (T) it was held that different items of property with a total value in excess of the court's jurisdiction can be claimed in one action, provided that each item is claimed under a separate cause of action and that the value of the thing(s) claimed in each separate cause of action does not exceed the court's jurisdiction.

2.3.4 Cumulative jurisdiction

Section 43 of the MCA provides that if two or more claims, each based on a different cause of action, are combined in one summons, the court shall have the same jurisdiction to decide each such claim as it would have had if each claim had formed the sole subject of a separate action. When a plaintiff brings several claims each of which constitutes a separate cause of action in the same summons, he will thus not be held to be splitting claims impermissibly as contemplated by s 40, and it will not matter that the total awarded to him exceeds the jurisdictional limit laid down in s 29 read with GN R1411 of 30 October 1998. The effect of s 43(1) is thus that a plaintiff may bring a number of claims against the same defendant in the same summons, provided that each claim arises out of a separate cause of action and that each cause of action falls within the monetary limits set by s 29. For example, when rent is payable monthly a separate cause of action lies for each month's rent (*African Share Agency Ltd v Scott, Guthrie & Co* 1907 TS 410) and several months' rent may therefore be claimed in one summons even though the total claimed is above the applicable monetary limit.

In personal-injury cases, however, medical expenses and general damages do not constitute separate claims, since pecuniary loss and non-patrimonial damage arising out of a single wrongful act are treated as both forming part of a single cause of action: *Government of the Republic of South Africa v Ngubane* 1972 (2) SA 601 (A),

Schoultz v Potgieter 1972 (3) SA 371 (E) at 373; *Casely NO v Minister of Defence* 1973 (1) SA 630 (A) at 642. For criticism of this approach, see PQR Boberg *The Law of Delict, volume 1: Aquilian Liability* (1984) 484--6, 516 and 530. But a claim for the cost of repairing a car damaged in a collision will be a separate cause of action from a claim in respect of personal injury suffered in the same collision. This is because the claim for the cost of repairing the car (property damage) will lie against the driver whose negligence caused the collision, whereas a claim for medical expenses and damages for pain and suffering will have to be claimed from the Road Accident Fund.

2.3.5 Counterclaim exceeding the jurisdiction of the court

Section 47 of the MCA sets out the procedure to be followed when a defendant's counterclaim exceeds the jurisdiction of the court. Section 47 will apply when the court has no jurisdiction because s 46 excludes that type of claim, where the amount claimed exceeds the applicable monetary limit stipulated in s 29, or where the court lacks territorial jurisdiction under s28.

The Magistrate must receive evidence in order to decide whether the counterclaim has a reasonable prospect of success. The procedure to be followed is set out in rule 20(4), (5) and (6).

Section 39 applies also to counterclaims. Thus, if the plaintiff claims R5 000 and the defendant counterclaims R105 000, the defendant could admit the plaintiff's claim and deduct it from the counterclaim in order to bring his counterclaim within the court's jurisdiction.

2.3.6 Abandonment in terms of MCA s 38

A plaintiff may bring a monetary claim that exceeds R100 000 within the court's jurisdiction by abandoning part of the claim. Once part of a claim is abandoned, that part is extinguished and cannot be claimed in that or any other action. However, if

the plaintiff proves only part of the claim, the abandonment is considered to take effect on that part of the claim which is not upheld. The following are illustrations of abandonment:

1. The plaintiff sues for R150 000 for work done and abandons R50 000 to bring the claim within the jurisdiction of the Magistrate's Court. The defendant pleads and proves a payment of R60 000 to the plaintiff, so only R90 000 of the plaintiff's claim is upheld. The R50 000 which plaintiff was required to abandon takes effect first on R60 000 part of the claim which was not upheld and there is nothing further to abandon from the part upheld. The plaintiff is, accordingly, entitled to judgment in the sum of R90 000.

2. The plaintiff sues for damages for personal injury suffered as a result of a motor-vehicle collision in the sum of R250 000 and abandons R150 000 to bring the claim within the jurisdiction of the Magistrate's Court. The court finds that the plaintiff and the defendant were equally at fault in causing the collision and apportions the damages so that only 50% of the plaintiff's claim is upheld ie R125 000. The R150 000 that the plaintiff had to abandon takes effect first on the R125 000 part of the claim which was not upheld, leaving R25 000 still to be subtracted from the R125 000 part of the claim which was upheld. The plaintiff is entitled to judgment in the amount of R100 000.

2.3.7 Deduction of an admitted debt in terms of MCA s 39

Another way in which a plaintiff may be able to bring a claim which exceeds the value limit of R100 000,00 within the jurisdiction of the civil Magistrates' Courts is by deducting from the claim an amount owed to the defendant. A plaintiff may, in the summons or at any time after the summons has been issued, deduct from the claim, whether liquidated or unliquidated, any amount which the plaintiff admits owing to the defendant. When the claim is only partially successful the operation of this section is

not the same as that of s 38 since the plaintiff always has to deduct the admitted debt from the amount to which the court finds the plaintiff entitled. For example:

> The plaintiff sues for R150 000 for work done, but admits owing the defendant R60 000 and deducts this amount to bring the claim within the court's jurisdiction. The plaintiff proves that he is entitled to payment of R120 000 therefore the court gives judgment for R60 000, which is the amount the plaintiff is entitled to less the amount admitted. If plaintiff had abandoned R50 000 instead of admitting that he owed R60 000, the abandonment would have taken place first on the R30 000 part of the claim not upheld and the court would have subtracted only R20 000 from the part upheld. Judgment would have been given for R100 000,00.

One should not make the mistake, however, of believing that abandonment is always more beneficial for the plaintiff than deduction of an admitted debt, because, where a plaintiff who does owe money to the defendant abandons, the defendant may counterclaim for the money owed and the plaintiff could lose both on the abandonment and the deduction. For instance –

> The plaintiff sues for R150 000 for work done and abandons R50 000. The defendant counterclaims for R60 000. The plaintiff proves that it is entitled to R120 000 in respect of the work done. The abandonment will take place first on the R30 0000 part of the claim not upheld, leaving R20 000 to be abandoned. The court will give judgment to the plaintiff for R100 000. If the defendant succeeds in proving the counterclaim the court will give judgment for the defendant in the amount of R60 000. When the two judgments are set off against one another the plaintiff will end up getting R40 000.

Sections 38 and 39 can be used concurrently. More examples of the way in which these sections operate can be found in Jones & Buckle Act 161--162A.

2.4 Territorial jurisdiction

2.4.1 General

This is governed by s 28 of the MCA, unless there is another relevant legislative provision. For example, in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE), the only court that has jurisdiction to hear an application for eviction in terms of the Act is the court within whose area of jurisdiction the land is situated.

Section 28 provides that the court has jurisdiction in respect of certain persons. The word ‘person' appearing in s 28 refers to the defendant and it is in respect of the defendant that the court must have jurisdiction. For purposes of s 28 ‘person' includes companies, bodies corporate, municipal and provincial bodies and, in terms of s 28(2), the State.

Section 28 is based on the common-law principles which regulate territorial jurisdiction in the High Courts, but, unfortunately, in some instances the courts have interpreted its provisions as an indication that the legislature intended the position to be different in the Magistrates’ Courts. The meanings of some of the words and phrases in s 28 are accordingly of great practical importance in deciding which civil Magistrates' Courts will have jurisdiction in a particular matter.

The grounds of territorial jurisdiction are set out hereunder, with reference to the provisions of s 28.

2.4.2 Defendant being within the court’s jurisdiction

Section 28(1)(a) provides that a court has jurisdiction in respect of ‘any person who resides, carries on business or is employed within the district’.

The crucial question in construing s 28(1)(a) is where the defendant resides, carries on business or is employed, because the person in respect of whom the court must have jurisdiction under this provision is the defendant. This is based on the common-law principle that the creditor must seek out the debtor and institute action where the latter lives or works (actor sequitur forum rei). Where the plaintiff resides, carries on business or is employed is irrelevant in the application of s 28(1)(a).

As to the meanings of 'resides, carries on business or is employed', see Jones & Buckle Act 42--8.

Residence is a different concept from domicile. A person resides where his or her home is for the time being. This concept does not require the same degree of permanence as that of domicile, although a visit for a limited time will not ordinarily constitute residence. See J & B Act 42--44.

A company resides at its principal place of business and if its registered office is at a different place, it is also regarded as residing there – *Bisonboard Ltd v K Braun Woodworking Machinery (Pty) Ltd* 1991 (1) SA 482 (A) at 496--9. It has been held that a company cannot be regarded as residing at every place where it has a branch office – *Kruger NO v Boland Bank Bpk* 1991 (4) SA 107 (T).

Section 28(1)(b) provides that a Magistrate's Court will have jurisdiction in respect of any partnership if its business premises are situated within the district or if any partner resides within the district.

In *Mills v Starwell Finance (Pty) Ltd* 1981 (3) SA 84 (N) it was held that the date of service of a summons, not the date of issue of the summons, is the date when the incidence of jurisdiction is determined under s 28(1)(a). If a court has jurisdiction at that time, it retains jurisdiction until the conclusion of the suit even if the defendant ceases before then to reside, work or carry on business within the area of jurisdiction of the court.

2.4.3 Cause of action arising within the court's area of jurisdiction

Section 28(1)(d) provides that a court will have jurisdiction in respect of 'any person, whether or not he resides, carries on business or is employed within the district, if the cause of action arose wholly within the district'. This is a cumbersome way of saying that an alternative ground of territorial jurisdiction is that the cause of action arose within the court's area. This is an alternative ground at common law and in the High Court, but unfortunately the word 'wholly' in s 28(1)(d) has given rise to a restrictive interpretation of the section.

A cause of action has been held to arise 'wholly' within the area of jurisdiction of the court in terms of s 28 (1)(d) when all of the facta probanda (the facts that it is essential for the plaintiff to prove in order to have a cause of action) have occurred within the area of jurisdiction of a particular civil magistrate's court – *Dusheiko v Milburn* 1964 (4) SA 648 (A). One must distinguish between facta probanda and facta probantia. Facta probanda are the facts in issue, whereas facta probantia are the evidence that must be adduced in order to prove the facts in issue. What must have occurred within the court's area of jurisdiction are the facts that it is necessary for the plaintiff to prove, not the evidence that is needed in order to prove each essential fact. So, for example, in a claim based on breach of contract, the essential facts are:

(i) that a contract was entered into between the parties;
(ii) the terms of the contract;
(iii) that the plaintiff has carried out its obligations; and
(iv) that the defendant has failed or refused to carry out its obligations.

If, for instance, the contract was concluded in Johannesburg by an agent acting on behalf of one of the contracting parties and all the other essential facts listed above occurred in Johannesburg, it would not matter that the authorization was given to the agent outside Johannesburg: the Johannesburg Magistrate's Court will have jurisdiction to hear the matter. The fact that the agent was authorized to conclude the contract on the principal's behalf is one of the facta probantia which help to prove that the contract in question was properly concluded. The factum probandum is that

the agent was duly authorized when he or she concluded the contract in Johannesburg on the principal's behalf. The giving of authority to the agent does not have to have occurred within Johannesburg because it is a factum probantium – see *Dusheiko v Milburn* (above).

The authors of Jones & Buckle, at Act 54--5, say that, with a contract, both offer and acceptance must be made within the same district, otherwise the whole cause of action will not have arisen within the district. This is not correct. In *Herholdt v Rand Debt Collecting Co* 1965 (3) SA 752 (T) it was held that the making of the offer is a factum probantium. The factum probandum which has to be proved is that at the time and place where acceptance occurred, there was an operative offer (at 756B--E). See also *Reid v Jeffreys Bay Property Holdings (Pty) Ltd* 1976 (3) SA 134 (C).

The case of *Myerson v Hack* 1969 (4) SA 521 (SWA) illustrates the way in which the courts have interpreted the section. In this matter the plaintiff sued on the basis that a contract for the lease of a holiday flat was concluded in Windhoek. The plaintiff alleged that the defendant had warranted that the flat was fit for human habitation, but on arrival in Cape Town found it to be filthy and uninhabitable. The plaintiff claimed as damages the amount she had paid as rental. The court held that the whole cause of action had not occurred in Windhoek because the breach, which gave rise to the damages claim, was the failure to make available in Cape Town a habitable flat. Since the breach was a factum probandum and it occurred in Cape Town, the whole cause of action did not arise in Windhoek.

Magistrate's court rule 6(5)(f) relating to endorsement of summonses states that when s 28(1)(d) is relied upon, the summons must contain an averment that the whole cause of action arose within the area of jurisdiction, but need not set out further particulars, although the defendant may request them. In *Dusheiko v Milburn* (above) the AD held that if the plaintiff does not give sufficient particulars of this nature in reply to a request to do so, then the correct procedure is for the defendant to except on the ground that the summons does not comply with the requirements of rule 5 or 6. See also *Rogoff v Goodwood Municipality* 1977 (3) SA 1101 (C), J & B Act 53--9.

Section 21 of the Credit Agreements Act 75 of 1980 provides that for the purposes of that Act, s 28 (1)(d) of the MCA shall not apply unless the credit receiver concerned at the relevant time no longer resides in the Republic. This has the effect of forcing credit grantors to sue where the defendant resides. A similar provision needs to be enacted with regard to credit-card transactions because some banks are issuing all their summonses against credit receivers out of the court where their head office is situated on the basis that that is where they accept the application for credit and therefore the whole cause of action arises there. Whether all the facta probanda relating to the credit transaction can be said to have occurred where the head office of the bank is situated when the credit receiver lives and makes purchases at the other end of the country is debatable, but a legislative provision would certainly assist consumers.

2.4.4 Actions in respect of property situated within the court's area of jurisdiction, or in respect of mortgage bonds over such property

Section 28(1)(g) provides that a court will have jurisdiction in respect of 'any person who owns immovable property within the district in actions in respect of such property or in respect of mortgage bonds thereon'. The wording of the section seems to require that it is the defendant who must be the owner of the property in question. If this is so, then the section cannot be relied upon when the plaintiff is claiming relief in respect of immovable property that he owns. Again the wording makes this ground much more restricted than it is at common law. At common law a court will almost always assume jurisdiction in respect of an action concerning property if the property is situated within its area of jurisdiction.

Rule 6(5)(g) provides that when this ground of jurisdiction is relied upon, the summons must contain an averment that the property concerned is situated within the area of jurisdiction of the court.

In *Liebenberg v Liebenberg* 1986 (3) SA 756 (C) it was held that the words 'in respect of' in s 28(1)(g) bore a narrow meaning, in the sense that a direct or causal link was required between the action and the immovable property or the mortgage bond passed over it. In *Kleynhans v Wessels NO* 1996 (4) SA 103 (O) it was held that an action in which payment of the balance of the purchase price of immovable property and occupational interest was claimed was an action 'in respect of' immovable property as intended in s 28(1)(g).

2.4.5 Incidental proceedings

Section 28(1)(c) provides that a court will have jurisdiction in respect of 'any person whatever, in respect of any proceedings incidental to any action or proceeding instituted in the court by such person himself'. The meaning of 'proceedings incidental' with regard to counterclaims is controversial and is discussed at length in Jones & Buckle Act 48--52.

The controversy is over whether this section gives a court jurisdiction, or limits a court's jurisdiction, when a defendant counterclaims and the court would not have had territorial jurisdiction in respect of the counterclaim if it had been brought as a claim in convention.

At common law a court will generally assume jurisdiction in respect of a counterclaim because it is convenient to decide all matters between the parties when they are before the court. In *Salkinder v Van Zyl & Buissinne* 1922 CPD 59 and *Innes-Grant v Kelsey* (1924) 45 NLR 268 it was held that a claim in reconvention will always be incidental to a claim in convention, and that to bring an action implies submission to the court's jurisdiction in reconvention. Authority for this view was, according the courts in those cases, to be found in the writings of the Roman-Dutch authorities. The authors of Jones & Buckle submit, however, that these cases are wrongly decided and that the better view is that the language in s 28(1)(c) points rather to, 'matters which are really incidents of the claim in convention, that is interlocutory orders, orders for costs, issue of execution, setting aside of judgment. As far as counterclaims are concerned, they believe that the word 'incidental, etc' means that

a court, which would not otherwise have jurisdiction, can assume jurisdiction only if the counterclaim arises out of the same facts as those upon which the claim in convention is based, since substantially the same factual or legal issues are likely to arise in both claims.

In rejecting the view of the courts in *Salkinder* and *Innes-Grant*, the authors of Jones and Buckle argue:

(a) That the comments of the Roman-Dutch writers on this issue were based on Roman practice, in which a plaintiff could choose the forum in which he wished to sue the defendant. He therefore had to submit to the jurisdiction of the forum chosen by him in respect of any counterclaim, as it would be unfair to allow him to dodge the jurisdiction of the judge already approached in order to destroy the right of reconvention accruing to the defendant. If the plaintiff could select whichever court he wished, then so should the defendant be able to do so. Today, however, things have changed and the plaintiff is restricted in his choice of forum: indeed, often the plaintiff will have no choice at all. The fact that the plaintiff attempts to enforce his claim by resort to the only court available does not indicate that he voluntarily submits to that court, which has no jurisdiction over him, in a dispute of which, when he issues summons, he may not even know the existence.

(b) That the view in *Salkinder* and *Innes-Grant* is incompatible with s 28(1)(f), which contemplates that a defendant in reconvention (who will be the plaintiff in convention) may object to the jurisdiction of the court to entertain the counterclaim.

(c) That it is not acceptable to interpret the MCA with reference to the common law as civil Magistrates' Courts are constituted under the Act and have no common-law jurisdiction: their jurisdiction must be derived from within the four corners of the constituent Act.

The view of the authors of Jones and Buckle is contrary to case authority and common-law principles are not necessarily correct.

2.4.6 Interpleader proceedings

Interpleader proceedings are proceedings that enable a person who is in possession of property which he or she does not own, and which is being claimed by two or more other persons contesting title against each other, to call upon those persons to appear before the court in order to determine who is entitled to the property. For example, the sheriff of the court, who is the official responsible for executing judgments, may attach property from a judgment debtor at the instance of a judgment creditor, and a third person may claim, in competition with the judgment creditor, that s/he is the rightful owner of the property, having lent it to the judgment debtor. The sheriff could, in such circumstances, issue an interpleader summons in terms of s 69 of the MCA and rule 44 of the rules.

Section 28(1)(e) provides that a court will have jurisdiction in 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;

(ii) the subject matter of the proceedings has been attached by process of the court;

(iii) such proceedings are taken under s 69(2) and the person therein referred to as 'the third party' resides, carries on business or is employed within the district; or

(iv) all the parties consent to the jurisdiction of the court.

2.4.7 Submission to the jurisdiction of the court by the defendant

Section 28(1)(f) provides that the court will have jurisdiction in respect of 'any defendant (whether in convention or reconvention) who appears and takes no objection to the jurisdiction of the court'. Thus, if the court does not have jurisdiction in terms of s 28, but the defendant does not raise this, the defendant will be deemed to have submitted to the jurisdiction of the court.

It has been held that mere entry of appearance to defend does not preclude a party from later raising an objection to the jurisdiction of the court, but failure to raise such an objection in the plea will almost certainly be regarded as a submission to the court's jurisdiction unless the defendant obtained knowledge of the facts upon which the objection is based only after the filing of the plea. See *William Spilhaus & Co (MB) (Pty) Ltd v Marx* 1963 (4) SA 994 (C), discussed in Jones & Buckle Act 60.

2.5 Extension of the court's jurisdiction by consent of the parties

Section 45 of the MCA allows parties to consent the jurisdiction of the Magistrates' Courts despite the fact that the value of the claim exceeds R100 000. Parties may also consent with regard to territorial jurisdiction, but there are restrictions as to when this can be done. It is not possible for parties to consent to the Magistrates' Courts having jurisdiction in respect of a type of claim which is excluded from the court's jurisdiction.

Section 45(1) stipulates that, subject to the provisions of s 46, the court will have jurisdiction to determine any action or proceeding otherwise beyond the jurisdiction if the parties consent in writing to this. A proviso to s 45(1) states that no court other than one having jurisdiction under s 28 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. This is the restriction

with regard to consents to territorial jurisdiction. The meaning of the proviso is that a consent to the jurisdiction of a particular civil Magistrate's Court will not be valid unless the court would in any event have had jurisdiction in terms of s 28, or unless the consent is given in relation to a particular claim already instituted or contemplated and not merely in anticipation of claims which might arise in the future. Thus, a clause in a written contract in terms of which the parties agree to the jurisdiction of, say, the Johannesburg Magistrate's Court in respect of any claim that may in the future arise out of the contract will not suffice to confer jurisdiction upon the Johannesburg Magistrate's Court unless that court already has jurisdiction, apart from the consent clause, in terms of s 28.

A difficult question is whether a general consent clause in a contract purporting to confer jurisdiction upon a particular court which lacks jurisdiction under s 28 is entirely null and void, or is operative with regard to value only. If it is entirely null and void, then no civil Magistrate's Court will have jurisdiction where the value of the claim exceeds the normal monetary limit provided for in s 29. If it is only the provision relating to territorial jurisdiction which is null and void, then a court which has territorial jurisdiction in terms of s 28 would be able to hear the matter.

This issue was considered by the Magistrate in the court a quo in *Tucker's Land & Development Corporation (Pty) Ltd v Viljoen* 1979 (1) SA 677 (T), who held that the entire consent clause in such circumstances would be invalid, so that even if action was instituted, not in the court consented to, but instead in the court of the area in which the defendant resided, the latter could not hear the matter by virtue of the consent clause when the value of the claim exceeded its jurisdiction. This view is supported by Jones & Buckle Act 185, where such a consent clause is described as ‘null and void'. That approach is probably correct, for the defendant may have had good reason for refusing to consent to the jurisdiction of any civil Magistrate's Court other than the one specified, and the court should not in effect make an agreement for the parties to which they themselves may never have consented. Unfortunately, on appeal the TPD did not find it necessary to decide whether the magistrate in the *Viljoen* case had been correct in holding that the clause was entirely null and void.

If the cause of action has arisen, then the parties may nominate a particular court, even though that court might not otherwise have had jurisdiction under s 28, since the consent is then given with reference to a specific action, as contemplated by the proviso to s 45 (1), which states 'except where such consent is given specifically with reference to particular proceedings already instituted or about to be instituted in such court'. See Jones & Buckle Act 184--8.

A consent in terms of s 45 must be in writing, but need not take the form of an agreement signed by the parties. A letter by the defendant's attorney to the plaintiff's attorney recording the consent will suffice.

It is important to note that a consent in terms of s 45 does not usually oust the jurisdiction of the High Courts, so a party who has consented can still chose to sue in a High Court.

See *Tuckers Land and Development Corporation (Pty) Ltd v Perpellief* 1978 (2) SA 11 (T) as to the onus of proving consent given in terms of s 45.

2.6 Removal of a matter to a High Court

Section 50 of the MCA provides the machinery whereby a defendant who is not happy for an action to be heard by a civil Magistrate's Court may have it removed to a High Court. Section 50(1) states that any action in which the amount of the claim exceeds the amount which is the value limit of the small claims courts, exclusive of interest and costs, may, upon application to the court by the defendant, be removed to the High Court having jurisdiction where the Magistrate's Court is held, subject to certain procedural requirements being met. The provision requires notice of intention to make such application to be given to the plaintiff and to the other defendants (if any) before the date on which the matter is set down for hearing in the civil Magistrate's Court. The objection to having the matter tried before a Magistrate must be stated, and the party applying to have the matter removed must give such security as the court may decide for payment of the amount claimed and of costs incurred or to be incurred. If there is more than one defendant to the action instituted

in the Magistrate's Court, then any such defendant may have the matter removed provided that the requirements of s 50 have been met.

If the applicant (the defendant) has complied with the relevant requirements, then the action must be stayed by the Magistrate. The plaintiff may then elect to remove the action to a High Court, in which event the summons will stand as a summons in the High Court. If the plaintiff does not elect to remove the matter to a High Court, then the matter either remains stayed or the plaintiff may issue a fresh summons in any superior court having jurisdiction.

In *Rheeder v Frank* 1939 CPD 446 the court held that, in deciding the question of costs, it must be determined whether the case was by reason of special difficulties either of law or of fact one which the defendant might rightly object to have tried by a Magistrate, and the onus is on the defendant to prove, should he succeed in the action, that he is entitled to costs on the High Court scale. In other words, the onus rests upon the defendant to show good cause for removal.

Section 50(2) provides expressly that the plaintiff, if successful in an action so removed to a High Court, may be awarded costs as between attorney and client. The defendant will have to show cause why such costs should not be awarded. It is only if there is something in the plaintiff's conduct which induces the court to mark its disapproval by withholding such costs that attorney-and-client costs will be refused.

Part 3 Parties to Civil Litigation

3.1 General

It is important to consider whether the correct parties are before the court, whether they have been correctly cited, and whether there are any third parties who have an interest which requires them to be joined.

Section 111(3) of the MCA provides that no misnomer in regard to the name of any person or place shall vitiate any proceedings if the person or place is described as commonly known, and the court may, on application, correct such misnomer at any time before or after judgment is given.

A court can allow the substitution of a party by way of an amendment provided that no prejudice results to the other parties to the proceedings. The case law and principles applicable in applications for substitution of a party are set out in *Luxavia (Pty) Ltd v Gray Security Services (Pty) Ltd* 2001 (4) SA 211 (W) at 215H--225G and are discussed by the authors of Jones & Buckle - Act 413. In dealing with applications of this nature, it is important to distinguish between situations where the person is a non-entity and those where an existing entity has been incorrectly cited – *Trust Bank Bpk v Dittrich* 1997 (3) SA 740 (C).

Considerations relating to parties involve two important issues: locus standi and joinder.

3.2 Locus standi

The expression ‘locus standi' is a shortened form of ‘locus standi in judicio', meaning literally ‘place to stand before a court'. This term is used in two senses. First, it may be used to refer to the capacity of a natural or juristic person to institute and defend

legal proceedings – ie capacity to litigate. Secondly, the term is used to refer to the interest which a party has in the relief claimed or the right to claim the relief.

3.2.1 Locus standi in the sense of the capacity of a party to litigate

Every natural person may sue or be sued if he or she has full legal capacity. Certain types of natural person do not, however, enjoy full legal capacity and therefore may not appear as parties in legal proceedings without appropriate assistance. For example, a minor who is not assisted or represented by his or her guardian lacks locus standi.

Persons suffering from mental incapacity lack *locus standi* – *Jonathan v General Accident Insurance Co of SA Ltd* 1992 (4) SA 618 (C). Where a person lacks *locus standi* owing to mental incapacity, a curator ad litem needs to be appointed to represent the party in the proceedings. The Magistrates' Courts cannot declare anyone to be of unsound mind, but once someone has been so declared in the High Court, a curator ad litem may be appointed for him or her in a Magistrate's Court – MCA s 33, J & B Act 137–141. Once a curator has already been appointed in the High Court the action may be instituted in a Magistrates' Court. A Magistrate's Court does not have the power to appoint a curator bonis.

Juristic persons may also have locus standi. For example, companies duly incorporated and registered in terms of the Companies Act 61 of 1973 are given locus standi by virtue of s 34 of the Act; a close corporation has locus standi by virtue of s 2(4) of the Close Corporations Act 69 of 1984 and; mutual banks registered under the Mutual Banks Act 124 of 1993 are declared by s 19(1) of the Act to be juristic persons. These juristic persons derive their locus standi from the legislation in terms of which they are formed.

At common law, a partnership, firm (ie a business, including a business carried on by a body corporate or carried on by a sole proprietor under another name), or an unincorporated association of persons (for example a sports club) could not sue or

be sued in its own name. This was because a partnership, firm or unincorporated association does not enjoy separate legal personality, distinct from that of the natural or juristic person or persons comprising it or running its affairs. However, Magistrate's Court rule 54(1), (4) and (5) enables partnerships, firms and unincorporated associations to be named as parties to legal proceedings. This is a procedural convenience and does not change the fact that the entity in question is not a legal persona.

An association which is a universitas and has separate legal personality may, however, sue in its own name and need not rely upon the provisions of rule 54. See *Bantu Callies Football Club (also known as Pretoria Callies Football Club) v Motlhamme and Others* 1978 (4) SA 486 (T) at 489--90; cf *Molotlegi and Another v President of Bophuthatswana and Others* 1989 (3) SA 119 (B) at 126H--J. Factors which indicate that a voluntary association is a universitas are perpetual succession, the capacity to acquire rights apart from its members, and the right to hold property in its own name (*Molotlegi* at 125G--I). In considering whether an association has locus standi, it is important to consider the provisions of its written constitution, if the association has one. If there is no written constitution, evidence might be led as to the intention of the persons who formed the association.

A trust cannot sue or be sued in its own name. All the trustees must be joined in their official capacities as plaintiffs or defendants – *Van der Westhuizen v Van Sandwyk* 1996 (2) SA 490 (W). It is not sufficient, therefore, to cite them merely as 'the trustees for the time being'.

Burial societies fall within the ambit of a long-term insurance business as defined in the Long-term Insurance Act 52 of 1998. In terms of s 7 of that Act, such a society may not conduct business unless it is registered in terms of the Act. If the society does not register, it has no *locus standi* to sue in terms of the agreement with its members. In terms of s 60 of the Act, the agreement is, however, still enforceable by a member of a society, who can sue the society.

The Minister of a Government department should be cited as the litigant in proceedings by or against the department – s 2 of the State Liability Act 20 of 1957. The Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 now regulates limitation of actions against organs of state and makes provision for notice requirements – J & B Rules Appendix E. There are many statutory bodies established by legislation and these bodies are usually endowed with corporate status by the legislation. Reference should be made to the particular legislation to establish what the status of a statutory body is and how it should be cited – J & B Rule 6--45.

3.2.2 Locus standi in the sense of a right to and interest in the relief claimed

Secondly, the term locus standi is used to refer to the question whether a plaintiff or an applicant has a sufficient interest in the matter to claim the relief he seeks. This involves an enquiry as to whether the claim is based on a legally enforceable right, and whether the particular plaintiff or applicant who has brought the claim is sufficiently closely interested to enforce that right. In other words, locus standi in this sense, or 'standing' as it is increasingly being called, is in issue when, having established the existence of a legally enforceable right, the court asks at whose instance the right is enforceable.

It is important to note that a person who has an interest in the relief claimed will nevertheless not have a right of action if his claim is not based upon a legally enforceable right. This is well illustrated by the English case of *Paton v Trustees of 13PAS and Another* [1978] 2 All ER 987; [1979] 1 QB 276 in which it was held that the father of an unborn child had no legally enforceable right to prevent his wife, the mother of the unborn child, from having an abortion.

When a clearly defined legal right attaches to a particular person it is obvious that the person has locus standi to enforce that right. So, for example, the owner of property can take action to protect it against damage by another or to claim compensation for damage already done to it. And any person has the right to approach the court to restrain another from causing him or her bodily harm, or to claim compensation for bodily injury suffered. Problems arise, however, when rights are not clearly defined, or the person to whom a right attaches is not in a position to enforce that right himself and someone else acts on his behalf.

The way in which locus standi in this sense may be problematic can be illustrated by reference to cases concerning the non-owner's right to sue for damage to property.

Where property is damaged or destroyed, the person normally entitled to sue for compensation is the owner. This accords with the principle 'res perit domino', which we have inherited from the law of ancient Rome. But a non-owner who enjoys a right of possession and use over the property by virtue of a contract with its owner might also have locus standi to sue where another has wrongfully damaged or destroyed it. Two such non-owners are commonly encountered in commercial practice – the credit receiver under an instalment sale transaction and the lessee. There are two possible bases upon which they may be allowed to claim damages for harm to the property in which they are interested:

(a) The wrongdoer's interference with the non-owner's rights of possession and use. The law recognizes that a non-owner in lawful possession of property has an interest in its preservation distinct from that of the owner who is not in possession, and these separate interests have been held to create liability to either (but not both) of them.

(b) The existence of an indemnity clause in the contract between owner and non-owner. Such a clause obliges the non-owner to compensate the owner for damage to the property while it is in his possession, regardless of how or by whom the damage is caused.

At first the courts relied steadfastly upon undertakings to indemnify the owner as the foundation of the non-owner's right to sue. This was the basis on which the court found that the plaintiff had locus standi in *Spolander v Ward* 1940 CPD 24, where the damaged motor vehicle was owned by the plaintiff's brother, but the plaintiff had undertaken that he would be liable for any damage sustained by the vehicle while he was using it.

This line of reasoning was, however, rejected in *Union Government v Ocean Accident & Guarantee Corporation Ltd* 1956 (1) SA 577 (A). There the Government had been contractually bound to pay a Magistrate his normal salary while he was recuperating from injuries sustained in a motor collision for which the defendant insurer was in law responsible. Having paid the Magistrate, the Government claimed this amount from the defendant on the basis that it represented damage in the form of loss of the Magistrate's services. Its action was dismissed. The Appellate Division formulated the rule that a person who suffers a financial loss purely because of his contractual relationship with another whose person or property has been harmed has no remedy. To hold otherwise, said Schreiner JA, would 'give occasion for a crop of actions at the suit of persons who had made contracts with the injured party' (at 585--6), thus opening the floodgates of excessive liability. After the *Ocean Accident* decision, it became evident that, if the non-owner was to have a claim, some other basis had to be found for it.

Hire-purchasers (now called credit receivers) then began to sue in their own right for damage to goods purchased by them. In *Lean v Van der Mescht* 1972 (2) SA 100 (O) and *Vaal Transport Corporation (Pty) Ltd v Van Wyk Venter* 1974 (2) SA 575 (T), a new principle emerged. A hire-purchaser was held entitled to sue by virtue of his possession of the damaged property. When the issue came before the Appellate Division in *Smit v Saipem* 1974 (4) SA 918 (A), the court stressed both the element of possession and the hire-purchaser's contractual obligation to compensate the owner. Although the seller retained his right of ownership, the court held, the property was not an asset to him in an economic sense, for it had been replaced by an action to recover the purchase price from the buyer. It was the latter action that

constituted the seller's real asset. Grotius allowed an action for damage to property not only to its owner but also to all those having an interest in the property, to the extent to which their interest had been diminished in value through the wrongful conduct of a third party. Grotius presumably accepted, said Jansen JA, that those to whom he allowed a right of action were in each case in possession of the property. It was proper, he continued, to apply the rule laid down by Grotius and to allow the hire-purchaser to sue on the basis that the diminution in the value of the property caused by the respondent was in an economic sense the possessor's loss. At the same time the court did not overrule the *Spolander v Ward* line of cases. The approach in *Spolander v Ward*, commented Jansen JA, 'fits in well with the development of our law from Roman times' and 'stands, from the point of view of legal history, above suspicion' (at 932A, in translation). The possibility of double liability (to the owner and the non-owner in possession) did not perturb the court, for the owner and the non-owner would seek compensation for the damage to their respective different interests, and no court could award compensation twice over for the same damage.
See: Mervyn Dendy 'Damage to Property: Can a Non-owner Sue?' (1987) 16 *Businessman's Law* 172--5.

Locus standi may also become an issue where a plaintiff or applicant claims relief on behalf of another person or persons, or claims relief in the public interest. The common-law rule is that a plaintiff/applicant will have locus standi only where the relief is claimed on the basis of a right enjoyed by that party, and that party has an interest in the relief claimed.

The AD deviated from this principle in *Wood and Others v Ondangwa Tribal Authority and Another* 1975 (2) SA 294 (A) when it decided that the applicants, who were church leaders and the secretary of a political organization, had locus standi to interdict certain tribal authorities from subjecting persons to irregular summary trial and corporal punishment. This decision was regarded by Prof Van der Vyver as 'evidence of a tendency to revive the actio popularis of Roman law in the area of human rights and civil liberties' : 'Actiones Populares and the Problem of Standing in

Roman, Roman-Dutch, South African and American Law' 1978 *Acta Juridica* 191. In subsequent cases, however, the South African Courts applied the decision very restrictively, holding that its application was limited to situations in which the life or liberty of the individual was threatened. Even organizations were held not to have standing to claim relief on behalf of their members – see Cheryl Loots *Keeping Locus Standi in Chains* (1987) 3 SAJHR 66.

This aspect of locus standi is now addressed by section 38 of Chapter 2 of the Constitution, which provides:

'Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are –
(a) anyone acting in their own interest;
(b) anyone acting on behalf of another person who cannot act in their own name;
(c) anyone acting as a member of, or in the interest of, a group or class of persons;
(d) anyone acting in the public interest; and
(e) an association acting in the interest of its members.'

The effect of s 38 is that any person or organization may enforce the rights contained in Chapter 2, irrespective of whether that person or organization is adversely affected by the alleged infringement of rights.

It is important to note that s 38 applies directly only when a right guaranteed in terms of Chapter 2 of the Constitution is being enforced, and that in other matters the common-law rule may still apply. However, under the influence of s 38, courts are increasingly adopting a liberal attitude to the issue of standing. In *Rail Commuter Action Group and Others v Transnet Ltd t/a Metrorail and Others (No 1)* 2003 (5) SA 518 (C), for instance, it was held that a restrictive approach to the standing of voluntary associations is incompatible with the spirit, purport and objects of s 38 of the Constitution. Legislators are also incorporating provisions similar to s 38 into

new pieces of legislation. For instance, the National Environmental Management Act 107 of 1998 contains a very similar provision in s 32.

3.3 Joinder of parties

See Jones & Buckle Act 165--81; Harms 3.11--12.

A joinder of parties takes place where two or more plaintiffs join together in bringing an action against a defendant or where a plaintiff joins two or more defendants in the same matter. It is also possible to have a plurality of plaintiffs and of defendants in the same matter. Frequently parties join or are joined for purposes of convenience, but under certain circumstances joinder of a party may be essential. Joinder of parties must accordingly be discussed under two headings: joinders of necessity and joinders of convenience.

3.3.1 Joinders of necessity

Where a person is a necessary party, the court will not deal with the issues without a joinder being effected, and no question of discretion or convenience arises.

In *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) the Appellate Division held that if a party has a direct and substantial interest in any order that the court might make in proceedings or if such order could not be sustained or carried into effect without prejudicing that party, he is a necessary party and should be joined in the proceedings, unless the court is satisfied that he has waived his right to be joined.

A couple of years later, however, in *Sheshe v Vereeniging Municipality* 1951 (3) SA 661 (A), the Appellate Division held that a landlord who brings an action for ejectment against his tenant does not need to join a sub-tenant. Van den Heever JA said: 'We have had numerous actions for ejectment against the lessees of hotels

and blocks of offices. In no case that I can recall to mind was it even suggested that the plaintiff was bound to join the lodgers, boarders or sub-lessees of offices.'

In *Henri Viljoen (Pty) Ltd v Awerbuch Brothers* 1953 (2) SA 151 (O) at 165--71 Horwitz AJP analysed, in the light of the *Sheshe* decision, what the Appellate Division meant by a 'direct and substantial interest' in the *Amalgamated Engineering Union* case. He came to the conclusion that what is required is a legal interest – an interest in the subject-matter of the litigation – and not merely a commercial or financial interest. It has more recently been held by the Constitutional Court that a political interest in the subject-matter of the litigation which does not amount to a legal interest will also not suffice: *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) at 102.

Joinder is always necessary in the case of co-trustees (*Mariola and Others v Kaye-Eddie NO & others* 1995 (2) SA 728 (W) at 731D--F), joint owners, joint contractors and parties suing or being sued on a partnership debt while the partnership is in existence (see *Morgan and Another v Salisbury Municipality* 1935 AD 167 at 171). Partners are seldom cited personally today as the partnership can sue and be sued in its own name (MC rule 54). Apart from these instances, one has to apply the test enunciated in the *Amalgamated Engineering Union* case as interpreted in subsequent cases.

When a party who has a direct and substantial interest has not been joined, the defendant or respondent may raise the objection of non-joinder, or the court may raise this issue mero motu. If a party has been joined but should not have been joined, then the objection would be one of misjoinder. In the case of non-joinder a necessary party is omitted, while in the case of misjoinder an unnecessary party is improperly added.

It is important to note that it was held in the *Amalgamated Engineering Union* case that, once it becomes apparent to the court hearing the matter that there is a third party, or there are third parties, who may have a legal interest in the proceedings,

the court may not proceed until such party or parties have either been joined or been given judicial notice of the proceedings. Judicial notice is notice emanating from the court which is served by the sheriff, or as directed by the court, which advises the third party or parties of the litigation and gives them an opportunity to join or otherwise protect their interests. This means that, where it appears that there are third parties who have a legal interest in the proceedings, a judicial officer must raise the issue of non-joinder mero motu if it is not raised by the parties.

3.3.2 Joinders of convenience

In order to save time and costs and avoid a multiplicity of actions, it is often desirable for parties to join or be joined in a matter, even where it is not essential for them to be joined.

Joinder in the Magistrates' Courts is governed primarily by ss 41 and 42 of the MCA 32 of 1944. Section 41 deals with joinder of plaintiffs and provides that any number of persons each having a separate claim against the same defendant may join as plaintiffs in one action if their right to relief depends upon the determination of some question of law or fact which, if separate actions were instituted, would arise in each action. The defendant in such a case may, however, apply to court for an order directing that separate trials be held, and the court may then in its discretion make such order as it deems just and expedient. Section 42 deals with joinder of defendants and provides that several defendants may be sued in the alternative, or both in the alternative and jointly, in one action whenever the plaintiff alleges that he has suffered damage and that it is uncertain which of the defendants is in law responsible for such damage. Any of the defendants may, however, request that separate trials be held and the court may then make such order as it may deem just and expedient. Where, however, a party joined as a defendant (or respondent) contends that another person who has not been joined should have beenjoined, he may apply to the court to add such other person as plaintiff, applicant, defendant or respondent in terms of MC rule 28(2).

In the Magistrates' Courts rule 28(2) provides simply that '[t]he court may, on application by any party to any proceedings, order that another person shall be added either as a plaintiff or applicant or as a defendant or respondent on such terms as may be just'. In *Khumalo v Wilkins and Another* 1972 (4) SA 470 (N) it was held that this rule is wide enough to allow joinders of convenience as well as joinders of necessity.

The essence of the rules relating to joinder of convenience is that parties may join or be joined if the determination of the various matters depends upon substantially the same questions of law or fact.

There may be a joinder of plaintiffs conditionally upon the claim of any plaintiff failing. This would apply where it is uncertain who the correct plaintiff is. For example, if a car sold in terms of a credit agreement is damaged and the seller has ceded his rights to a third party, but it is uncertain, for some reason, whether or not the cession is valid, then the seller (the cedent) and the third party (the cessionary) may join as plaintiffs in the alternative in suing the wrongdoer.

Joinder of defendants in the alternative occurs frequently, for example when the owner of property wishes to claim compensation for damage caused to it but is unsure which of two potential defendants caused the damage. In cases of this type, all that the plaintiff need do in order to avoid an order of absolution from the instance at the close of the case is to show prima facie that it has sustained damage which was caused by the wrongful and blameworthy conduct of either the one defendant or the other, even though it remains uncertain at the close of the plaintiff's case which alternative is the correct one: *Mazibuko v Santam Insurance Co Ltd and Another* 1982 (3) SA 125 (A) at 134B--135G.

Where plaintiffs join, each must make out a separate cause of action against the defendant and when defendants are joined, the plaintiff must disclose a separate cause of action against each defendant. This does not apply to joinders of necessity, where the plaintiff might have to join a party who has a direct and substantial interest

in the outcome of the proceedings, but against whom it has no right of action. An example is provided by the facts of *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A), in which, although the appellant union's claim could not have been made against the Durban City Council, the court nevertheless held that the council had an interest in the outcome of the proceedings since it also had locus standi to claim relief against the respondent concerning the same issue.

Where liability is joint and several, as with joint wrongdoers in delict, joinder is competent but not necessary, therefore the plaintiff may choose to sue one or both parties. If the plaintiff chooses to sue only one of them, that defendant may join the other as a party. This is known as 'third-party procedure' and is specifically provided for in the High Courts by uniform rule 13. There is no third-party joinder rule in the Magistrates' Courts, but in *Khumalo v Wilkins* the court held that the provisions of rule 28(2) are wide enough to allow a defendant to join an alleged joint wrongdoer as co-defendant.

In *Shield Insurance Co Ltd v Zervoudakis* 1967 (4) SA 735 (E) it was held that when a third-party notice is issued in terms of High Court rule 13 the third party is not made a joint defendant with the party issuing the notice, and the court cannot give a judgment for the plaintiff against such third party. The court can, however, if the defendant and the third party are allegedly jointly liable in delict to the plaintiff for damage suffered by the latter, apportion fault between the defendant and the third party in terms of s 2 of the Apportionment of Damages Act 34 of 1956. The position is thus that, although the third party becomes a party to the action, the court may grant relief against it only in favour of the defendant who issued the third-party notice, not in favour of the plaintiff. In *Khumalo v Wilkins* the court acknowledged that this type of joinder done in terms of MC rule 28(2) would have the same effect.

Note that in terms of s 2(2) of the Apportionment of Damages Act, notice of any action may at any time before the close of pleadings be given by the plaintiff or by any joint wrongdoer who is sued in the action to any joint wrongdoer who is not sued in the action and the latter may then intervene as a defendant. In terms of s 2(4), if a

joint wrongdoer is not sued in an action instituted against another joint wrongdoer and no notice is given to him by the plaintiff or by any joint wrongdoer who is sued, then no proceedings may thereafter be instituted against him by the plaintiff or, for a contribution, by the joint wrongdoer who is sued, except with leave of the court.

3.4 Intervention

Rule 28(1) of the Magistrate's Court rules enable a third party `having an interest' in the proceedings to apply for leave to intervene. The requirement that the intervening party must have an interest may mean that, in the Magistrates' Courts, intervention is competent only where a legal interest exists and not where a party wishes to intervene on the basis of convenience. In the High Court uniform rule 12 makes it clear that intervention on the basis of convenience is competent. See Harms 3.13, J & B Rule 28 1--6.

Part 4 Trial Actions: Summons to Close of Pleadings

4.1 The summons

4.1.1 Form and content of the summons

The form and content of a summons commencing action is regulated by rules 5 and 6 of the Magistrate's Court rules. The following must be noted and observed when dealing with summonses:

- The appropriate form is Form 2 for almost all summonses commencing action. Form 2A must be used for provisional sentence proceedings. Form 3 provides for a summons that includes an automatic rent interdict, which may be used by a landlord to secure the hypothec over the tenant's property on the premises.

- Each form must bear a R20 revenue stamp. Although the State and various parastatals are exempted from paying stamp duty in terms of s 4 of the Stamp Duties Act 77 of 1968, they are still required to stamp their summonses with a R20 revenue stamp, in the same way as other litigants are. According to the State Law Adviser, the revenue stamp is a court fee and not revenue, and therefore falls outside the ambit of the Stamp Duties Act. The State Law Adviser argues that there is no correlation between the Stamp Duties Act and the MCA and that exemptions provided for in the Stamp Duties Act are not applicable to fees due under the MCA – Advice ref: 184/95 (AC).

- The summons must be signed by the plaintiff or the plaintiff's attorney.

- It must set out the full address where the plaintiff will accept service of process, notices or documents. In places where there are three or more

attorneys or firms of attorneys practising independently of one another, the plaintiff's address may not be more than eight kilometres from the court. A Docex or any other address within eight kilometres of the court is acceptable. The address does not have to be an attorney's address – rule 6(2)(c). The Magistrate exercises his or her own discretion in enforcing the rule and should be guided by whether a litigant is prejudiced by non-compliance with the rule.

- The summons must call upon the defendant to defend the action within five days after service, or 20 days if the opponent is the State (rule 13(2)), and must warn the defendant of the consequences of failing to do so.

- The summons must comply with the provisions of rules 5 and 6 and must be printed in accordance with the prescribed form. The wording of these forms may not be changed.

- The summons must be issued by the Clerk of the Court who:
  - signs it;
  - dates it;
  - allocates a case number;
  - defaces (cancels) the revenue stamp; and
  - returns it to the plaintiff or plaintiff's attorney for service.

  The refusal by the Clerk of the Court to perform any assigned functions is subject to review by the court on application – s 13(2).

- The clerk must check the summons for the accuracy of the costs claimed and compliance with the eight-kilometre rule – rule 6(4)(a) and (b).

- The Magistrate must check compliance with all the other requirements.

4.1.2 Particulars of claim

The particulars of claim detail the nature of the action that the plaintiff institutes against the defendant, eg goods sold and delivered, or professional services rendered. If the particulars of a claim amount to fewer than 100 words, these are written on the face of the summons. Particulars that exceed 100 words are set out in an annexure that forms part of the summons – rule 6(3)(d).

Rule 6(3)(a) requires the particulars of claim to show:

- the nature and amount of the claim;
- the rate at which interest is calculated if interest is claimed (the rate at which interest may be claimed is currently 15.5% in terms of the Prescribed Rate of Interest Act 55 of 1975 – a higher rate of interest may be claimed only if the defendant has agreed to pay the higher rate and this is pleaded); and
- the amount claimed for the attorney's costs and court fees if the action is not defended, except if attorney-and-client costs are claimed.

Where a plaintiff sues upon an instrument presentment of which was necessary, the summons must state that the instrument was presented – rule 6(5)(e).

More claims than one may be made in a summons either alternatively or otherwise, but claims not made in the alternative must not be inconsistent or be based on inconsistent averments of fact – rule 6(6). The particulars of each claim and the relief sought in respect of each must be stated separately – rule 6(3)(c).

Where the particulars of claim are set out in an annexure they form part of the summons. The particulars of claim must be set out in sufficient detail to disclose a valid cause of action and must not be vague, ambiguous or uncertain. In a defended matter, where the particulars of claim are defective the defendant may take exception to the summons in terms of rule 17(2). Where application is made for default judgment it is the Clerk's or the Magistrate's duty to ensure that a valid cause of action is made out.

Rule 6(5) requires the summons to show the following particulars with regard to parties:

- The defendant's surname, sex and residence or place of business, and, where known, the defendant's first name or initials and occupation. If the defendant is sued in a representative capacity, the summons should state that capacity. The rule still requires a female defendant's marital status to be particularised, but there is no longer good reason for this since women married in community of property no longer lack the capacity to litigate without assistance – see *Nedcor Bank Ltd v Hennop and Another* 2003 (3) SA 622 (T) in which the requirement that the summons state sex and marital status of a woman was held to be unconstitutional.

- The first name, surname, sex, occupation and residence or place of business of the plaintiff.

- Where the plaintiff sues as a cessionary, the name, address and description of the cedent at the date of cession, and the date of the cession.

As far as jurisdiction is concerned, the rules require that the summons –

- show any abandonment of part of a claim under s 38 or set-off under s 39;

- where s 28(1)(d) is relied upon, contain an averment that the whole cause of action arose within the jurisdiction; and

- where s 29(1)(g) is relied upon, contain an averment that the property concerned is situated within the district.

It is clear from the language of rules 5 and 6 that their provisions are mandatory.

If there is non-compliance with these rules, then the Clerk of the Court may return the summons to the plaintiff before it is issued. The Clerk, however, often only checks costs and compliance with the eight-kilometre rule. The Magistrate should check compliance with other requirements, particularly where there is an application for default judgment. If the Magistrate thinks that there is potential for prejudice to the defendant, non-compliance should be queried.

In defended matters the defendant can apply in terms of rule 60(2) to compel the plaintiff to remedy non-compliance or take exception in terms of rule 17(2)(c).

4.1.3 Reissue and amendment of summonses

The term used when seeking to amend the defendant's service address, or to effect an alteration to the summons after issue but before service, is 'reissue'. Rule 7 deals with such situations. Before the summons has been formally issued by the Clerk of the Court, the plaintiff is at liberty – and without leave of the court – to amend it as he or she deems fit. The clerk must initial these changes when he or she issues the summons, otherwise the changes will be of no force or effect. Also, once the summons has been issued, the Clerk of the Court must initial any alterations made before the amended summons can become effective.

With regard to amendments, rule 7(2) states specifically that unless they are initialled, they shall have 'no effect'. It is a further rule of practice that such alterations should first be initialled by the plaintiff's attorney. In either situation, the leave of the court is not needed before the summons can be served again – *Marine and Trade Insurance Co Ltd v Reddinger* 1966 (2) SA 407 (A). All alterations to the summons must be dated. It is recommended that Tippex alterations should not be accepted. The Clerk of the Court is required to initial amendments before and after issue.

Failure to comply with this rule is not always treated harshly in practice. In *Edwards v Beneke* 1970 (2) SA 437 (T) the court held that although such an unauthorized alteration would constitute an irregularity, it would not – unless the alteration was material – nullify the process. A court's decision will depend on the possibility of prejudice or fraud. However, as officers of the court, Magistrates and Clerks have the duty to enforce the law and ensure that amendments are indeed initialled.

There is no provision for any fees being claimable by the plaintiff for a reissue of the summons if undefended.

Once a summons has been served, it can be amended only in terms of rule 55A. See section 4.3.10 and J & B Rule 7--1.

4.1.4 Lapsing of a summons

Rule 10 provides that a summons will lapse if it is not served within 12 months of the date of its issue or, if it was served, if the plaintiff has not within 12 months after service taken further steps in the prosecution of the action. The rule applies to both defended and undefended matters – *Manyasha v Minister of Law and Order* 1999 (2) SA 179 (SCA).

The 12-month period may be extended under the following circumstances:

- Where the defendant at its request has been given an extension of time to pay off the debt and the plaintiff has agreed not to seek judgment within the said period, except in the case of default by the defendant. The period is extended by the plaintiff filing an affidavit with the Clerk of the Court, explaining the position and setting out the period of extension required, prior to the expiry of the initial period. The summons then does not lapse until 12 months after the expiration of the period of extension.

- Where the plaintiff has failed to take further steps in the prosecution of the action, the period may be *ex post facto* extended under the provisions of rule 60(5) (*Manyasha* above).

The steps that the plaintiff needs to take to further the action and prevent the summons from lapsing are generally some act that brings, or intends to bring, the proceedings one stage nearer to completion – *Silberman and Others v Novter Investments (Pty) Ltd* 1993 (2) SA 850 (W). These steps need not be successful in furthering the prosecution of the action – *Minister of Law and Order v Zondi* 1992 (1) SA 468 (N).

Examples of steps within the meaning of this rule are the following:

- the supply of further particulars to the summons;
- a demand for a plea;
- the delivery of a replication or the taking of an exception to a plea;
- an application for summary judgment; or
- the furnishing of security in terms of rule 62(2).

4.1.5 Procedure after service of summons

When a defendant fails to enter an appearance to defend within the time allowed after service of summons the plaintiff may apply for default judgment. This is dealt with below.

When the defendant does enter an appearance to defend then the matter is referred to as a defended action. The procedural steps which follow upon entry of appearance to defend are set out after the section on default judgment.

4.2 Default judgment

4.2.1 General

Default judgment refers to a judgment entered in the absence of the party against whom it is entered because that party has failed to defend the matter, either by failing to enter an appearance to defend the summons or by failing to file a plea. The procedure is governed by rule 12. Rule 12(1) lists in detail the instances where a default judgment may be granted.

If the defendant has entered an appearance to defend but has failed to deliver a plea within the time stipulated in rule 19, or within any extended time allowed, the plaintiff may deliver a notice in writing calling upon the defendant to deliver a plea within five days of receipt of this notice, and, on the failure of the defendant to deliver his or her plea within that period or within any further period that may be agreed between the parties, the defendant is barred from delivering a plea and the plaintiff may apply for default judgment. Notice of the application for default judgment must be served on the defendant where the defendant has been barred from filing a plea, but no notice to the defendant is required where there is a failure to enter an appearance to defend in response to the service of a summons.

4.2.2 Application for default judgment

The plaintiff applies for default judgment by filing a written request for default judgment (Form 5) in duplicate with the clerk of the court, together with the original summons and return of service. It often happens that an original summons is lost or misplaced. Rule 12(1)(a) states expressly that the plaintiff is to lodge the original of the summons with the clerk, although rule 12(1)(e) provides that when original summonses are lost or misplaced the court may allow a duplicate summons or a copy to be used. A certificate must be affixed to the summons in terms of rule 12(1)(e)(i) and the copy must be accompanied by a statement in terms of rule 12(1)(e)(ii).

When the claim is liquidated the request is dealt with by the Clerk of the Court.
Rule 12(4) provides that when the claim is unliquidated the Clerk must refer the request to the court (ie to a Magistrate). An 'unliquidated' claim is a claim for an amount that must be assessed by the court before judgment can be given. It is mainly claims for damages which are unliquidated, but other claims such as claims for fair and reasonable remuneration for work done and/or services supplied may also be regarded as unliquidated – see, for instance, *Neves Builders & Decorators v De la Cour* 1985 (1) SA 540 (C). The assessment of the quantum (amount) of the judgment must be done by the court, as it is a judicial function, which cannot be performed by the Clerk.

Rule 12(5) also requires the Clerk to refer to Magistrate a claim based on an agreement governed by the Credit Agreements Act 75 of 1980. A Clerk may grant a default judgment on a claim based on any other type of liquid document, provided that the original document has been filed – rule 12(6). If the original cannot be found, the Clerk of the Court must refer the request to the court, and the plaintiff must provide the court with an affidavit setting out reasons why such originals cannot or should not be filed – see *Barclays Western Bank Ltd v Creser* 1982 (2) SA 104 (T) at 106E. A liquid document is a document signed by the debtor on the face of which it appears that the debtor owes the creditor a fixed amount of money.

The Clerk of the Court does not have the jurisdiction to grant a default judgment where a plea is delivered but subsequently withdrawn. Neither may the Clerk of the Court grant a default judgment where the defendant files a plea and consents to judgment on a portion of the claim but disputes the balance, and the plaintiff then abandons the disputed portion and requests judgment on the admitted portion. In these circumstances the Clerk must refer the request to the court for a judgment.

If the Clerk has any doubt about whether a default judgment should be granted, the request should be referred to a Magistrate in terms of rule12(7). There is case law to

the effect that the Clerk may use this rule to refer s 57 and s 58 judgments to the court – *First National Bank of SA Ltd v Schweizer Drankwinkel (Pty) Ltd and Another* 1998 (4) SA 565 (NC); and Pretorius *Burgelike Prosesreg in die Landdroshowe* Vol. 1 (1986) 403.) Proceedings in terms of ss 57 and 58 are explained below in section 4.2.5.

Where an application for default judgment is referred by the Clerk to the Court, the Magistrate dealing with the matter may call upon the plaintiff to produce written or oral evidence in support of the claim and may give judgment in terms of the plaintiff's request for so much of the claim as has been established to the Magistrate's satisfaction – rules 12(7)(a) and (c).

Where the claim is for damages, evidence will always be required to enable the court to assess the quantum of damages. The court will require proof, to its satisfaction, that the plaintiff's claim for compensation has been reasonably assessed. In practice, the plaintiff will usually attach an affidavit to the request for default judgment, setting out the particulars that support his or her entitlement to the judgment and the quantum claimed. It is, however, within the discretion of the court to decide whether oral evidence or an affidavit is sought, or both – *Western Bank Ltd v Meyer* 1973 (4) SA 697 (T). This decision is conveyed to the plaintiff through the Clerk of the Court.

In *Briel v Van Zyl* 1985 (4) SA 163 (T) at 169, it was held that the affidavit attached to the request for default judgment (in a claim for damage to a vehicle in a motor collision) must be that of an expert in the applicable field and that it must be stated that he or she is qualified to be considered an expert. In some instances, eg defamation cases, an affidavit by an expert is not required.

In *Dorfling v Coetzee* 1979 (2) SA 632 (NC) the court said that as a rule evidence of the cause of action must be led when damages are claimed, but it is left to each court to decide whether in a particular case such evidence can be dispensed with. In *Dorfling*, which concerned damage sustained in a motor collision, the court held that

it was essential that evidence of the cause of action be led in order to determine whether there had been contributory negligence on the part of the plaintiff, which would require an apportionment of damages.

Rule 12(2) provides that if it appears to the Clerk of the Court that the defendant intends to defend the action but that the entry of appearance is defective in one or more of the following respects:

- it has not been properly delivered

- it has not been properly signed

- it does not set out the postal address of the signatory or an address for service as required by rule 13

- it exhibits two or more of the above defects or any other defect of form,

then the Clerk may not enter judgment against the defendant. The Clerk must call upon the plaintiff to deliver to the defendant a written notice calling upon the defendant to deliver a memorandum of entry of appearance in due form within five days of the receipt of the notice. In this notice the plaintiff is also required to advise the defendant in what respect(s) the notice is defective. If the defendant fails to remedy the defect(s), then the Clerk or court may proceed, on the plaintiff's request, to note a default judgment.

In *Mthanthi v Pepler* 1993 (4) SA 368 (D) it was held that a Magistrate to whom a request for default judgment is referred should generally not grant default judgment if there are documents in the court file (regardless of whether they have been lodged timeously) indicating that the defendant intends to defend. The magistrate should in those circumstances and in the proper exercise of his or her discretion defer the granting of judgment until the defendant has been served with an appropriate notice. In this case it was also held that, since an application for default judgment is an ex

parte application, the plaintiff has the duty to disclose all relevant facts and documents – at 375A--B.

Rule 13(3) provides that an appearance to defend which is entered late will be effective as long as a request for default judgment has not been filed. It sometimes happens that after the five-day period (dies induciae) stipulated in the summons in terms of rule 12(1)(a) has expired, but judgment has not yet been noted, that both the request for default judgment and the defendant's appearance to defend are filed on the same day. In this case, rule 13(3) provides that if the judgment has not been granted then the notice of appearance to defend will still be effective, but that the plaintiff will then be entitled to costs for the default judgment on an undefended scale.

4.2.3 Default-judgment orders

A judgment by default may be granted for:

- any sum not exceeding the sum claimed in the summons, or other relief claimed;
- the costs of the action; and
- interest at the rate specified in the summons to the date of payment (if no rate is specified, the Prescribed Rate of Interest Act 55 of 1975 applies.)

The judgment is usually entered by the Clerk or Magistrate in chambers without the plaintiff or his or her attorney being present. Rule 12(9) provides that judgment must be entered by making a minute of record thereof.

Clerks of the Court may not refuse to grant a request for default judgment. If the papers are not in order, the Clerk may direct a query to the applicant. If the query does not resolve the problem, the Clerk must refer the matter to a Magistrate. A Magistrate is the only person who has the authority to refuse a request for default judgment – rule12(7)(e).

The Magistrate may either decide to 'refuse a request for default judgment on the papers' or to 'refuse' it in terms of rule 12(7)(e). In the former instance the merits of the case are not considered. This enables the plaintiff to resubmit the request once the defect has been corrected. A dismissal or refusal in terms of rule 12(7)(e) is, however, a final judgment.

4.2.4 Default judgments on claims in reconvention (counterclaims)

A default judgment may be granted on a counterclaim. A claim in reconvention or a counterclaim has the effect of a summons – rule 20(1). It is, however, not necessary (indeed, not provided for) to enter an appearance to defend in respect of a claim in reconvention. If the plaintiff does not file a plea to the defendant's counterclaim, the defendant may seek a default judgment in terms of rule 12(1)(b) – *Matyeka v Kaaber* 1960 (4) SA 900 (T). See also rule 20 (1) and (2).

In the case of *Smith NO v Brummer NO and Another* 1954 (3) SA 352 (O), default judgment was refused on a counterclaim because it was held that the claim in convention and the claim in reconvention were too closely interrelated and that there was a danger that a subsequent investigation of the claim in convention might disclose that the default judgment had been wrongly granted. It was subsequently held in *Matyeka v Kaaber* 1960 (4) SA 900 (T) at 904D that, since the defendant was entitled to counterclaim in a completely separate action, and would then have been entitled to a default judgment, the defendant should not be penalized for joining the action with that of the plaintiff for the sake of convenience.

In practice, a situation could exist where a plaintiff initiates an action through the issue of a summons. The defendant defends this, and meets the summons with a counterclaim. Thereafter the plaintiff withdraws the main action. In such circumstances, the defendant will still be entitled to proceed to court on trial.

Where a plea to a counterclaim is filed, the matter must be set down for trial to obtain judgment in terms of s 48 or rule 32.

Another possibility is that the defendant brings an application in terms of rule 60(2) for an order compelling the plaintiff to file a plea to the defendant's counterclaim. Should the plaintiff persist in the default, the defendant may be entitled to a final judgment in terms of rule 60(3).

4.2.5 Proceedings commenced by way of a letter of demand

It often happens that the issue of a letter of demand precedes a plaintiff's summons. In many instances it is essential that a letter of demand be sent in order that the debtor be placed in mora – *Nel v Cloete* 1972 (2) SA 150 (A). Section 56 of the MCA governs whether these costs are recoverable. The section stipulates that for costs to be recoverable, the letter of demand must:

- be a registered letter sent by an attorney;
- call for payment of a debt (ie a liquidated sum of money); and
- stipulate the fees and disbursements.

The court in *Independent Newspapers KZN Ltd v Chief Magistrate, Durban and Others* 1999 (1) SA 842 (N) ruled that as long as proof is furnished that a letter of demand has been sent, the costs may be claimed on taxation (Item 1, Part II, Table A of Annexure 2 to the rules). If the letter of demand does not comply with s 56, the cost of the letter cannot be claimed as it falls under the costs of the summons (Item 2, Part II, Table A of Annexure 2 of the rules). This ruling deals only with letters of demand that led to payment of the claim before a summons was issued. See also *Caldwell v Savopoulos* 1976 (3) SA 741 (D).

In terms of sections 57 and 58 of the MCA it is possible for a default judgment to be applied for on the basis of the defendant's response to a letter of demand without a summons having been issued. Section 57 provides that any person (called the defendant) who has received a letter of demand or has been served with a summons demanding payment of any debt may in writing admit liability, offer to pay the debt and costs in instalments and agree that in the event of failure to carry out the terms of the offer, the plaintiff (creditor) shall, without notice to the defendant, be entitled to apply for judgment for the amount of the outstanding balance of the debt and for an order of court for payment in instalments. If, after being advised of acceptance of the offer, the defendant fails to carry out the terms of the offer, the plaintiff may request default judgment. The request must be accompanied by a copy of the letter of demand (where no summons has been issued); the written acknowledgement of debt and offer to pay; the plaintiff's written acceptance of the offer; and an affidavit or affirmation by the plaintiff or a certificate by the plaintiff's attorney stating in what respects the defendant has failed to carry out the terms of the offer, what payments have been made since the date of the letter of demand or summons, and how the balance claimed is arrived at.

Section 58 is similar to s 57, except that it provides for the situation where the debtor, in response to the letter of demand or a summons, consents in writing to judgment in favour of the creditor. The request for judgment in this case must be accompanied by the summons or letter of demand and the defendant's written consent to judgment. If it appears from the written consent that the debtor has also consented to an order of court for payment in instalments, an order may be made for payment in instalments.

It is important for magistrates to be familiar with sections 57 and 58, because although most judgments granted in terms of these sections are handled by the Clerks of Court, some matters may be referred by the Clerk to the Magistrate.

4.2.6 Claims for tracing fees

It regularly occurs that a sheriff is unable to serve the summons on the defendant either because the defendant is unknown at the given address or because he or she has left that address. In these circumstances, the plaintiff is required to expend money tracing the defendant. When the defendant has been located, the plaintiff then includes a second claim in the summons for the money spent on tracing fees.

At common law, there is no duty on the defendant to inform the plaintiff of his or her new address. Tracing fees constitute a substantive claim, if the plaintiff is entitled to these fees at all. For example, the defendant has no obligation to furnish the plaintiff with an address or updates of changed addresses. For this reason, the money spent by the plaintiff in tracing the defendant is for the plaintiff's own account. An exception to this would be where the defendant has contractually undertaken to keep the plaintiff updated with his or her address and undertakes financial responsibility for money expended where he or she fails to do so. The quantum of the claim for tracing fees must be proved in terms of rule 12(4).

The obligation on the defendant to pay tracing fees, in the absence of such a contractual undertaking, arises ex lege after judgment (Item 3(d), Part I, Table B of Annexure 2). For this reason, attorneys can automatically include these costs only in respect of s 65 proceedings (s 109).

4.2.7 Checklist for consideration of default-judgment applications

1. Is the summons in the prescribed form (Form 5)?
2. Has the summons been properly issued: does it bear a case number, a R20 revenue stamp, and the signature of the plaintiff or attorney and the signature of the Clerk of the Court?
3. Have rules 5 and 6 been complied with?
4. Does the court have jurisdiction and have the necessary allegations been made to establish jurisdiction?

5. Do the parties have *locus standi in judicio*?
6. Has the summons been properly served and a return of service attached? If service was by registered post, is proof of receipt annexed?
7. Has the summons lapsed (rule 10)?
8. Have the *dies induciae* expired (a five-day period since service of summons, 20 days where the defendant is the State)?
9. If the summons was amended before service, were the amendments signed and initialled?
10. If the summons was amended after service, was rule 55A complied with?
11. Has an appearance to defend been delivered? (Remember rule 12(1)(b)(i) for a judgment in default of plea.)
12. Does the summons disclose a cause of action?
13. Is the plaintiff's request for default judgment in due form and signed?
14. If the plaintiff's claim is based on a liquid document, is the original of the liquid document attached and stamped if necessary?
15. Is the plaintiff's quantum within the court's jurisdiction and has sufficient evidence been produced to prove the quantum?

4.2.8 Default judgment at a trial hearing

If the defendant does not appear at the appointed time for the trial of the action, a judgment with costs may be given against the defendant – rules 32(1) and (2). This is dealt with in the section which deals with the trial hearing.

4.3 Defended actions

4.3.1 General

Once an action becomes defended, the parties are required to exchange documents called pleadings which set out the facts relied on for the action or defence.

An action becomes defended when the defendant serves on the plaintiff and files with the court a notice of appearance to defend, as provided for by rule 13.

After entry of appearance to defend, the defendant is required to file a pleading called a plea which sets out the defendant's response to the plaintiff's summons and the facts on which the defendant relies by way of a defence. However, there are two other proceedings which the parties may choose to utilize at this stage of the proceedings –

- a request for further particulars to the plaintiff's particulars of claim
- an application for summary judgment.

4.3.2 Requests for further particulars for the purpose of pleading

In the civil Magistrates' Courts it is possible, in terms of rule 16(1), to request further particulars to a summons or any other pleading. The rule provides that a notice requesting such further particulars as are reasonably necessary to enable the requesting party to plead may be delivered not more than ten days after entry of appearance in the case of a summons or after the delivery of any other pleading or after judgment on any exception to such pleading has been given. Rule 16(2) provides that the particulars must be furnished within ten days after receipt of the request. Once furnished the particulars become part of the pleading in respect of which they were requested.

A similar procedure for requesting further particulars to pleadings used to exist in the Supreme Court (as it then was), but was abolished with effect from 1 January 1988, on recommendation of the Hoexter Commission. In the High Court it is accordingly now necessary that all pleadings contain sufficient particularity to enable the opposite party to reply to them, otherwise they are excipiable or liable to be set aside as irregular.

Magistrates are called upon to make decisions as to the degree of particularity required for the purpose of pleading where the party receiving the request fails or

refuses to supply the particulars and the requesting party brings an application to compel compliance with the request in terms of rule 60(2). The reported decisions of judgments on applications to compel further particulars for the purpose of pleading handed down by the then Supreme Court before 1988, when the procedure was abolished, provide useful guidelines because the test applied was the same as that which prevails in the Magistrate's Courts – are the particulars necessary for the other party to be able to respond or to decide whether to respond?

Useful guidelines relating to particularity in pleadings are set out in *SAR & H v Deal Enterprises (Pty) Ltd* 1975 (3) SA 944 (W). A basic rule is that the requesting party is entitled only to particulars relating to the facta probanda of the plaintiff's cause of action or the defendant's defence. It is important to distinguish between the material facts which must be proved (facta probanda) and those facts which will be relied upon in order to prove the material facts (facta probantia). Facta probantia should not be pleaded at all, whereas facta probanda must be pleaded with sufficient particularity to enable the other party to respond. In other words, the pleader must state the facts that the party concerned is obliged to prove with sufficient particularity to identify them, but for the purpose of pleading it is not required that the pleading tell the other party how those facts will be proved. It is often difficult to draw a line between facta probantia, which are not required in a pleading, and essential details or facta probanda, which are.

For example, if negligent driving is averred, the other party is entitled to a clear indication of the respects in which the driver was allegedly negligent, but is not entitled to a preview of the facts that will be placed before the court to prove that the driver was negligent. In *Coop and Another v Motor Union Insurance Co Ltd* 1959 (4) SA 273 (W) the plaintiff pleaded that the driver of the vehicle insured by the defendant was negligent in that

(a) he failed to keep a proper look-out;
(b) he drove at a speed which was excessive in the circumstances;
(c) he drove on the incorrect side of the road;
(d) he swerved on to the incorrect side of the road;

(e) he failed to exercise proper control over the car;

(f) he failed to avoid the collision when by the exercise of reasonable care he could have done so.

The defendant requested particulars as to the manner in which it was alleged that the driver failed to avoid the collision and failed to exercise proper control. The court said at 275E--F: 'The question as to the exact manner in which the driver could have avoided the accident or failed to exercise proper control is just as much a matter of evidence as is the exact speed at which he drove or the circumstances which rendered that speed excessive.'

In *Motaung v Federated Employers' Insurance Co Ltd* 1980 (4) SA 274 (W) the plaintiff alleged that a collision had taken place between her minor child, who was a pedestrian on the gravel verge of a street, and a motor vehicle insured by the defendant. She pleaded that the driver of the vehicle 'drove on the gravel verge of the road, when he was duty bound not to do so'. The defendant requested particulars as to the direction in which the vehicle was being driven and the direction in which the child was moving. Applying the approach recommended in *Deal Enterprises,* Goldstone AJ, as he then was, held that these details were not necessary for the purpose of pleading since the particulars which had been pleaded were sufficient to enable the defendant to reply.

Another guideline is that a party is not entitled to particulars in order to find out what evidence his opponent intends to rely upon. In the High Courts, in terms of rule 21(2), a party may after close of pleadings request further particulars for the purpose of trial and such a request may, if necessary, call for the disclosure of evidence, but further particulars for the purpose of pleading never relate to the evidence necessary to prove the facts in issue. (Note that the rules governing requests for further particulars for the purpose of trial, a procedure which exists in the High Courts, but not the Magistrates' Courts, are very different and care should be taken not to refer to that case law mistakenly.)

Another important rule is that a party is not entitled to particulars which pertain only to its own case, for instance particulars required for the purpose of enabling the defendant to ascertain whether there is a defence or a counterclaim, or to formulate the defence. Thus, in *Modingwane v Du Plessis* 1961 (2) SA 705 (T), where a boy had his foot damaged by a lawn-mower, the defendant asked in his request for further particulars whether the lawn-mower was a separate motorized unit, but the court refused to compel the furnishing of such further particulars because the defendant was attempting to obtain information from the plaintiff so that it could put forward a defence, in terms of the Motor Vehicle Insurance Act 29 of 1942, that the lawn-mower was a motorized vehicle, and thus that the defendant was exempted under the Act from liability in respect of damage caused by it.

When a party in a pleading simply denies the other side's averments it is not necessary to furnish further particulars as to the denial, unless the denial embodies by implication a positive averment of fact.

If a litigant is entitled to further particulars, then the party from whom they are requested may not avoid furnishing them by saying that the relevant information is in the possession of the requesting party or available to that party from another source. In *Wilson v Die Afrikaanse Pers Publikasies (Edms) Bpk* 1971 (3) SA 455 (T) at 464G it was held that a pleader who is unable to furnish further particulars to which the other side is entitled should state the reason for the inability to do so.

Note that the same principles apply irrespective of whether the request is for particulars to a summons, or the defendant's plea or the plaintiff's replication.

Another rule which can provide a defendant with further particulars for the purpose of pleading is rule 15(1), which provides that a defendant may at any time after entry of appearance to defend and before delivery of a plea or notice of bar apply to the plaintiff by notice for copies of all or any of the accounts or documents upon which the action is founded. This procedure should not be confused with the procedure which allows parties to call for discovery of all documents relevant to the matter after

close of pleadings – rule 23. Rule 15(1) gives access only to documents on which the action is founded, as opposed to discovery, which gives access to all relevant documents.

4.3.3 Applications for summary judgment

If the defendant gives notice of his intention to defend and the plaintiff believes that the defendant does not have a bona fide defence, the plaintiff may apply for summary judgment if the claim of one of the following types:
(a) a claim based on a liquid document;
(b) a claim for a liquidated amount in money;
(c) a claim for delivery of specified movable property; or
(d) a claim for ejectment.

The purpose of summary judgment is to enable a plaintiff whose claim falls within one of the above categories to obtain a speedy judgment and put an end to the matter without having to go to trial if the defendant lacks a bona fide defence. The procedure is regulated by magistrate's court rule 14, which is almost identical to High Court rule 32.

Notice of the application must be delivered within 10 days of delivery of the notice of intention to defend and the defendant must have at least 10 days' notice of the application.

The defendant may file a plea within the time allowed for the plaintiff to apply for summary judgment, although the defendant cannot, by doing so, defeat the plaintiff's right to obtain summary judgment. Provided, therefore, that the plaintiff brings his application in time, summary judgment may be granted even though a plea has already been filed: *Vesta Estate Agency v Schlom* 1991 (1) SA 593 (C) at 594H--595I.

In *Paul v Peter* 1985 (4) SA 227 (N) it was held that a plaintiff who, in terms of Magistrate's Court rule 16(2), replies to a request for further particulars made by the defendant in a civil Magistrate's Court action does not thereby waive the right to continue with a summary-judgment application already launched. The reasoning of the court was that, since the plaintiff is obliged to reply to the request for further particulars, it could not be held that the right to continue with the summary-judgment application had been forfeited. This resolved in the Magistrates' Courts an issue in respect of which there were conflicting decisions in the provincial and local divisions of the Supreme Court (as they then were).

The procedure relevant to summary-judgment applications and the law relating to the basis on which a judicial officer should decide such applications is dealt with in section 7.2, in the part dealing with applications.

If summary judgment is granted, it is a final judgment and puts an end to the matter, unless the defendant takes the decision on appeal or review. If summary judgment is refused, the defendant must serve and file a plea and the matter proceeds to trial in the usual way.

4.3.4 The defendant's plea

The plea is the defendant's response to the summons.

The defendant is required to file a plea within ten court days after:

- entry of an appearance to defend; or
- delivery of documents or particulars requested in terms of rule15 or 16; or
- dismissal of an application for summary judgment; or
- making of an order giving leave to defend; or
- dismissal of an exception or application to strike out.

In the plea the defendant must admit, deny, or confess and avoid the material facts alleged in the particulars to the summons and must clearly and concisely state the

nature of the defence and all the material facts on which it is based – rule 19(4). A bare denial of liability or a defence of general issue is not admissible, but the defendant may, either as a sole defence or in combination with any other defence not inconsistent therewith, deny specifically any of the allegations in the summons – rule 19(6). In *FPS Ltd v Trident Construction (Pty) Ltd* 1989 (3) SA 537 (A) at 542A--B it was held that a defendant must give a fair and clear answer to every point of substance raised by a plaintiff in the particulars of claim.

By denying a fact, the defendant places it in issue so that it has to be proved at the trial. Every allegation of fact by the plaintiff that is inconsistent with the plea is considered as denied. All other allegations are considered as admitted – rule 19(10). Once a fact has been admitted, or is deemed to have been admitted, it is eliminated as an issue in the action and need not be proved by the plaintiff.

It is for this reason that an application for amendment of a plea which involves the withdrawal of an admission should be considered carefully. In *Amod v SA Mutual Fire & General Insurance Co Ltd* 1971 (2) SA 611 (N) at 614 it was held that the court will require a reasonable explanation both of the circumstances under which the admission was made and of the reason why the defendant seeks to withdraw it. In addition, the court held, the question of prejudice to the other party must be considered. If the result of allowing the admission to be withdrawn will cause prejudice or injustice to the other party to such an extent that a special order as to costs will not compensate him, then the application to amend will be refused. See also *Levy v Levy* 1991 (3) SA 614 (A) at 622B--D and *JR Janisch (Pty) Ltd v WM Spilhaus & Co (WP) (Pty) Ltd* 1992 (1) SA 167 (C) at 170C--D. The fact that the amendment will cause the respondent (the party opposing an application for leave to withdraw the admission) to lose his case is not the type of prejudice referred to by the court. The type of prejudice which would justify the refusal of an amendment is illustrated by the case of *South British Insurance Co Ltd v Glisson* 1963 (1) SA 289 (D), in which the insurance company in a third-party claim erroneously admitted that it was the insurer of the vehicle driven by the negligent driver. The court refused to allow the withdrawal of this admission because the claim which the plaintiff would

otherwise have had against the then Motor Vehicle Insurers Association of Southern Africa had prescribed. Another case in which a defendant was held bound by his admission was *Dinath v Breedt* 1966 (3) SA 712 (T), in which an order had been granted ejecting the defendant from certain property. On appeal the defendant argued that the order had been wrongly made since the plaintiff was not the owner of the property at the time of issue of summons. The court held that the defendant could not rely on this fact because it had not denied the plaintiff's allegation of ownership in the summons. This case also illustrates the principle that while an admission stands on the pleadings the defendant is estopped from relying on a contention to the contrary.

In a plea in confession and avoidance the defendant admits the facts in the plaintiff's particulars of claim but sets up other facts which, if established, would have the effect of avoiding the normal legal consequences of the plaintiff's allegations. In other words, the defendant sets up some excuse or justification for the conduct complained of. For instance, the defendant admits having caused damage to the plaintiff by his negligence during a game of rugby, but states that the plaintiff voluntarily submitted himself to the risk of incurring such damage (a defence of volenti non fit injuria). A defendant who pleads in confession and avoidance must set out the essential facts on the basis of which it seeks to escape liability.

Another way in which a defendant may plead is to state that it has no knowledge of a particular allegation, is therefore not in a position either to admit or to deny it, and accordingly puts the plaintiff to the proof of it. The effect is that the allegation is placed in issue and must be proved. Rule 19 does not provide for this manner of pleading, as the High Court rules do, but Jones and Buckle (Rules 19--12f) express the opinion that this form of pleading is acceptable in the Magistrates' Courts.

In *Standard Bank Factors Ltd v Furncor Agencies (Pty) Ltd* 1985 (3) SA 410 (C) it was held that there is a clear distinction between denying an allegation and not admitting it. A plaintiff faced with a positive denial must anticipate and prepare for the leading by the defendant of evidence rebutting the allegations made in the

particulars of claim. A plaintiff faced with a `non-admission', on the other hand, need not do so. There is even authority for the proposition that he need not anticipate so much as a challenge by way of cross-examination of his witnesses. That may be going too far, but a denial (and a fortiori a plea of non-admission) because of lack of knowledge will not entitle the pleader to contradict the plaintiff's averments by leading contradictory evidence at the trial. A plaintiff is entitled to know which of the two stances a defendant adopts, and a plea which leaves that in doubt will be vague and embarrassing. In *N Goodwin Design (Pty) Ltd v Moscak* 1992 (1) SA 154 (C), however, Van den Heever J disagreed with the decision in *Furncor:* the distinction between a denial and a plea of non-admission, she said, was merely one of emphasis (at 163G--H). But the view of Van den Heever J overlooks the principle that litigants must confine themselves at trial to the averments made in their pleadings. If the defendant is in a position to lead evidence in rebuttal of facts pleaded in the declaration or particulars of claim, then it must surely have independent knowledge as to the truth of those facts. To allow the defendant to lead such evidence despite an averment in the plea that it has no knowledge of the plaintiff's allegations is thus to permit the defendant (a) to fight the case on a basis at odds with the contents of the plea and (b) to take the plaintiff by surprise at trial. See 1992 *Annual Survey of SA Law* 589--91.

The plaintiff is entitled to except to the plea if the plea fails to disclose a defence good in law, if it is vague and embarrassing, or if it does not comply with the requirements of rule 19. Instead of immediately excepting to the plea, the plaintiff may first elect to request further particulars. Should the further particulars not clarify the meaning of the plea, an exception may then be brought. Exceptions are dealt with in section 4.3.12 below.

4.3.5 Special pleas

A special plea raises a defence which may be adjudicated upon without going into the merits of the case. Rule 19(12) provides that any defence which can be adjudicated upon without the necessity of going into the main case may be set down

by either party for a separate hearing upon 10 days' notice at any time after the defence has been raised.

A defence raised by way of a special plea may either be dealt with at the trial, usually as the first step in the trial, or be set down to be heard prior to the trial. If the effect of the special plea being upheld will be to put an end to the action, then is best decided as early as possible so as to avoid incurring unnecessary costs.

The object of a special plea may be either to delay the proceedings until some defect in or temporary bar to the plaintiff's claim is removed or to defeat the action altogether. A plea which delays the action is often referred to as a dilatory plea, whereas one which defeats the action is referred as a plea in abatement. The term 'plea in bar' is also sometimes used to refer to special pleas. In *Van der Westhuizen v Smit NO* 1954 (3) SA 427 (SWA) at 430D--F the court emphasized the undesirability of giving a special plea any specific heading such as a plea in bar or a plea in abatement, and said it would be wiser simply to describe such a pleading as a special plea and to set out in the body of the plea the grounds to be relied on.

A question which has arisen is whether a defendant who raises a special plea must 'plead over' ie file the defence on the merits at the same time as filing the special plea. There are conflicting judgments on this issue as to High Court procedure, but in the Magistrates' Courts it would seem that one must always plead over, since rule 19(4) seems to require a defendant to set out his whole defence, and therefore to plead over. In *Pretorius v Fourie NO* 1962 (2) SA 280 (O) it was held that in an action in a civil Magistrate's Court a defendant who had failed on his special plea had no right at that stage to request further particulars to the plaintiff's summons for the purpose of pleading his defence on the merits. The court held that the defendant should have included his defence on the merits in his original plea.

A plea and a special plea need not be contained in the same document but both must be delivered (served and filed) within the prescribed time limit.

Examples of defences that would be raised by way of a special plea:

1. Defence of non-joinder or misjoinder – the effect is usually to delay the action.
2. Defence of lack of locus standi in judicio, for example that the plaintiff is an unassisted minor suing without his guardian's assistance.
3. Plea that the court does not have jurisdiction. The effect is to defeat the claim to which the plea is raised, but the matter can be brought afresh in the correct court.
4. Prescription.
5. Res judicata – the objection that the claim raises an issue which has already been adjudicated will put an end to the matter if successful.
6. Lis pendens – the objection that the matter is already before another court (another suit is pending between the same parties concerning the same thing and founded on the same cause of action) does not always result in termination of the action because the court has a discretion as to whether to stay the action before it or allow it to go ahead.

The facts on which the defendant relies in the defence raised by way of a special plea must be proved, and therefore oral evidence will have to be presented in the normal way when the defence is adjudicated.

If a special plea does go to the merits, it will be excipiable – *Glennie, Egan & Sikkel v Du Toit's Kloof Development Co (Pty) Ltd* 1953 (2) SA 85 (C).

4.3.6 Notice of bar

If the defendant fails to file a plea within the prescribed time, the plaintiff may serve a notice of bar on the defendant – rule12(1)(b). This is a notice that calls upon the defendant to file a plea within five days. If the defendant fails to file a plea within the required time, he or she may be denied the opportunity of doing so later. The plaintiff will then be able to apply for default judgment.

4.3.7 Tender and/or payment into court by a defendant

In terms of rule 18, a defendant may –

- make an unconditional payment into court of the full amount claimed with admission of liability, whereupon the proceedings are stayed save in respect of the recovery of costs not included in such payment – rule 18(1);

- pay an amount into court without prejudice by way of an offer of settlement – rule 18(2); or

- plead a tender of part of the amount claimed and pay into court in terms of rules 18(7) and 19(7) the amount tendered.

A defendant who pays money into court, in terms of either rule 18(1) or rule 18(2), must, at the same time, notify the plaintiff in writing of the payment into court. The notice must set out the amount that has been paid and whether it has been paid in unconditionally or whether it is an offer of settlement under rule 18(2). If the amount had been paid as an offer of settlement, the notice must disclose whether the settlement relates to both the claim and costs or only the claim.

The main purpose of tender and payment into court is to enable a defendant to avoid liability for costs because a defendant will not be liable for any costs incurred after the date on which the tender or payment was made if it proves to have been sufficient, in that a plaintiff who proceeds with the action does not prove entitlement to more than was tendered or paid into court. If the offer is too low, it will not protect the defendant with regard to costs at all.

When the tender is made with admission of liability, the plaintiff may accept the tender and proceed with the claim in order to recover the balance. The question of costs will depend upon whether judgment is granted for more than was tendered.

When a tender is made without admission of liability, as an offer of compromise, a plaintiff who accepts the tender may not proceed with enforcement of the claim since acceptance results in settlement of the claim. If a plaintiff refuses an offer of compromise and proceeds with the action, the question of costs will depend upon the outcome. If the plaintiff proves entitlement to anything more than was offered, the plaintiff is entitled to a full order of costs. If the plaintiff does not succeed in proving entitlement to more than was offered, the plaintiff will be liable for all the costs from the date on which the amount of the offer was paid into court – rule 18(6).

Where the claim is for damages or compensation, the amount of a tender or payment into court must not be disclosed to the court or in the pleadings until after judgment on the claim has been given, and an order for costs may be made only after disclosure of the amount tendered or paid into court – rule 18(9).

A defendant who wants to make an offer of compromise may either tender payment of an amount to the plaintiff at common law or pay an amount into court in terms of rule 18(2). A common-law tender is simply an offer of payment made by one party that is open for acceptance by the other and the normal rules of offer and acceptance apply. The advantage of common-law tender is that it may be made even before action has been instituted and therefore gives more costs protection.

A common-law tender, once pleaded, will protect the defendant in respect of costs if sufficient. The disadvantage of relying on a common-law tender and pleading it, rather than making a payment into court in terms of rule 18(2), is that if the defendant's liability is found to be less than the amount tendered, the plaintiff is nevertheless entitled to judgment for the full amount tendered, even though the plaintiff refused to accept the tender and even though the defendant made the tender without admission of liability – *Greer v McHarry* 1938 WLD 182; *Foord v Lake and Others NNO* 1968 (4) SA 395 (W). A tender may be either an unconditional one with admission of liability, or a tender of part-payment made on the condition that it may be accepted only in full and final settlement of the claim (in other words, an offer of compromise).

Whether the tender is conditional or unconditional depends on the intention of the offeror – *Harris v Pieters* 1920 AD 644.

Magistrates must always ensure that when money has been paid into court, at the conclusion of the matter, an order is made as to who is entitled to uplift the money. Failure to do this will result in administrative problems – the files cannot be closed, the attorneys sometimes cannot be traced, and the money remains unclaimed.

Instead of paying a sum of money into court, a defendant may lodge a security in a form that is acceptable to the attorney of the plaintiff (or to the plaintiff, where he or she sues in person) – rule 18(11).

4.3.8 Claims in reconvention

A claim that a defendant has against the plaintiff may be raised by means of a claim in reconvention. The defendant becomes the plaintiff in reconvention and the plaintiff becomes the defendant in reconvention. The claim in reconvention runs an identical course to that of a claim in convention and rule 20(1) provides that the rules apply mutatis mutandis to counterclaims, except that it is not necessary to file an appearance to defend a counterclaim. At the conclusion of the hearing, the court will be required to give judgment in respect of both the claim in convention and the claim in reconvention. A claim in reconvention is also known as a counterclaim.

Rule 20(3) provides that a defendant may set up by a claim in reconvention any right or claim of any amount which may be alleged against the plaintiff, whether liquid or illiquid, whether liquidated or unliquidated, and whether or not it arises out of or is connected with the subject matter of the claim in convention, and such claim (if within the jurisdiction of the court) shall have the same effect as a cross-action, so as to enable the court to pronounce a final judgment in the same action both on the claim in convention and on the claim in reconvention. Rule 20(7) provides that where both the claim in convention and the claim in reconvention proceed to trial, each action may be tried separately, but judgment on both shall be given pari passu.

Where an action is withdrawn, stayed, discontinued or dismissed the counterclaim may proceed separately – rule 20(9).

A defendant who admits the plaintiff's claim may plead that it is excused from payment by virtue of the counterclaim and pray that judgment on the plaintiff's claim be stayed pending judgment on the counterclaim – J & B Rule 20--3. In *Consol Ltd t/a Consol Glass v Twee Jongegezellen (Pty) Ltd and Another* 2002 (2) SA 580 (C) it was held that a court has wide discretion as to whether to postpone judgment on the claim in convention pending judgment on the claim in reconvention and that the reason for doing this is convenience, not to achieve a set-off.

A counterclaim must be filed within the time allowed by the rules for delivery of a plea – rule 20(2).

4.3.9 The plaintiff's reply

Where the defendant's defence is other than a bare denial of one or more of the allegations in the summons, the plaintiff may, within 10 days after the delivery of the plea, or after the delivery of further particulars to the plea, deliver a reply to the plea – rule 21(1). The rules applicable to the plea apply mutatis mutandis to the reply – rule 21(2). In High Court proceedings a reply to the plea is called a replication.

The purpose of the reply is to introduce new facts in response to allegations contained in the plea. A reply will often be necessary where the plea is a confession and avoidance or where the defendant denies allegations and pleads facts in support of the denial. Generally, a reply should be filed only when it is necessary to answer the plea other than by way of a bare denial. If a reply is not filed, the plaintiff is deemed to have denied the allegations in the plea – rule 21(3). An example of a matter in which it would be necessary to reply to a plea would be where the defendant denies his agent's authority to enter into a contract and the plaintiff replicates that the defendant is estopped from doing so – a plaintiff who did not file a

reply to this effect would not be able to lead evidence in support of the estoppel at the trial.

It is not permissible to use a reply to plead a new cause of action, to introduce a fresh claim or to increase the amount of the original claim. The introduction of such matter renders a reply excipiable or susceptible to an application to strike out. This does not mean that a plaintiff may not introduce new facts in his reply, but such facts must be made in answer to the plea.

The pleadings will close when the reply is delivered or when the time in which a reply may be delivered has expired – rule 21(4).

4.3.10 Subsequent pleadings

High Court uniform rule 25(5) states that '[f]urther pleadings may ... be delivered by the respective parties within ten days after the previous pleading delivered by the opposite party and that such pleadings shall be designated by the names by which they are customarily known'. The names by which further pleadings are known are, in order after the replication, the rejoinder, surrejoinder, rebutter and surrebutter. These pleadings are seldom used in practice and are necessary only when the response to a replication or subsequent pleading is other than a joinder of issue or bare denial. There is no provision for a rejoinder or any subsequent pleadings in the Magistrate's Court Rules – see J & B Rule 21--3.

4.3.11 Amendment of pleadings

Rule 55A enables a party to amend a pleading or a document other than an affidavit without having to apply to court unless there is opposition to the proposed amendment. Affidavits cannot be amended because they constitute evidence and a statement under oath that the evidence given is true and correct. If a deponent

wishes to change the evidence given in an affidavit, this can be done only by filing a supplementary affidavit that sets out why this is being done.

In terms of rule 55A a notice of intention to amend must be served on all other parties, furnishing particulars of the amendment. The notice must state that unless written objection to the proposed amendment is received within 10 days of delivery of the notice, the amendment will be effected. An objection to a proposed amendment must state clearly and concisely the grounds on which the objection is founded. If a objection complying with the rule is delivered within the stipulated 10-day period, the party wishing to amend may, within 10 days after delivery of the objection, lodge an application for leave to amend. The application is interlocutory in nature, and will not always require an affidavit to be filed in support of it – *Swartz v Van der Walt t/a Sentraten* 1998 (1) SA 53 (W).

If, on the other hand, no objection is made within the time allowed, then every party who received the notice of intention to amend is deemed to have consented to the amendment, and the party who gave notice of the proposed amendment may, within 10 days after the expiration of the objection period, effect the amendment by delivering to the other parties each relevant page in its amended form, unless the court directs otherwise.

An amendment authorized by an order of court may not be effected later than 10 days after the order is granted, unless the court orders otherwise. As in the case where no objection to the proposed amendment is made, the amendment made pursuant to an order of court is effected by delivery of each relevant page of the document in question in its amended form, unless the court otherwise directs.

Any party affected by an amendment may, within 15 days after the amendment has been made, or within whatever other period the court may determine, make any consequential adjustment to the documents filed by him, take exception to the document as amended, or apply for the striking out of material from the document as amended.

Rule 55A(10) provides that, notwithstanding the provisions of the rule, the court may, at any stage before judgment, grant a party leave to amend any pleading or document on such other terms as to costs or other matters as the court deems fit. This is in line with s 111(1) of the MCA, which states that 'the court may, at any time before judgment, amend any summons or other document forming part of the record: Provided that no amendment shall be made by which any party other than the party applying for such amendment may (notwithstanding adjournment) be prejudiced in the conduct of his action or defence.'

In *Trans-Drakensberg Bank Ltd (under judicial management) v Combined Engineering (Pty) Ltd* 1967 (3) SA 632 (D) it was held, at 637--638, that, in considering an application for amendment, a court should aim to do justice between the parties by deciding the real issues between them. The mistake or neglect of one of them in the process of placing the issues on record should not be allowed to stand in the way of this. The punishment for the party who seeks an amendment is being mulcted in the wasted costs. The court held that an amendment should be refused only if to allow it would cause prejudice to the other party that is not remediable by an order for costs and, where appropriate, a postponement.

Where an amendment will result in a pleading becoming excipiable, the court will generally refuse the application for amendment. However, if it is not clear that the pleading will be excipiable, but only arguable that it may be, the court should allow the amendment, and the other party may thereafter take exception – *Bowring Barclays & Genote (Edms) Bpk v De Kock* 1991 (1) SA 145 (SWA) at 151B--H.

Applications for amendments have been allowed even after both sides had closed their cases, and even after close of argument: *Levy v Rose* (1903) 20 SC 189 and *Myers v Abramson* 1951 (3) SA 438 (C). In *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd en 'n Ander* 2002 (2) SA 447 (SCA) the Supreme court of Appeal set out the considerations which apply when a court must decide whether to allow an amendment of pleadings at a late stage.

Section 111(2) provides that an amendment may be made on such terms as to costs as the court may judge reasonable and rule 55A(10) contains a similar provision. Rule 55(9) provides that a party who gives notice of an amendment is liable, unless the court otherwise directs, for the costs occasioned to any other party by the amendment. A party who opposes an amendment unreasonably will normally have to bear the costs of the application – *Gcanga v AA Mutual Insurance Association Ltd* 1979 (3) SA 320 (E); and *Genn NO v Rudick Holdings (Pty) Ltd* 1983 (2) SA 69 (W).

4.3.12 Exceptions

An exception is a legal objection to a pleading which complains of a defect inherent in the pleading. When a court is faced with an exception it must look at the pleading objected to as it stands and may not consider any extraneous facts – *Dilworth v Reichard* [2002] 4 All SA 677 (W). In other words, the defect must be apparent ex facie the pleading for exception to be an appropriate method of objection. Where facts need to be placed before the court to show that there is a defect, then the taking of an exception is not the appropriate procedure.

For example, where a summons alleges that the whole cause of action arose within the court's area of jurisdiction, but also alleges that the contract which gives rise to the cause of action was concluded outside the court's area of jurisdiction, the defendant should except because it is clear from the plaintiff's own allegations that the whole cause of action did not arise within the court's area of jurisdiction. On the other hand, if the summons alleged that the contract was concluded within the court's area of jurisdiction but the defendant can prove that this is not so, the defendant will need to file a special plea and lead evidence at the hearing thereof as to where the contract was concluded.

When further particulars to a pleading are furnished, they become part of the pleading. Therefore, in the above example, if it was alleged as part of the further particulars that the contract was concluded outside the court's area of jurisdiction,

whereas the summons alleges that the whole cause of action arose within the court's area of jurisdiction, the defendant would be able to take exception to the summons.

It was held in *Walsh NO v Scholtz* 1968 (2) SA 222 (GW), *Rand Staple-Machine Leasing (Pty) Ltd v ICI (SA) Ltd* 1977 (3) SA 199 (W) and *Union & SWA Insurance Co Ltd v Hoosein* 1982 (2) SA 481 (W) that the defence of prescription should be taken by way of a special plea and not an exception, even when it appears from the plaintiff's particulars of claim that the claim has prescribed. This is because the plaintiff may wish to replicate a defence to the averment of prescription, for example that the defendant has waived the right to plead prescription. The plaintiff could not plead a defence by way of replication if the matter were raised on exception because there is no provision for a response to a notice of exception, and new facts may not be introduced in exception proceedings.

In the High Courts exception may be taken to any pleading. The Magistrate's Court rules specifically allow exceptions to a summons and a plea. There is no specific reference to an exception to a reply, but rule 21(2) provides that the rules applicable to the plea shall mutatis mutandis apply to a reply, thus making it possible to except to a reply on the same grounds as to a plea – see J & B Rule 21--3.

Rule 17(2) provides that the only exceptions which may be taken by a defendant are

(a) that the summons does not disclose a cause of action;
(b) that the summons is vague and embarrassing;
(c) that the summons does not comply with the requirements of rule 5 or 6;
(d) that the summons has not been properly served;
(e) that the copy of the summons served on the defendant differs materially from the original.

Rule 19(14) provides that a plaintiff may except to a plea on the ground

(a) that it does not disclose a defence;
(b) that it is vague and embarrassing;
(c) that it does not comply with the requirements of rule 19.

The first two grounds mentioned under both rules coincide with the grounds on which a pleading may be excepted to in the High Court, with the result that most High Court decisions on exception are applicable in the Magistrates' Courts. The other grounds are more technical and were probably added because the Magistrates Court rules do not provide for applications to set aside an irregular proceeding, which would be the appropriate remedy in the High Court in terms of uniform rule of court 30(1).

The purpose of an exception is raise the issue of the defect in the pleading at an early stage so that if the defect is fatal to the party's case, the matter can be disposed of and time, effort and money will not be wasted by taking the matter to trial. The upholding of an exception will, however, not always put an end to the matter because where the defect can be cured, for instance by amendment, the court will usually allow the party against whom exception was taken to cure it. In this instance the purpose of the exception is to cure the defect which is prejudicing the excipient in the conduct of the case.

Rules 17(5)(a) and 19(15)(a) provide that a court may not uphold an exception unless it is satisfied that the party taking exception would be prejudiced in the conduct of the case if the defective pleading were allowed to stand. Jones and Buckle (Rule 17--16) cite cases which indicate that a party would be prejudiced if that party is unable to understand the case which the defective pleading attempts to make out, or would have difficulty in responding to the pleading as it stands. Where the upholding of the exception would put an end to the matter, the excepting party is obviously prejudiced if the matter proceeds to trial instead of being disposed of at an early stage.

Both rules require the excepting party to state clearly the ground upon which the exception is based – rules 17(5)(b) and 19(15)(b). There is no prescribed document by means of which exception is taken. The document in which the particulars of exception are set out is called a notice of exception and is drawn as a notice, but it has been held that the document is in fact a pleading. In the High Court it has accordingly been held that an exception can be taken to an exception, but this

probably does not apply in the Magistrate's Court where the rules are specific as to the pleadings to which exception may be taken. An exception may be set down by either party on 10 days' notice – rules 17(7) and 19(18). If particulars of an exception to a summons have been delivered before the hearing of an application for summary judgment, then the exception should be heard at the same time as the summary-judgment application – rule 17(7).

Failure to disclose a cause of action or defence – There are two circumstances in which exception may be taken that a pleading discloses no cause of action or defence:

1. When a pleading lacks an averment that is essential to the cause of action or defence. In other words, one of the essential allegations of fact is missing. Every pleading must contain a complete chain of facts on which the pleader relies. If any linking fact is omitted, the sequence is broken and the conclusion is valueless or false. An exception taken on the ground that an essential averment is lacking will not normally dispose of the matter, since the court will generally grant leave to the respondent to amend his pleading. Leave is usually granted irrespective of whether the plaintiff applied for it at the hearing of the exception: *Group Five Building Ltd v Government of the Republic of South Africa (Minister of Public Works and Land Affairs)* 1993 (2) SA 593 (A) at 602D--E. A party raising this type of exception in a Magistrate's Court need not request further particulars designed to elicit the missing averment before taking exception.

2. When a pleading is bad in law in that it does not make out a cause of action or defence which is enforceable according to South African law. For example, in *Preller v Jordaan* 1956 (1) SA 483 (A) the defendant took exception on the basis that undue influence was not a ground for setting aside a contract. Other examples would be an exception to a claim for damages based on an innocent misrepresentation inducing a contract and an exception to a claim for damages for emotional suffering following the death of a loved one. The

ground of these exceptions would be that our law does not recognize such a claim. The case reports contain many cases decided on this kind of exception because the points in issue are legal points, and these cases often make new law or develop the law. With this ground, the exception will finally dispose of the matter if it succeeds because the issue is one of law, not a technical deficiency in the pleading capable of rectification. For the purpose of such an exception the factual allegations contained in the pleading excepted to are deemed to be true, so that what the court must decide is whether the party could succeed on the basis set out in the pleading if all the allegations pleaded were proved to be true and correct.

All matters of pure law should be disposed of by way of exception before trial. If an exception will put an end to the matter should the exception be upheld, then it must be taken. The party who fails to take exception in such circumstances may be held liable for costs incurred from the time when the exception should have been taken. So, for example, in *Algoa Milling Co Ltd v Arkell & Douglas* 1918 AD 145 the court found that the defendants should have excepted to the plaintiff's declaration as disclosing no cause of action and that they were entitled only to such costs as would have been incurred had they so excepted. In *Berezniak v Van Nieuwenhuizen* 1948 (1) SA 1057 (T) it was held that a defendant who failed to take exception to a summons should not be deprived of the costs of trial if a successful exception would have resulted only in an amendment of the summons.

Exception that a pleading is vague and embarrassing – A pleading will be vague and embarrassing in the following circumstances:

1. It is worded in such a way that the opposite party is unable to understand clearly the case it is called upon to meet (for example when a statement in a pleading is meaningless or capable of more than one meaning; when it is not clear whether the plaintiff is suing in contract or delict; or when the defendant pleads a general denial which contains within itself the possibility of an admission).

2. There is lack of particularity (for example when a party alleges that a contract was constituted by conduct but fails or refuses to specify what the conduct was, or when the plaintiff pleads special damage but fails to give details of the damage). In the Magistrate's Court further particulars should be requested before taking exception on the ground of lack of particularity. Failure to do this may result in an adverse order of costs.

3. The pleading contains two sets of contradictory allegations and the opposite party can, by admitting one of them, destroy the cause of action or defence that the pleading seeks to make out: *Levitan v Newhaven Holiday Enterprises CC* 1991 (2) SA 297 (C); *Chauvier and Others v Pelican Pools (Pty) Ltd* 1992 (2) SA 39 (T); *Trope v SA Reserve Bank and Another and Two Other Cases* 1992 (3) SA 208 (T) at 211E, 213A, 215E.

A court will uphold an exception that a pleading is vague and embarrassing only if the excipient can show substantial embarrassment such that the party will be prejudiced in the conduct of the action if the pleading is allowed to stand. In *Trope and Others v South African Reserve Bank* 1993 (3) SA 264 (A) at 211B it was held that once the court has determined that the pleading is defective, it must undertake a quantitative analysis of the embarrassment which the pleading causes to the excipient and then make a ruling as to whether or not the embarrassment is so serious as to cause prejudice if the excipient has to plead to the pleading as it stands. The onus is on the excipient to show embarrassment and prejudice.

Rules 17(5)(c) and 19(15)(c) require that before taking an exception on the ground that a pleading is vague and embarrassing, the excipient must, by delivery of a notice, give the other party an opportunity of removing the cause of complaint. When an exception is allowed on the ground that a pleading is vague and embarrassing, the court will usually give the respondent an opportunity to file an amended pleading within a certain time. See *Trope* at 269H--I.

Exceptions in terms of rules 17(2)(c), (d) and (e) and 19(14)(c) – The more technical exceptions referred to in these sub-rules will also be upheld only if the excipient can show that the defect causes prejudice. If an exception based on failure to comply with the rules is upheld, it will generally be appropriate to allow the defect to be corrected. If exception is taken on the ground that a summons has not been properly served and the improper service is established, then the exception should be upheld where the claim prescribed after the improper service and is no longer enforceable – *SA Instrumentation (Pty) Ltd v Smithchem (Pty) Ltd* 1977 (3) SA 703 (D). This is a good example of the kind of prejudice which warrants an exception being upheld.

4.3.13 Applications to strike out

Rule 17(6)(a) provides that a defendant may apply to strike out where:

- any two or more claims in a summons, not being in the alternative, are mutually inconsistent or are based on inconsistent averments of fact;
- any argumentative, irrelevant, superfluous or contradictory matter is contained in the summons.

Rule 19(17)(a) makes similar provision with regard to the defendant's plea.

When a pleading contains allegations which should not be there at all, an application to strike out is appropriate. An exception, on the other hand, is often taken when there is something lacking in the pleading. It may be difficult, however, to distinguish between the situation in which a pleading is excipiable because it is vague and embarrassing and the situation in which an application to strike out is appropriate – for example when statements in pleadings are inconsistent, evasive, capable of more than one meaning or meaningless. A test which may be applied in deciding which procedure is correct is to ask whether the complaint concerns only one or certain paragraphs, or whether it affects the pleading as a whole: if the offending paragraphs are removed, will the pleading still disclose a claim or a defence? If so, then an application to strike out the offending paragraph(s) is probably appropriate.

The same principle applies to lack of particularity. If the objecting party is embarrassed because it is not possible to respond to an allegation owing to insufficient particularity, the allegation can be struck out if it is not a necessary part of the case. But if the lack of particularity is such that the objecting party is unable to plead at all, then exception is appropriate.

In *Vaatz v Law Society of Namibia* 1991 (3) SA 563 (Nm) at 566E the court defined irrelevant matter as comprising ‘allegations which do not apply to the matter in hand and do not contribute one way or the other to a decision of such matter'. Thus, to decide whether an allegation is irrelevant, one must ask: `What are the issues raised in the pleadings or the affidavits?' If an allegation does not relate to any of those issues, then it can be struck out.

If an allegation in a pleading consists of facta probantia rather than facta probanda, it may be struck out as irrelevant. Facts which are relevant to prove the facta probanda, but do not constitute facta probanda or particularity thereto, are not relevant for the purpose of pleading and the objecting party may be prejudiced by being required to admit or deny such facts in the pleadings.

An allegation which, according to the law of evidence, would not be admissible in court may not be pleaded and is therefore liable to be struck out, as are allegations relevant only to prove such inadmissible facts. Facts which are themselves not inadmissible but can be proved only by inadmissible evidence are also liable to be struck out.

An application to strike out may be set down by either party on 10 days’ notice – rules 17(7) and 19(18). If an application to strike out an allegation in a summons has been delivered before the hearing of an application for summary judgment, then the application should be heard at the same time as the summary-judgment application – rule 17(7).

4.3.14 Close of pleadings

In terms of rule 21(4) the pleadings are deemed to be closed 10 court days after a plea is filed if, within that time:

- no further particulars are requested;
- no exception is noted;
- no application is launched; or
- no reply is delivered.

It is important to know when pleadings close because the parties may then ask for discovery and the matter may be set down for trial. If further particulars to the plea are requested, the pleadings will close when a reply is filed. If no reply is filed, the pleadings will close 10 court days after the reply to the further particulars is delivered unless an exception has been noted or further and better particulars are sought. If an exception has been noted, the closure of pleadings will depend on the outcome of the exception.

The pleadings may not be regarded as closed if any application or exception to a pleading is not finally disposed of by means of a court order. A pending application keeps the pleadings open.

Part 5 The Pre-trial Period

5.1 General

Close of pleadings marks the beginning of the pre-trial stage of action proceedings during which the parties prepare for trial. The rules provide for a number of procedures which take place during this period. These procedures are designed to facilitate preparation for trial by the parties, particularly with regard to evidence.

Our present rules and practice conventions do not provide the judicial officer with much opportunity to expedite the movement of the matter towards trial, but there is a growing perception of the need for judicial officers to be more active in controlling the proceedings during this stage. This is evidenced by recent experimentation in the Western Cape with a pre-trial conference rule (uniform rule 37A) which gave judicial officers increased responsibility for ensuring that the matter would be trial-ready by the date of the hearing. That rule has now been allowed to lapse, reportedly because the High Court in the Western Cape did not have the resources to implement the rule properly. It is suggested that the pre-trial provisions in the Magistrates' Courts allow judicial officers to play a more active role to the extent that their resources allow this.

There are two reasons why it is necessary for judicial officers to become more active in case management during the pre-trial stage. The first is that the administration of justice is seriously prejudiced by the fact that trial rolls are full of matters which are not trial-ready and are accordingly postponed or settled on the day of the trial, resulting in the phenomenon of collapsing trial rolls which leave courts standing empty during court hours. The second is that parties are seriously prejudiced by the fact that legal practitioners often do not efficiently expedite the processing of the matter so that it is trial-ready by the date on which it is set down to be heard.

Judicial officers should constructively use any opportunity they have to promote good administration of justice through case and trial-roll management.

5.2 Set-down of the matter on the trial roll

A matter is usually set down by the plaintiff by giving notice of the trial for a day or days approved by the Clerk of the Court. The plaintiff fills in an application form requesting allocation of a trial date, and once a date has been allocated the plaintiff serves and files a notice of trial in terms of rule 22(1). The notice must be delivered at least 20 days before the date allocated for the trial by the clerk of the court – rule 22(3). If a plaintiff does not deliver a notice of trial within 15 days after the pleadings have closed, then the defendant may set the matter down in terms of rule 22(1). A defendant's notice of set-down must also be delivered at least 20 court days before the trial date. If notice is delivered less than 20 days before the trial, the matter must be removed from the roll. The party who sets the matter down does not need to consult with the other party as to the date for hearing.

If the plaintiff fails to set the matter down within 15 days of close of pleadings, the defendant may, instead of setting the matter down, apply to court, in terms of rule 27(5), for dismissal of the plaintiff's action. This application must be brought on notice. The defendant must show that pleadings have closed, that at least 15 court days have passed since the pleadings closed and that the plaintiff has not applied for the first available trial date or a trial date within 20 court days, whichever is soonest. The court, instead of dismissing the plaintiff's claim, has the discretion to make any other order that it considers to be just. The onus is on the plaintiff to provide an explanation as to why the matter was not set down timeously. The case law relevant to the exercise of the court's discretion is set out in J & B Rule 27--5. This rule applies even if the plaintiff proceeded to set the matter down for trial after the launch of the rule 27(5) application – *Theron v Van der Merwe* 1980 (3) SA 462 (C) at 467A.

Rule 27(5) applies only when the matter is set down for the first time. Once a matter has come before the court and has then been postponed, rule 31(1) applies. This rule entitles either party to set a matter down. The party wishing to set the matter down must obtain a date from the Clerk of the Court and deliver the notice at least 10 days before the trial date. If a matter is struck or removed from the roll, this is

tantamount to a postponement sine die – *Goldman v Stern* 1931 TPD 261.

It is possible for a matter to be postponed by the court to a specific date; for example, for continuation of the trial or for handing down of a judgment. In these circumstances the date need not be obtained from the Clerk of the Court, but the Clerk of the Court must be informed of the date.

The matter must be set down for hearing in the court out of which the summons was issued, unless the court orders otherwise – rule 29(1).

5.3 Discovery

Discovery is a procedure whereby the parties disclose to each other what documents they have in their possession or under their control that are relevant to the matter. It ensures that before trial both parties are made aware of all the documentary evidence that is available.

A party is obliged to make discovery only if called upon by the other party to do so. The discovery rules are designed for the benefit of the parties; there is no obligation upon a party to request or compel discovery. The failure to take advantage of the rules may well result in a disorderly presentation of the case in court and, in this case, the court may mark its disapproval of a party's failure to ask for discovery by an adverse order as to costs – *Pelidis v Ndhlamuti* 1969 (3) SA 563 (R).

Rule 23(1) provides that a notice calling upon a party to make discovery may be delivered after close of pleadings, but not later than 15 days before the date of trial (Form 13). A party has no right to require the other party to produce documentary evidence before close of pleadings, except in terms of rule 15(1), which allows a defendant to request production of any document upon which the action is founded.

The notice which calls for discovery requires the other party to deliver the books and documents in its possession or under its control which relate to the action and which

the party intends to use in the action or which tend to prove or disprove either party's case. The schedule must be verified by affidavit and must be delivered within 10 days of delivery of the notice. Documents in respect of which privilege is claimed must be listed separately in the schedule and the ground on which privilege is claimed in respect of each must be set out. Discovery is accordingly made by way of an affidavit which states that the schedule annexed to the affidavit lists all the documents in that party's possession or under its control which relate to the action and which the party intends to use in the action or which tend to prove or disprove either party's case. The schedule is divided into two parts.

- Part 1 lists and describes documents which are not privileged.
- Part 2 lists and describes documents in respect of which privilege is claimed and sets out in respect of each the ground on which privilege is claimed.

Rule 23(4) requires the discovering party, on receipt of notice, to allow the other party to inspect and make copies of all books and documents discovered. The discovering party is, however, not required to allow inspection and copying of those books and documents which are listed and described as being privileged. The grounds on which privilege may be claimed are governed by the law of evidence and are set out in J & B Rule 23--4A to 10. Thus, privileged books and documents must be listed and described, but need not be made available to the other party. Usually, it is only the attorney and the client who are entitled to inspect. In the High Courts, experts have been allowed to perform the inspection if good cause is shown - *Kope v Bourke's Luck Syndicate Ltd (in liquidation)* 1925 WLD 40.

The most common privileged documents are communications between attorney and client, witness statements, advices to client and any document brought into existence for the purposes of the trial. High Court rule 35(2) provides that discovery shall not be made of statements of witnesses taken for the purposes of the proceedings, communications between attorney and client or attorney and advocate, pleadings, affidavits and notices in the action. There is no similar provision in the civil

Magistrates' Courts; accordingly, the practice is to list such documents generally in the second schedule to the affidavit as privileged documents.

The discovery affidavit must be made by the party himself or, if the party is a juristic person, by a person who has authority to make it and has personal knowledge of the matter. Only under exceptional circumstances would an attorney be allowed to make a discovery affidavit on behalf of the client and, where this is done, full reasons for the departure from the usual procedure should be detailed in the affidavit – *Rellams (Pty) Ltd v James Brown & Hamer Ltd* 1983 (1) SA 556 (N). Although many of the documents may be in the attorney's file, they are still under the control of the client since the attorney is the client's agent and it is the client who must make the affidavit. A discovery affidavit is an important document and an attorney should make sure that the client understands the significance of swearing under oath that the schedule lists all the documents which are discoverable. Note too, that it is irregular for an attorney to attest to his or her own client's affidavit in litigation proceedings.

Where a document is only partly privileged, the privileged part may be concealed by pasting over it or otherwise covering it – *Caravan Cinemas (Pty) Ltd v London Film Productions* 1951 (3) SA 671 (W) at 678. Where privileged communications come into the hands of third parties, for example through interception or copying, the third parties cannot be prevented from disclosing their contents – *Calcraft v Guest* [1898] 1 QB 759 and *Hurley and Seymour v Muller & Co* (1924) 45 NLR 121.

The sanction provided by the rule for failure to make discovery when requested to do so is that a book or document not disclosed may not be used for any purpose on the trial of the action by the party in whose possession or under whose control it is without the leave of the court on such terms as to adjournment and costs as may be just, but the other party may call for and use such book or document in the cross-examination of a witness. This sanction alone is not sufficient to protect the interests

of the other party, because the party who should have made the discovery may want to hide books or documents which do not favour his case and which tend to advance the case of the requesting party and the requesting party may not know of the existence of such books or documents, or may not have had sight of them, which renders the right to use them in cross-examination useless.

Where a party fails to make discovery in response to a request to do so, or where the requesting party believes that inadequate discovery has been made or that the party is hiding books or documents, an application to compel discovery, or to compel proper discovery, may be brought in terms of rule 60(2) – *Venter v Du Plessis* 1980 (3) SA 151 (T). A judicial officer who is faced with an application to compel further and proper discovery should regard the oath of the person who made the initial discovery as being prima facie conclusive and must accordingly require the applicant to convince him or her that there is good reason to believe that there are further documents which should be discovered – see *Federal Wine & Brandy Co Ltd v Kantor* 1958 (4) SA 735 (E) and the other cases cited by J & B Rule 23--4 fn5. In *Lenz Township Co (Pty) Ltd v Munnick* 1959 (4) SA 567 (T) it was held that, where the respondent in an application to compel argues that there is no obligation to discover a particular book or document because it is irrelevant, or that there is no obligation to produce it because it is privileged, the court has an inherent power to examine such book or document. Although Magistrates do not have inherent power, they do have the power to do what is impliedly necessary to perform their functions – *Van Der Merwe v De Villiers* 1953 (4) SA 670 (T).

Rule 23(4) allows either party to give the other notice to produce at the trial books or documents which have been discovered and also any other books or documents specified in detail. The rule provides that such notice to produce has the effect of a subpoena with regard to all books or documents in the possession or under the control of the party to whom the notice is given. A party who knows that the other party has a specific book or document which has not been discovered may use this rule to get the book or document produced at the trial instead of compelling

discovery, but if it is a document which should have been discovered, then that party is entitled both to compel discovery and to give notice to produce.

Discovery may not be refused on the basis that a copy of the document is already in the possession of the party requesting it, since the rule requires all discoverable documents in a party's possession or control to be discovered. See *Quintessence Co-ordinators (Pty) Ltd v Government of the Republic of Transkei* 1991 (4) SA 214 (Tk) at 216F--J.

Discovery can be obtained only against parties to the action. The only way of obtaining a document in the hands of a third party is to subpoena that party to appear as a witness and to bring the document to court. There is no way of forcing a third party to disclose a document in its possession before the trial, nor can the rule 23(4) notice to produce be used in respect of persons who are not parties to the action.

5.4 Pre-trial procedures relating to evidence

5.4.1 Expert evidence

Rule 24 requires a party who is going to call an expert witness to notify the other party of its intention to do so. This notice must be in writing and must be delivered at least 15 court days before the trial. In addition, a summary of the evidence that the expert will give, as well as his or her reasons for the conclusions reached, must be delivered to the other party at least ten days before the trial.

The purpose of the notice and the summary is to ensure that the opposition has adequate time to prepare its response to the expert testimony. Evidence of the expert will be admissible only if it is dealt with in the summary. Should the evidence fall outside the ambit of the summary, the opposition will be entitled to object to the

leading of the evidence. The court may, if requested to do so, grant leave for such evidence to be led, after considering any prejudice that may be suffered.

Rule 24(9) provides that no person will be entitled, except with the permission of the court or the consent of all parties, to call an expert witness unless both an expert notice and an expert summary have been timeously delivered. This is also applicable to judgments granted in terms of rule 32 where the defendant fails to appear for trial and default judgment is granted. If evidence is required before default judgment can be granted at trial in terms of rule 32, such evidence is normally given orally.

If either the notice or the summary is delivered late, it is likely that an objection will be raised when an attempt is made to lead the expert evidence. The prejudice complained of will usually relate to inadequate time for preparation and consultation.

The court in granting leave to lead expert evidence may consider allowing the matter to stand down for a period of time depending on the grounds for the objection. This will enable the opposing party to consult with the witness and remove any prejudice that might otherwise have been suffered.

5.4.2 Medical examinations

Rule 24(1) provides that any party to proceedings in which damages or compensation in respect of alleged bodily injury is claimed may, by notice, require the party claiming the damages or compensation to undergo a medical examination.

If the plaintiff objects to the nature of the examination, to the person who will examine him or her, or to the amount of money he or she has been tendered, the other party must be notified within 10 court days. The notice must be in writing and must set out the nature and grounds of the objection and suggest an alternative place, date or time for the examination, if this is the complaint. If the objection relates to the amount of money tendered, the notice must give details of additional money

required. If the other party believes that the objection has no merit, an application may be brought, on notice, to compel attendance at the examination. The party who was examined may be re-examined by the medical practitioner at a later stage but no further examination is permitted after the second examination.

The medical examiner is obliged to give a full report of his or her findings and opinions in writing, and a copy of this must be given to the party examined.

A party who is claiming damages may also be requested to furnish copies of medical reports, hospital records, X-rays and the like – rule 24(4).

5.4.3 Inspection and examination of things

When the state or condition of anything, movable or immovable, is relevant to an issue upon which the court must decide, any party may, in terms of rule 24(6), at least 15 court days before the trial, give notice to the party who has the thing to make it available for inspection or examination.

The party receiving this notice is entitled to request details about the planned examination. If he or she believes that the object will be materially damaged if it is examined, then the object need not be submitted for inspection. If a dispute arises as to whether the object should be submitted for examination, then either party may bring an application to court and the court may make such order as it may deem just.

A full report of the findings and the opinions formed by the examiner must be disclosed to the other party upon request.

5.4.4 Plans, diagrams, models and photographs

The use of plans, diagrams, models and photographs is regulated by rule 24(10). A party to an action is not entitled to tender in evidence any plan, diagram, model or

photograph, unless every other party to the action is given notice of the intention to do so not less than ten days before the hearing of the action. There are two exceptions to this restriction: where the party concerned obtains the leave of the court or the consent of all the other parties to the action.

The notice must state that every party receiving it is entitled to inspect the plan, diagram, model or photograph and must require these parties to state, within 10 days of receiving the notice, whether they have any objection to the plan, diagram, model or photograph being admitted in evidence without proof. If the party receiving the notice fails, within the period the notice specifies, to object to the admission in evidence of the plan, diagram, model or photograph, it will be received in evidence on its mere production and without further proof. A party who unnecessarily objects may be ordered to pay the additional costs incurred in proving such evidence.

The words 'plan, diagram, model or photograph' in rule 24 apply only to representations of physical features of a relevant place or of objects that can be objectively determined. They do not include marks on such a plan, diagram, model or photograph that amount to an expression of opinion; for example, an alleged point of impact in a motor-vehicle collision.

5.4.5 Subpoenas

The only reliable way of securing the attendance of a witness at a court is by way of a subpoena (Form 24) issued by the clerk of the court. Rule 26 makes no mention of a subpoena duces tecum, but the prescribed form is in the nature of a subpoena duces tecum, since it makes provision for the witness who is being subpoenaed to be required to bring specified books or documents to court. There is no provision for compelling the witness to allow either party to inspect the documents before testifying. In the High Court rule 38(1)(b) was introduced to settle the issue of whether a witness could be so compelled because there was conflicting case law on the question (Herbstein and Van Winsen *The Civil Practice of the Supreme Court of*

South Africa (Now the High Courts and the Supreme Court of Appeal 4ed (1997) 629 fn 98).

A person must have some degree of custody or control over a document before he or she can be compelled to produce the document on a subpoena duces tecum. The mere fact that the person has access to the document is not sufficient.

Rule 26(2) provides that the court may set aside the service of any subpoena if it appears that the witness served was not given reasonable time to enable him or her to appear in pursuance of the subpoena.

Where a witness fails to appear the court may impose a fine or imprisonment in terms of s 51(2)(a) or issue a warrant of arrest in terms of s 51(2)(b). The court may impose a fine or issue a warrant only if it is satisfied that the witness is in fact a necessary witness who was duly subpoenaed, that sufficient conduct money was furnished to the witness, and that sufficient notice was given to the witness.

5.4.6 Interrogatories and commissions de bene esse

Whenever a witness resides or is in a district other than that in which the case is being heard, the court may, if it appears to be consistent with the ends of justice, upon the application of either party approve of interrogatories that either party wants to have put to the witness, and shall transmit the interrogatories to the court of the district where the witness resides or is for that court to record the evidence of the witness. The record is then returned to the court where the matter is pending, and is received by it as part of the evidence – MCA s 52.

When it is not possible to secure personal attendance of a witness at a trial, a party may apply to court to have the witness's evidence taken by a commissioner, either inside or outside the Republic. The commissioner then transmits the record to the court to be received in evidence – MCA s 53.

The granting of an application for evidence to be taken on commission or by interrogatory is within the discretion of the court. Generally speaking, the court will grant the application if the witness cannot be brought to court for some valid reason, for example old age, infirmity, ill-health or because the witness is overseas.

5.4.7 Pre-trial conferences

Section 54 of the MCA, read with rule 25, makes provision for the holding of a pre-trial conference. The holding of a pre-trial conference in the Magistrate's Court is not compulsory, as it is in the High Court, with the result that this procedure is often overlooked. The Magistrate's Court provisions, however, give judicial officers an opportunity to play an active role in the management of the case, which the High Court rule does not give to judges. If Magistrates use this rule proactively, they will be able to ensure that the cases which come to trial are trial-ready and eradicate the problem of collapsing court rolls. This will promote good administration of justice and protect the interests of parties.

Section 54 gives Magistrates extensive powers by providing that the court may at any stage in any legal proceedings in its discretion suo motu or upon the request in writing of either party direct the parties or their representatives to appear before it in chambers for a conference to consider –

(a) the simplification of the issues;
(b) the necessity or desirability of amendments to the pleadings;
(c) the possibility of obtaining admissions of fact and of documents with a view to avoiding unnecessary proof;
(d) the limitation of the number of expert witnesses;
(e) such other matters as may aid in the disposal of the action in the most expeditious and least costly manner.

If one compares this to High Court rule 37, one finds that the High Court rule does not give judges the power to call pre-trial conferences at all. It is a procedure which is entirely in the hands of the legal practitioners representing the parties, which is

made compulsory by the requirements that a matter may not be set down for trial before a pre-trial conference has been called for and that at the commencement of the trial counsel for the parties must report to the court whether the conference has been duly held and, if so, hand in a minute. The only power that a judge has to call the parties before him or her is in terms of uniform rule 37(4), which provides that before the trial proceeds the judge may call into his chambers counsel for the parties with a view to securing agreement on any matters likely to curtail the duration of the trial. In 1993 a new rule was enacted and introduced into the High Court rules as rule 37A. This rule was brought into operation as applying only to the Cape Provincial Division and was utilized on an experimental basis for a period of 4 years. It gave judges a much more active role, requiring the parties to attend a pre-trial conference before a judge at which they were required to address the judge on a long list of matters relating to preparation for trial, and giving the judge the power to make directions or orders as to those matters. The parties were then required to hold a second pre-trial conference not less than 35 days before the date fixed for the hearing and file a minute of that conference and a report on compliance with any directions or orders made by the court with the Registrar not less than 30 days before the trial. A judge could then summon the parties to chambers to consider the minute and secure agreement on any matter likely to curtail the trial. Unfortunately, the Judge President of the CPD requested the Rules Board for Courts of Law not to extend the application of the rule because his court had not been provided with the necessary resources to implement it.

Perhaps High Court rule 37A was too complicated and too prescriptive. Section 54 of the MCA, on the other hand, gives Magistrates such a wide discretion that they can utilize it to the extent that they are able to do so and to the extent that they find it effective in promoting good administration of justice.

The purpose of a pre-trial conference is to shorten the trial by reducing and simplifying the issues that need to be decided by the trial court. A successful pre-trial conference should considerably reduce the time spent in court. A pre-trial

conference can also be used by a judicial officer to ensure that a matter which has been set down for trial is trial-ready so that last-minute postponements and removal of matters from the roll can be avoided. Concerns relating to evidence, procedure and the way in which a matter is progressing towards trial can also be addressed.

A Magistrate can call a pre-trial conference on his or her own initiative or at the request of a party at any stage in any legal proceedings – s 54(1). The wording of this section gives the Magistrate a very wide discretion and there is no indication that only one pre-trial conference can be called in any particular matter. It may be a good idea to call a pre-trial conference when a trial date is applied for so that an assessment can be made as to how many days the matter should be set down for. A further pre-trial conference a few weeks before the date of hearing would enable the court to ensure that the matter will be ready for trial and, if not, to have it removed from the roll.

Section 54(2) provides that '[t]he court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of the parties or their representatives.' Section 54(3) provides that such order shall be binding on the parties unless altered at the trial to prevent manifest injustice. Both parties must be furnished with a copy of the order and the original is kept in the court file. The wording of the order is set out in Form 20 of Annexure 1 to the rules.

Section 54(4) gives considerable power to Magistrates to deal with parties who refuse or neglect to appear at a conference which the Magistrate has called. In addition to the power to punish for contempt of court, the Magistrate may make such order as he or she considers equitable in the circumstances, and upon conclusion of the proceedings may order a party which absented itself to pay costs incurred as a result of the absence. The court has a discretion to order costs as it deems fit. It is entitled to order costs on higher scale or on the scale of attorney-and-client. It may

decide to reserve the question of costs pending the outcome of the trial action. This will enable the trial Magistrate to adjudge properly the correct costs order and whether or not the one party should pay part of the trial costs. At the conclusion of the trial it may be possible for the trial Magistrate to make a finding as to how much extra time was spent in court as a result of the failure to attend the pre-trial conference, and order that the defaulting party pay the costs in respect of such additional time.

It is possible that a party attends the pre-trial hearing but refuses to co-operate by failing to make concessions or admissions that would shorten the trial process without prejudicing his own case. A court may be asked to consider a punitive costs order for the extra time occasioned by this behaviour.

A party who wants to request a pre-trial conference must address to the Clerk of the Court a written request which indicates generally the matters which it is desired should be considered at the conference. The Clerk must forthwith place the request before a judicial officer. The Magistrate has a discretion and is not obliged to call a conference at the request of a party. If the Magistrate decides to call the conference, the Clerk will be directed to issue a process in accordance with Form 19 directing the parties to attend the conference. This document must be delivered by hand or by registered post at least 10 days prior to the date fixed for the conference. Placing the notice in the pigeonhole of the party, if an attorney, will comply with the directions for service.

The manner in which the pre-trial conference should proceed is not prescribed by the Act or rules. The matters mentioned for consideration in s 54(1) may be elaborated on to include the following –

The simplification of the issues

- What aspects are in dispute?
- Have the parties tried to resolve the issues informally?
- Can these aspects be resolved without the hearing of evidence?

- Is there documentary material that would assist?
- Are any points *in limine* to be raised at the trial?
- Are the pleadings closed?
- What is common cause between the parties?
- Have photographs been taken?
- Has a plan been drawn up?
- Has an inspection *in loco* been held?
- Upon what cases or legal authority does each party rely?

The necessity or desirability of amendments to the pleadings

- Does the summons disclose a cause of action?
- Does the plea disclose a defence that is good in law?
- Do the pleadings correctly reflect the case of the parties?

The possibility of obtaining admissions of facts

- Is either party prepared to make any admissions other than those already made in the pleadings?
- What prevents a party from making an admission and can the other side assist in this regard?

The possibility of admissions as to documents

- Has discovery taken place?
- Have the documents that will be used at trial been identified?
- Have both sides had sight of all documents that will be used in the trial?
- Are there any further documents that could usefully be placed before the court?
- Is it necessary for the parties to prepare a bundle of documents which are likely to be referred to at the trial?
- If a bundle is to be prepared, which party is responsible for the copying and preparation of documents?

The limitation and number of expert witnesses

- If the parties have not already both already instructed experts, is there an expert who would be acceptable to both sides?
- If the parties have instructed experts, have the experts met to attempt to reach agreement with regard to the matters in issue, and if so, is there a minute of such meeting/s?

Other matters that may aid in the disposal of the action in the most expeditious and least costly manner

- How many witnesses does each side intend to call?
- Who are the witnesses?
- Are all the witnesses available?
- Are the parties prepared to exchange witness statements?
- How long does each party anticipate as to the duration of the trial?
- Are the parties willing to consider alternative means of dispute resolution, for example mediation or arbitration?
- If so, would they like a Magistrate to act as a mediator or arbitrator?
- Has either party failed to comply with the rules of court?
- Should any issues be decided separately?
- Is there any dispute as to onus to begin or onus of proof?
- Which party will undertake responsibility for paginating the court file?

Part 6 The Trial

6.1 General

This part deals with the actual trial, at which evidence and argument are presented to the court, after which the court is required to give judgment. Certain rulings which the court may be called upon to make during the trial are examined. This is followed by an overview of the procedure followed in a trial, and reference to some aspects of the law of evidence which are important.

Rule 29 applies to civil trials. Rule 29(3) provides that the court may, before proceeding to hear evidence, require the parties to state shortly the issues of fact or questions of law which are in dispute and may record the issues so stated. It is important to determine exactly which issues are in dispute. This is generally first done in chambers and then confirmed in court. Following this procedure avoids misunderstandings arising between the parties and avoids time being wasted on issues that are not in dispute.

The court should ask whether any party wishes to make a formal admission as to any aspect, which is in dispute. A defendant may, for example, deny in the plea that the plaintiff was the owner of the damaged motor vehicle but after discussions with the other side be satisfied that the plaintiff is indeed the owner. If the defendant does not formally admit that the plaintiff is the owner, the plaintiff will have to prove ownership. If something has been admitted, then it is taken to be proved and it will not be necessary to adduce any evidence regarding that aspect. Formal admissions are made in the pleadings or orally before the court. They are made in order to reduce the number of issues before the court.

6.2 Rulings

There are various rulings which a court may make during a trial, or directions which a court may be required to give.

6.2.1 Separation of issues

Rule 29(4) provides that if it appears to the court mero motu that there is a question of law or fact which may conveniently be decided either before any evidence is led or separately from any other question, the court may make an order directing the disposal of such question in such manner as it may deem fit, and may order that all further proceedings be stayed until such question has been disposed of, and the court shall at the request of any party make such order unless it appears that the questions cannot conveniently be decided separately. The word *shall* indicates that, if a party requests separation, the court must order separation unless it is inconvenient to do so.

This subrule can be used in cases where there is more than one issue in a cause of action. For example, in a claim for damages arising from a motor-vehicle collision, the issues of the amount of damages (quantum) and delictual liability of the driver (negligence) may be separated. The convenience of all the parties must be taken into consideration. This means that the court must determine the nature and extent of the advantages that would flow from separation, such as the saving of time and costs. See J & B Rule 29--5 to 29--7.

6.2.2 Stated case

Rule 29(5) provides that if the question in dispute is a question of law and the parties are agreed upon the facts, the facts may be admitted in court, either viva voce or by written statement, by the parties and be recorded by the court and judgment may be given thereon without further evidence. See J & B Rule 29--7 to 29--8.

6.2.3 Exception on trial

Rule 29(6) provides that when questions of law and issues of fact arise in the same case and the court is of the opinion that the case may be disposed of upon the questions of law only, the court may require the parties to argue upon those questions only and may give its decision thereupon before taking evidence as to the issues of fact, and may give final judgment without dealing with the issues of fact.

6.2.4 Postponements

Rule 31(1) provides that the trial of an action or the hearing of an application or matter may be adjourned or postponed by consent of the parties or by the court, either on application or request or of its own motion. Rule 31(3) provides that any adjournment or postponement shall be on such terms as to costs and otherwise as the parties may agree or as the court may order.

The court has a discretion as to whether an application for a postponement should be granted or refused, even where wasted costs are tendered. The legal principles applicable to an application for the grant of a postponement are set out in J & B Rule 31--1 to 5. It is stated in J & B at Rule 31--5 to 6 that there are three types of costs orders relevant to applications for postponement –

- ***'costs of postponement'*** which means the costs for the application for postponement, and does not include costs incurred in another case in consequence of a postponement;
- ***'costs of the day'*** which are the extra costs caused by the postponement of the proceedings, and which are ordered to be paid by the party responsible for the postponement and consequent waste of the day; and
- ***'wasted costs'*** which are those extra costs incurred in consequence of the postponement that have become useless and unnecessary by reason of the postponement.

It should be noted that ‘costs of the day’ are in principle the same as ‘wasted costs’. The principles governing the decision as to what costs order is appropriate are described by J & B at Rule 31--6 to 7.

6.2.5 Points in limine

A party may raise a point in limine regarding the facts or law during the proceedings and the Magistrate will then need to adjudicate the point raised – see *Presto Parcels v Lalla* 1990 (3) SA 287 (E). Each party should be given an opportunity to address the court on the point raised.

A Magistrate may, for instance, raise lack of jurisdiction as a point in limine if it appears that there is a problem in this regard (see Part 2). Both parties should be invited to address the court on the issue raised.

There are also other points in limine that a Magistrate can raise, for example that the summons has lapsed in terms of rule 10.

6.2.6 Onus to adduce evidence

It is important to distinguish between the overall onus which a party may have to prove or disprove a case (bewyslas) and burden of proof or onus to adduce evidence (weerleggingslas). D T Zeffertt et al *The South African Law of Evidence* (2003) 155 states that the duty to adduce evidence is a procedural device which ‘ensures that the parties give their evidence in the most logical order and allows the trial to be shortened by dispensing with the evidence of one party if his opponent has adduced no evidence which could support a finding in his or her favour'. The onus (bewyslas) is determined by the pleadings and never shifts. The evidentiary burden arises as soon as the evidence or a presumption of law or an inference creates the risk that a litigant might fail. The evidentiary burden may shift from one litigant to another during the course of the trial.

Rule 29(7) and (8) provide that if on the pleadings the burden of proof is on the plaintiff, he shall adduce his evidence first, whereas if it is on the defendant, the defendant shall first adduce his evidence, and if necessary the plaintiff shall thereafter adduce evidence. Rule 29(9) provides that where the burden of proving one or more issues is on the plaintiff and that of proving others is on the defendant, the plaintiff shall first call evidence to the extent that he bears the burden of proof, and may then close his case, and the defendant shall then call his evidence on all the issues. If the plaintiff has not called any evidence on any issues proof whereof is on the defendant, he shall have the right to do so after the defendant has closed his case. If the plaintiff has called any such evidence, he shall have no such right.

Rule 29(10) provides that in a case of a dispute as to the party upon whom the burden of proof rests, the court shall direct which party shall first adduce evidence.

6.2.7 Competence and compellability of witnesses

The general rule is that every person is presumed to be competent and compellable to give evidence. Section 8 of the Civil Proceedings Evidence Act 25 of 1965 ('CPEA') provides:

> 'Save in so far as this Act or any other law otherwise provides, every person shall be competent and compellable to give evidence in any civil proceedings.'

Section 42 of the CPEA provides:

> 'The law of evidence including the law relating to the competency, compellability, examination and cross-examination of witnesses which was in force in respect of civil proceedings on the thirtieth day of May, 1961, shall apply in any case not provided for by this Act or any other law'.

Parties cannot consent to the admission of an incompetent witness's evidence. In order to be compellable, a witness must be competent to give evidence. The method of determining competence or compellability is normally a trial within a trial.

Nothing prevents a litigant from calling an opponent and/or his witnesses to testify.

Witnesses who are incompetent

In terms of s 9 of the CPEA, a person is incompetent to testify if he appears or is proved to be suffering from idiocy ("or lunacy" has been deleted) or insanity, or labouring under any imbecility of mind arising from intoxication or otherwise, as a result of which he or she is deprived of the proper use of reason.

Witnesses who are not compellable

In terms of s 10 of the CPEA, husbands and wives are not compellable when the evidence they are to give involves the disclosure of any communication made between them during the course of their marriage. 'Marriage' is widely defined and includes putative marriages, marriages that have been annulled, and traditional, customary and religious marriages. Furthermore, no person can be compelled to give evidence if his wife or her husband could not be compelled to give such evidence.

Children

There is no statutory provision governing a child's capacity to give evidence, nor is there a common-law age limit. Children can testify if they:

a. appreciate the duty to speak the truth;
b. have sufficient intelligence to understand what they are saying and what other roleplayers in court, for example legal representatives and the Magistrate, are saying; and
c. can communicate effectively.

Judicial officers

Judges and Magistrates are not competent to give evidence in cases over which they preside or have presided, as their role as impartial judicial officers could be compromised. If a judicial officer has personal knowledge of a fact, he or she may not take judicial notice of it.

6.2.8 Non-appearance of a party, withdrawal and dismissal

If a plaintiff or applicant does not appear at a time appointed for the trial of an action or the hearing of an application, the action or application may be dismissed with costs. Alternatively, the defendant may choose to lead evidence so that a judgment in his favour can be granted. The advantage is that a judgment makes the matter res judicata whereas a dismissal or order of absolution from the instance does not.

If a defendant or respondent does not appear at the trial, a judgment (not exceeding the relief claimed for) may be given against him with costs. The rules relevant to the production of evidence for the purpose of obtaining a default judgment apply.

The withdrawal or dismissal of an action or a decree of absolution from the instance shall not be a defence to a subsequent action. However, the successful party may request that the new action / application be stayed until the taxed costs of the previous action / application are paid.

6.2.9 Inspections in loco

It is for the trial Magistrate to decide whether or not an inspection *in loco* should be held – *R v Roberson* 1958 (1) SA 676 (A). If the court decides that such an inspection is necessary, it also decides at what stage it should be held – *East London Municipality v Van Zyl* 1959 (2) SA 514 (E) at 517. The Magistrate who conducts an inspection *in loco* should be careful not to put himself or herself in the position of a witness, nor to express any opinion on his or her observation.

The court must ensure that all parties are present at the inspection – *Norwitz v The Magistrate of Fauresmith and Bane* 1928 OPD 109. The practice of a magistrate holding the inspection alone is irregular.

The court records its observations and informs the parties of these at the inspection. This enables a party who disagrees with any observation to point out other factors to the court that may influence the observations made by the court at the scene and in the presence of all parties. If the court does not subsequently amend its observations, the disputed points should also be noted on the record of the court's observations – *Kruger v Ludick* 1947 (3) SA 23 (A).

On returning to court, the presiding officer should read his or her statement of observations into the record and invite both parties to comment on these observations on record. The written statement should then be entered into the record as an exhibit. The parties should also be given the opportunity of leading evidence to correct the court's observations if they wish to do so. For this purpose a witness may need to be recalled – *Kruger v Ludick* 1947 (3) SA 23 (A).

6.3 The trial process

6.3.1 Opening address

Before commencing with the trial, it is practice for the party who is *dominus litis* to inform the court of the facts that are common cause between the parties, and that will be admitted. Counsel further advises the court of the facts in dispute and issues of law in dispute. Counsel for the other side should then be given an opportunity to address the court on the factual subject matter of the case. This gives the judicial officer the opportunity to determine the ambit of the trial (see above).

Magistrates seldom have the time or opportunity to familiarize themselves thoroughly with the facts or pleadings in the case before the trial. Therefore, this address should

be seen as a valuable opportunity for the Magistrate to become acquainted with the basic facts, which makes it easier to follow the evidence.

It may also be appropriate for counsel to advise the court, either at the beginning of the trial or later, depending on the way the evidence develops, who the witnesses will be.

6.3.2 Order of evidence

It is usual for counsel acting for the party who has the onus to begin to commence by adducing the evidence of that party. There is, however, no reason why the case could not commence with the testimony of another witness if that testimony is more appropriate. The important point about evidence is that it should be presented in a systematic and chronological manner, to make it easy for the court to assess the full picture, and reduce the chance of a party forgetting to present relevant evidence.

It may also be that neither litigant decides to testify at all. This would be the case where each admits the other's evidence and the facts in dispute relate to the evidence of their respective witnesses only. For example, both plaintiff and defendant are employers and the subject matter of the case is a motor collision. At the time of the collision, the litigants' vehicles were both being driven by their employees acting within the course and scope of their respective duties. The damage to the vehicles and the quantum are agreed on by both parties, but the question of negligence is not. In such a case it seems that neither the plaintiff nor the defendant would need to testify.

The plaintiff and the defendant may be present in court during the leading of evidence. If, for example, the defendant leads a witness before the defendant has given evidence, he cannot be compelled to leave the court while the witness is testifying. However, the plaintiff's witnesses should leave the court when the plaintiff is testifying and the defendant's witnesses should leave the court when the defendant is testifying. Rule 29(2) provides that a witness who is not a party to the

action may be ordered by the court to leave the court until his evidence is required or after his evidence has been given, or to remain in court after his evidence has been given and until the trial is terminated or adjourned.

6.3.3 Evidence-in-chief

In the examination-in-chief no leading questions may be put to the witness. As a rule of thumb, one can say that a leading question is one to which the witness need only answer ‘yes’ or ‘no’, or to which an answer is suggested. No leading questions can be put to a witness unless the questions relate to matters that are common cause or to which the parties have agreed.

6.3.4 Cross-examination

Once each witness has given evidence-in-chief, counsel for the other party may cross-examination the witness. Failure to cross-examine a witness is not an irregularity, but failure to afford a party an opportunity to cross-examine a witness is a gross irregularity.

The objectives in cross-examination may be:

- to elicit facts favourable to the cross-examining party’s case;
- to elicit facts that may be used to cross-examine other witnesses;
- to show that evidence adverse to the cross-examining party’s case is unacceptable;
- to place doubt upon the credibility of a witness;
- to put the cross-examining party’s case to a witness in order that the witness may be aware of that version and can comment on it.

To achieve these objectives, counsel may use the following techniques:

- a comparison of the evidence with established or clearly demonstrable facts;
- testing of the evidence for incongruities of fact or conduct;

- testing of the evidence against common sense;
- testing of the evidence against the state of mind of the witness at the time; and
- testing of the witness on collateral matters.

It is the duty of the presiding officer to ensure that 'fair play' prevails in the courtroom, and therefore the Magistrate should ensure that counsel does not bully or aggressively cross-examine a witness.

The following principles apply with regard to placing limits on cross-examination:

- Vexatious, abusive, oppressive or discourteous questions may be disallowed. The court must ensure that the dignity of the court is maintained and must prevent unfair questioning.

- Misleading or vague statements should not be put to the witness.

- Inadmissible evidence, such as privileged statements, may not be put to a witness.

- In civil cases where inadmissible evidence is elicited and no objection is made, the party failing to object may be held to have consented to the admission.

- A witness may be cross-examined as to his or her memory, perception and accuracy in relating his story.

- Cross-examination based on previous inconsistent statements is permitted. If the statement is denied, it may be proved but only if it is relevant. If it is a collateral matter, it may not be proved.

- An answer to a question that solely concerns the credibility of a witness must be accepted as final, subject to the following exceptions:
  - denial of previous convictions - *Clifford v Clifford* [1961] 3 All ER 231;
  - acts that tend to show that the witness is biased in favour of the party who called him or her, or that he or she is prejudiced against the case of the cross-examiner – *Thomas v David* (1836);
  - contradicting evidence that enables the court to make a proper assessment of the evidence.

6.3.5 Re-examination

When the cross-examination of a witness is complete, counsel who led the evidence may re-examine the witness on facts that emerged in cross-examination and that were either not dealt with or not fully dealt with in evidence-in-chief, or are not clear. The purpose of re-examination is not to give counsel who was remiss in presenting complete evidence-in-chief a 'second bite at the cherry'. It should be restricted to what is necessary in consequence of the cross-examination.

In summary, the purpose of re-examination is to:

- clear up any misunderstandings;
- correct wrong impressions or misperceptions;
- explain answers given in cross-examination that might create a false impression;
- put the court fully in the picture; and
- correct patent mistakes made under cross-examination.

Leading questions may not be asked during re-examination.

6.3.6 Questions by the court

Rule 29(13) states that any witness may be examined by the court as well as by the parties. The case of *Hamman v Moolman* 1968 (4) SA 340 (A) makes it clear that the court should be mindful of its position of relative detachment in civil proceedings. A court's examination of witnesses should be confined to the clarification of issues that have been overlooked by counsel or that are obscure. The court should allow both parties an opportunity to ask questions arising from the response of the witness to the court's question.

6.3.7 Taking judicial notice

Judicial notice can be taken only of facts that are so well known that they amount to general knowledge or can be easily ascertained (for example that Parliament sits in Cape Town). See Zeffertt et al *The South African Law of Evidence* 715.

6.3.8 Failure to call a witness

A litigant in a civil trial can obtain relief on such matters as have been proved. Therefore, the party presenting evidence should do so in a manner that will entitle that party to a favourable judgment. If the court is of opinion that an additional witness should have been called to satisfy an element requiring proof, then in the absence of such testimony, the party who should have called that witness will not have satisfied the court with regard to his case. A court may draw a negative inference if a party was in a position to call a witness but failed to do so.

The court cannot, without the consent of the parties, call for testimony from a person who was not called as a witness by any party – *Pauley v Marine and Trade Insurance Co Ltd (2)* 1964 (3) SA 657 (W).

6.3.9 Leave to adduce further evidence

With the leave of the court, a party has the right to adduce further evidence – rule 29(11). A party may seek leave to adduce further evidence at any stage before judgment. However, if it appears to the court that the evidence was intentionally withheld out of its proper order, the court may refuse such leave.

Jones and Buckle Rule 29--10 to 11 set out five criteria that should inform the court's decision on whether or not further evidence should be adduced. These criteria are:

- the reason why the evidence was not led timeously;
- the degree of materiality of the evidence;
- the balance of prejudice;
- the general need for finality in judicial proceedings; and
- the stage that the particular litigation has reached

6.3.10 Recalling a witness

Rule 29(12) states that the court may at any time before judgment, on the application of a party or of its own motion, recall any witness for further examination.

This subrule applies only to witnesses who have already been called. The court cannot, without the consent of the parties, call for testimony from a person who was not called as a witness by any party - *Pauley v Marine and Trade Insurance Co Ltd (2)* 1964 (3) SA 657 (W). For the appropriate criteria to be applied, see *Hamman v Moolman* 1968 (4) SA 340 (A).

It is open to the court to suggest calling a specific person as a witness if both parties consent to this. This is useful when both parties would like to cross-examine the witness in question.

6.3.11 Absolution from the instance at the end of the plaintiff's case

If the onus to adduce evidence is on the plaintiff and the defendant is of the opinion, when the plaintiff closes his case, that the plaintiff has not made out a prima facie case, then the defendant may apply for absolution from the instance. The test at the end of the plaintiff's case is whether the court, applying its mind reasonably to the evidence, could or might (not should or ought to) find for the plaintiff – *Gordon Lloyd Page & Associates v Rivera and Another* 2001 (1) SA 88 (SCA). In *Ardecor (Pty) Ltd v Quality Caterers (Pty) Ltd and Others* 1978 (3) SA 1073 (N) at 1076F--G, it was pointed out that the power that a court has to grant absolution from the instance at the close of the plaintiff's case is a discretionary one.

In considering an application for absolution at the close of the plaintiff's case, the court should accept the evidence as being true and not go into the credibility of the plaintiff's witnesses unless they have crumbled completely. Absolution from the instance at the close of the plaintiff's case cannot be granted when the onus is on the defendant to prove some issues.

The effect of an order of absolution from the instance is dealt with in section 6.4.2 below.

6.3.12 Argument

Once both parties have closed their cases, the legal representatives of each party are entitled to address the court in argument. Argument may canvass both factual and legal issues. It is during argument that case law is referred to in order to persuade the court to find in favour of the party for whom argument is being presented. The court may interrupt counsel to ask questions or make comments. Courts are increasingly adopting the practice of telling counsel at the beginning of the argument stage of the trial what issues the court would like counsel to address it on. The court should ensure that both counsel address the issues with which the court needs to deal in its judgment. Once the argument is finished, the trial is at an end, and judgment must be given.

6.4 Judgment

6.4.1 Delivering judgment

The court, having heard argument, may either hand down an extempore judgment or reserve its judgment. Where judgment is reserved, only the legal representatives need to appear to note the judgment. Appearance is obviously impossible where the court chooses to telephone or fax the judgment to the parties. See, however, the case of *Snyman v Crouse en 'n Ander* 1980 (4) SA 42 (O) and *Hallick and Another v Plumtree Motors CC* 1997 (3) SA 703 (C).

When the judgment is handed down, it is wholly irregular – contemptuous in fact – for a practitioner or party to interrupt the court. Regardless of the party in whose favour the judgment is awarded, it is practice for counsel to rise at the conclusion and say: 'As the court pleases'.

When an extempore judgment is delivered the Magistrate may receive a request for written reasons for judgment. Rule 51(1) provides that upon request in writing by any party within 10 days after judgment and before the noting of an appeal, the judicial officer shall within 15 days hand to the Clerk of the Court a written judgment showing the facts found to be proved and the reasons for judgment.

6.4.2 Types of order

The different types of order that a court can make as a result of the trial of an action are detailed in s 48 of the MCA. These are:

- judgment for a plaintiff in respect of his claim in so far as it has been proved;
- judgment for a defendant in respect of his defence in so far as it has been proved;
- absolution from the instance, if it appears that the evidence does not justify the court giving judgment for either party;

- such judgment as to costs (including costs as between attorney and client) as may be just;
- an order suspending execution of the judgment pending arrangements by the other party for payment; and
- an order for payment of the judgment amount in instalments, including an order contemplated in s 65J and s 73 of the MCA.

Judgment for the defendant

Where the court does not find for a plaintiff but accepts the defendant's defence, it should not dismiss the claim but give judgment in favour of the defendant.

Absolution from the instance

The decree of absolution from the instance is an order by means of which the plaintiff's case is 'dismissed', granted either at the end of the plaintiff's case or at the end of the whole case. Its effect is to leave the parties in the same position as if the action had never been brought. The plaintiff can, therefore, begin the action afresh and is not susceptible to a plea of *res judicata* – *Minister of Police v Gasa* 1980 (3) SA 387 (N) at 389 D--E.

Where both parties present evidence, at the end of the case the court may find that the versions of the plaintiff and defendant are mutually destructive, in the sense that acceptance of the one version necessarily involves the total rejection of the other version. In such circumstances, and if the court is unable to accept the version of the plaintiff as true and the version of the defendant as false, the proper judgment is absolution – *National Employers Mutual General Insurance Association v Gany* 1931 AD 187 at 199.

Absolution cannot be granted where the onus to begin is on the defendant. Since absolution from the instance is tantamount to dismissal of the plaintiff's claim, it cannot be granted at the close of the defendant's case, for the plaintiff has not yet

been heard. If the evidence at the end of the defendant's case is such that the defendant has not discharged his onus, the proper course is to give judgment in favour of the plaintiff. The court cannot give judgment for the plaintiff until the plaintiff has closed his case.

6.4.3 The formulation of a judgment

The word 'judgment' refers to both the order of the court and the reasons for the order. Although reasons do not have to be given at the same time as the order is made, the reasoning process underlying the order should be clear in the court's mind before the order is made. This section deals with the process of organizing the reasons for judgment.

The giving of reasons for judgment has three main aims. These are:

- to explain how the court arrived at its decision so that it does not appear to be arbitrary;
- to satisfy the litigant's sense of justice and reassure him that his evidence and legal argument have been listened to and carefully considered; and
- to assist the court on appeal should an appeal be noted.

Judicial officers develop their own method of writing judgments based on their own style and thought processes. Reading the published judgments of the higher courts can be of great value in developing one's own methodology. The following general points should be kept in mind:

- keep judgments as short and clear as possible;
- avoid quoting long passages from authorities;
- do not repeat the evidence in detail; and
- ensure that anyone who reads the judgment can immediately grasp the essentials of the case.

The methodology described below can be usefully applied in most cases.

Identify the parties and the issues

Give a brief description of the parties and the nature of the plaintiff's claim and the defendant's defence. If a counterclaim is at issue, it too should be briefly described along with the plaintiff's defence to it. Claims or defences that have been abandoned at the trial should be noted.

Analyse the issues with regard to the facts

This should be done with reference to the pleadings, any admissions or amendment of pleadings made during the trial, the evidence and the arguments presented.

Make findings on the facts

- Summarize the evidence. Avoid setting out what the witness said in chief, under cross-examination and re-examination, and summarize the evidence as a whole. The most important witnesses should be dealt with first and witnesses who gave corroborating evidence can be dealt with briefly.
- Analyse the evidence. Did a witness contradict himself and if so, what is the effect of the contradiction on his evidence as a whole? Was a witness contradicted by another witness? Did any of the witnesses have vested interests in the outcome of the case? Be careful not to place too much emphasis on the demeanour of a witness.
- Choose between conflicting versions and give reasons for the choice made. This involves a consideration of the credibility of the witness as well as a consideration of the probabilities on the evidence.

Analyse the legal issues and make findings on the legal position

The analysis of the legal position can be done before or after the analysis of the facts and no hard and fast rule can be laid down in this regard. Whichever choice enables a Magistrate's judgment to read logically and clearly should be followed. The law relating to the issues involved should be briefly set out and discussed. If there are conflicting decisions in regard to this area of the law, the presiding officer should set out why he or she has chosen to follow a particular decision.

Apply the law to the facts

Having decided which facts are proved, the court should then apply the law to the facts and set out to what extent the plaintiff has proved his claim or the defendant his defence.

Review the judgment carefully

It is often necessary to redraft reasons for judgment once they have been written, but bear in mind that parties are more interested in hearing the outcome of the case quickly than in receiving a stylistically perfect judgment. Remember that justice delayed is justice denied! A judgment should reflect the fact that the judicial officer has carefully and impartially applied his or her mind to the facts presented and the arguments raised.

Part 7 Applications

7.1 General

7.1.1 Introduction

Application procedure provides a mechanism, other than trial action, by means of which relief may be obtained from a court of law. Trial actions are commenced by way of summons, while applications are initiated by way of a notice of application (also referred to as a notice of motion) which is usually supported by an affidavit, or affidavits, that set out the facts upon which the applicant relies for relief. An affidavit is a document containing a statement of facts which is signed and sworn to by the witnesses in front of a commissioner of oaths. In an application, the party initiating proceedings is referred to as the applicant. The party called upon to answer the application is known as the respondent.

A significant distinction exists between application procedure in the Magistrates' Courts and motion proceedings in the High Courts in that application procedure is widely used for claiming substantive relief in the High Court in matters not involving a material dispute of fact. The increased utilization of application procedure was a development which was able to take place in the High Courts because they have inherent jurisdiction to regulate their own procedure, but the Magistrates' Courts do not have such inherent jurisdiction and are, therefore, limited to the use of application proceedings only where provided for, either expressly or by necessary implication, in the MCA or the Magistrate's Court rules.

Even in the High Courts, where a much wider range of relief may be sought through application, it is accepted that such procedure is not without its limitations and that it not appropriate for deciding real and substantial disputes of fact. The reason for this is that in trial actions witnesses must appear in person and may be subjected to cross-

examination so that their credibility may be tested. Seeing and hearing the witnesses give evidence enables the court to decide which witness is more credible or reliable. When a court has only affidavits before it, and where the affidavits set out conflicting facts, it may be very difficult for the court to decide which deponent is more credible or reliable.

Applications may be used for two purposes:

- to claim substantive relief;
- to claim procedural relief.

In the Magistrates' Courts there is very little scope for claiming substantive relief by way of application. Almost all the provisions of the Act and rules which provide for the application procedure deal with applications which are of a procedural nature and which enable parties to claim relief in connection with litigation already instituted by way of trial action. These are generally known as interlocutory applications because they take place during the course of the trial action, but there are some which are preliminary in nature and some which would be brought after judgment has been given, such as applications relating to execution of judgments. Rule 55(9) provides that all interlocutory matters may be dealt with upon application.

7.1.2 Ex parte applications

As a general rule, applications must be brought on notice to the party against whom relief is claimed. This general rule is expressed in rule 55(1), which provides that, except where otherwise provided, an application to the court for an order affecting any other person shall be on notice. In certain circumstances, a party may bring an application to court without first notifying the party against whom relief is claimed. Such an application is called an 'ex parte application'.

In the High Courts the only circumstance in which an applicant may proceed ex parte, where relief is claimed against another party, is where the purpose of the application would be defeated if notice were to be given to the party against whom relief is claimed. For instance, where the party who wants to claim relief believes that the other party will hide or destroy evidence if he becomes aware of an impending action, then giving notice to that party of an application to attach the evidence would probably have the result that the evidence would be hidden or destroyed before the attachment order can be granted and served. In the High Courts urgency alone is not accepted as a ground for proceeding ex parte, unless the urgency is so great that there is not enough time to serve notice before bringing the application.

In the Magistrates' Courts these same principles should apply, but, unfortunately they have been distorted because

- rules 56 and 57 provide for certain types of application to be brought ex parte without adding the requirement that they should be brought ex parte only if the giving of notice would defeat the purpose of the application; and
- there is no provision for urgent applications in the MCA or rules, and therefore the only way a party can obtain an order quickly without having to go through the usual process of serving notice and enrolling the matter for hearing is to proceed ex parte (although rule 9(14) does allow the court to reduce the notice period for an application on good cause shown – see J & B Rule 9--4 to 9--15).

As a result of these distortions, a general opinion prevailed before 1997 that the types of application governed by rules 56(1) and 57(1) could always be brought ex parte, despite the fact that rule 55(8) provides that in every application the person substantially interested shall be made respondent. Rule 55(9), which provides that any application which may be brought ex parte may also be brought on notice, may have been partly responsible for this opinion, because its wording creates the impression that proceeding ex parte, where this is authorized, is the rule rather than the exception.

The belief that parties had the right to proceed ex parte in applications governed by rules 56 and 57 was dispelled in *Office Automation Specialists CC and Another v Lotter* 1997 (3) SA 443 (E), a case in which it was held that parties should be allowed to proceed ex parte only where there is good reason to dispense with the giving of notice to the party against whom relief is claimed. At 447A--C, the court quoted the following passage from the 8th edition of Jones and Buckle:

> 'Though Rule 56 empowers magistrates' courts to grant *ex parte* orders affecting other parties' interests, the Rule does not do away with the common-law principle that the courts are extremely loath to grant any such orders upon *ex parte* application. Rule 56 is quite consistent with the common-law principle; it is an empowering provision, not an abolishing one, and it is still true to say that applications should be made *ex parte* only when there is some good reason for that procedure … – reasons such as urgency, or that the giving of notice would defeat the very object for which the order is sought.'
>
> At 448A--C the court concluded: 'I accordingly conclude that, while applications of the type referred to in Rule 56(1) can be brought *ex parte*, an applicant bringing such an application does so at his peril if he does not make out a good and proper case as to why an order should be granted without notice to the other party.'

It is important to note that a court will never grant final relief on an ex parte basis. If notice is not given to the respondent, then once the order is granted, the order must be served on the respondent together with a copy of the application. Such an order is called a rule nisi. It informs the respondent that on a certain date, which is called 'the return day' the respondent may appear before the court to show cause why the order granted ex parte should not be confirmed. The audi alteram partem principle thus prevails in that, on the return day, the respondent is afforded the opportunity to oppose the application and to request the court to set the order aside. Rule 55(7) provides that any person affected by an order made ex parte may apply to discharge it on not less than 12 hours' notice. In other words, the party against whom the ex parte order was granted may anticipate the return day by giving the applicant not less than 12 hours' notice that the matter has been set down for hearing. The purpose of this subrule is to enable a party who is prejudiced by an ex parte order to get the matter before court quickly.

Another principle which has been applied very strictly by courts in respect of ex parte applications is the principle that the applicant has the duty of utmost good faith to disclose to the court all facts which are relevant, including facts which tend to detract from the applicant's case and favour the party against whom relief is being sought. If an order has been made on an ex parte application and it later appears that material facts that might have influenced the decision of the court to grant the order were not disclosed, the court has a discretion to set aside the order on the ground of non-disclosure and make a punitive order. It is irrelevant whether the omission of facts was made wilfully or negligently. The reason for this requirement is that hearing a matter in the presence of only one party negates the audi alteram partem principle, one of the most important principles underlying the rules of civil procedure.

There are numerous cases in which this principle has been applied:

- In *Cometal-Mometal SARL v Corlana Enterprises (Pty) Ltd* 1981 (2) SA 412 (W) at 414 it was held that failure to set out all the facts which might influence the court (whether these facts are favourable to the applicant or otherwise) will justify the court setting aside a rule *nisi* on the return date. See also *Gainsford and others NNO v HIAB AB* 2000 (3) SA 635 (W); *MV Rizcun Trader (4) v Manley Appledore Shipping Ltd* 2000 (3) SA 776 (C).

- In *Ex parte Madikiza et uxor* 1995 (4) SA 433 (Tk5) at 437A--B it was held that the absence of acceptable reasons for failure to disclose a material fact is one of the reasons the court will take into consideration in exercising its discretion whether to grant or deny the relief sought.

- In *J W Jagger & Co (Rhodesia) (Wholesaling) (Pvt) Ltd v Mubika* 1972 (4) SA 100 (R) it was held that, even though he may be partially successful in an application, an applicant may be ordered to pay the costs of the application if he has negligently failed to disclose any material facts.

- In *Schlesinger v Schlesinger* 1979 (4) SA 342 (W) an order obtained ex parte was set aside with costs, on the scale as between attorney and client, because the applicant was found to have displayed a reckless disregard of a litigant's duty to a court to make a full and frank disclosure of all known facts that might influence the conclusion the court reaches.

Recent case law has made it clear that the requirement of utmost good faith to disclose all material facts applies whenever only one party is before the court at the time when the application is made. Thus, in a default-judgment application the applicant has a duty to disclose all relevant facts to the court because, even though the summons was served on the defendant, at the time when the default-judgment application is made it is only the applicant who is before the court. See *Bankorp Ltd v Ridl and Another* 1993 (4) SA 276 (D).

It has also been held that the normal duty which counsel and attorneys have to direct the court's attention to relevant authority should be taken particularly seriously in ex parte applications – *Ex Parte Hay Management Consultants (Pty) Ltd* 2000 (3) SA 501 (W).

One kind of application which must of necessity be brought ex parte is an application for substituted service because, if documents cannot be served on the defendant/respondent in any of the usual ways prescribed by rule 9, then it stands to reason that notice of the application for directions as to how service should be effected cannot itself be served.

In terms of rules 55(5) and (6), except where otherwise provided, ex parte applications must be made in writing, stating shortly the terms of the order applied for and the grounds on which the application is made, and need not be supported by an affidavit or other evidence. Examples of rules which 'provide otherwise' are rules 56 and 57, both of which require the applications which they regulate to be supported by an affidavit and prescribe what must be contained in the affidavit.

7.1.3 Types of application

A list of all the different types of application which may be brought in the Magistrates' Courts is set out in Jones and Buckle Rule 55--2 to 3. The general rule which governs the application procedure is rule 55, but some kinds of application have special rules which prescribe how they should be brought and opposed.

Section 30 of the MCA provides that subject to the jurisdiction prescribed by the Act, the court may grant against persons and things orders for arrest tanquam suspectus de mandamenten fuga, attachments, interdicts and mandamenten van spolie. Rule 56 prescribes the procedure to be followed in these applications. Section 30bis empowers the court to grant applications for attachment to found or confirm jurisdiction and to give directions as to service of documents. This type of application is governed by rule 57. Both rule 56 and rule 57 state that these applications may be made ex parte. The discussion under the heading 'ex parte applications' above is therefore applicable. Section 32 enables a lessor to attach property on leased premises to perfect the common-law landlord's hypothec. Section 36 empowers the court to grant applications for rescission of judgment and the procedure is prescribed by rule 49.

This part of the *Bench Book* deals with the general rules relating to application procedure, such as rule 55, while parts 7.2 to 7.11 deal with specific types of application.

7.1.4 General rules regulating application procedure

Rule 55(1) requires the notice of application to state the terms of the order applied for and the time when the application will be made to court. The notice should be in accordance with Form 1 of Annexure 1 the rules. It is usual practice to mention the rule or section of the Act in terms of which the application is brought in the heading to the notice, or in the body of the notice, although the rules do not prescribe this. The notice

must be delivered to the respondent not less than 10 days before the hearing and not less than 20 days before the hearing where the State is the respondent – rule 9(14).

Rule 55(2) states that, except where otherwise provided, an application need not be supported by an affidavit, but in the event of any dispute arising as to the facts, the court may –

(a) receive evidence either viva voce or by affidavit and try the issues in dispute in a summary manner; or

(b) order that the issue shall be tried by way of action. The court may then order that the applicant shall be the plaintiff and the respondent be the defendant, and that the notice of application shall stand as a summons, or that the applicant shall deliver such particulars of his claim as are prescribed in rule 6.

This subrule is anomalous, first because it is difficult to see how a dispute of fact would arise if there are no affidavits filed in support of the application and, presumably, no affidavits filed by the respondent. Secondly, it is not appropriate that procedural applications should be converted into trial actions and, as previously indicated, there is very little scope for claiming substantive relief by way of application in the Magistrates' Courts.

7.1.5 Affidavits

High Court rule 6(1) provides that every application must be supported by an affidavit, but it has been held that affidavits are not always necessary for interlocutory applications. The function of affidavits is to place facts before the court, but in procedural interlocutory applications, such as an application to compel the furnishing of further particulars for the purpose of pleading, whatever facts the court needs to know are apparent from the court file and there is no need to place further facts before the court. Thus, the test which should be applied in deciding whether an application should

be supported by an affidavit is to ask whether it is necessary to place before the court facts in support of the relief sought. Unfortunately, the rules of the Magistrates' Courts differ from the general rule which should be applied in stating that supporting affidavits are not necessary '[e]xcept where otherwise provided'. Harms, in section 6.7, lists the instances in which affidavits are required. The law relating to attestation of affidavits is set out by Harms in section 6.16.

The Magistrate's Court rules are also anomalous in that they make no provision for the filing of an answering affidavit by the respondent and a replying affidavit by the applicant. There is no doubt, however, that the audi alteram partem rule requires that a party who needs to respond to facts stated in an affidavit filed by the other party should be given the opportunity to do so. Thus, if the respondent wishes to oppose a matter and needs to place facts before the court, an answering affidavit may be filed. The applicant may then file a replying affidavit, responding to the facts in the answering affidavit, except in summary-judgment proceedings (see below).

7.1.6 Contents of affidavits

When affidavits are filed, they must contain all the facts which are relevant to establish the case of the party filing them. Both the material facts and the facts relevant to prove the material facts (facta probanda and facta probantia) must be stated. In this respect affidavits which support a claim or respond to it are very different from pleadings. Pleadings should contain only facta probanda, because the facta probantia will be placed before the court by way of oral evidence at the trial. At the hearing of an application, no oral evidence is heard, unless the court invokes the provisions of rule 55(2)(a).

Every affidavit should begin with a statement by the deponent (the person who made the affidavit) that the facts contained in the affidavit are within his personal knowledge, because the hearsay rule applies to affidavits in the same way that it does to oral evidence. This is particularly necessary where the deponent is making the affidavit on behalf of a juristic person. Such a deponent should also state that he has been

authorized to make the affidavit on behalf of the juristic person. Sometimes it is convenient for a party to file a main affidavit which 'tells the whole story' and then, in so far as the main affidavit contains hearsay evidence, annex verifying affidavits (also known as confirmatory affidavits) made by the people who do have personal knowledge of the facts. The deponent to the main affidavit would normally state: 'The facts are within my personal knowledge save where otherwise indicated and are, to the best of my knowledge and belief, true and correct.' It should be kept in mind that section 3 of the Law of Evidence Amendment Act 45 of 1988 gives the court some discretion whether or not to admit hearsay evidence.

Documents which support the case of a party should be annexed to the affidavit of a witness who has first-hand knowledge of that document, and the deponent should 'prove' the document by describing it in the affidavit and referring to the annexure.

Where substantive relief is claimed, the founding affidavit (the affidavit which supports the notice of application) must contain:

- facts which indicate that the court has jurisdiction;
- facts which show that the applicant has locus standi;
- the material facts relevant to the cause of action on which the applicant relies, for if an affidavit does not disclose a cause of action, the respondent can apply for the dismissal of the application;
- facts relevant to prove the material facts (facta probantia);
- a conclusion of law;
- a prayer for relief.

It is important not to confuse a conclusion of law with an argument as to the law. A conclusion of law simply states what the party submits it is entitled to on the basis

of the facts set out, but it does not argue why it is so submitted. Neither pleadings nor affidavits should ever contain argument, either as to the facts or as to the law.

The requirements of the respondent's answering affidavit, which deals with the allegations contained in the applicant's founding affidavit are the same as those of the applicant.

7.1.7 Delivery of applications – rules 2(1)(b) and 9(11)

There is no requirement that applications need be served by the sheriff. The definition of 'deliver' is set out in rule 2(1)(b) read with rule 9, indicates that it is only a summons or other process of the court which needs to be served by the sheriff. Again, this is probably an anomaly, or an indication that the drafters of the rules considered all applications to be of an interlocutory or ancillary nature. In the High Court any document which initiates proceedings must be served by the sheriff, whereas applications of an interlocutory or ancillary nature are delivered inter partes by the parties or their attorneys. Thus, a notice of motion which initiates proceedings and claims substantive relief should served by the sheriff.

Delivery, according to rule 2(1)(b) includes both service on the defendant and filing with the Clerk of the Court. The first day of the appearance to defend will be excluded, and so will Saturdays, Sundays and public holidays.

7.1.8 Extension of time limits

Sometimes a specific time period within which a particular application must be brought is prescribed by the Act or rules. When an application is brought outside this prescribed period, the applicant will generally be able to apply to the court for condonation of the late filing of the main application, either before or simultaneously with the bringing of the main application.

Rule 60(5) provides that any time limit prescribed by the rules may *at any time,* whether before or after expiry of the period limited, be extended by:

- the written consent of the opposite party; and
- if such consent is refused, then by the court on application and on such terms as to costs and otherwise as may be just.

A defaulting party must, therefore, first approach the other party for written consent to file the application late. Only if such consent is refused may the applicant then approach the court for permission to file an application outside the prescribed time limit.

The words 'at any time' does not mean that a person may bring a second application for condonation after one application has already been refused on the same facts for the same relief.

The court has a discretion whether to grant condonation or not. The applicant will have to show sufficient cause why the courts should grant an extension of time – see J & B Rule 60--4.

7.1.9 Condonation of short service

Rule 60(6) provides that where there has been no notice or where there has been short service of any application, the court may, instead of dismissing the application, adjourn the proceedings for a period equivalent at least to the period of proper notice upon such terms as to costs as may be just. This does not apply if the court has consented to short service in terms of rule 9(14), or where the parties have agreed to treat such notice as valid. In that instance the court will then proceed as if the notice was valid.

If the proceedings are postponed in the absence of the party who received short service, due notice of the adjournment must be given to that party by the party responsible for the short service.

7.2 Applications for summary judgment

J & B Rule 14--1 to 14--37; Harms section 21

7.2.1 Introduction

This is an application which may be brought by a plaintiff in a trial action where the defendant enters an appearance to defend and the plaintiff believes that the defendant has no defence, provided that the claim is of one of the following:

- a claim based on a liquid document;
- a claim for a liquidated amount;
- a claim for delivery of specified movable property; or
- a claim for ejectment.

A summary-judgment application may not be brought in respect of any other type of claim.

See the discussion in section 4.3.3 as to when summary judgment may be claimed and as to the meaning of the terms ‘claim based on a liquid document’ and ‘claim for a liquidated amount’. In fact, it was not necessary for the rule to specify both of these types of claim because a claim based on a liquid document will always be a claim for a liquidated amount.

It is important to note that when summary judgment is applied for on a claim for eviction, account must be taken of the provisions of the following legislation:

- the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998;
- the Interim Protection of Informal Land Rights Act 31 of 1996;
- the Extension of Security of Tenure Act 62 of 1997 (ESTA) and
- the Land Reform (Labour Tenants) Act 3 of 1996.

A defendant with a counterclaim is not able to use the summary-judgment procedure in respect of the counterclaim. The reason for this is that rule 20(3) and (7) require the court, where each party has a claim against the other, to give judgment on both simultaneously, to accommodate set-off.

7.2.2 Procedure

A plaintiff must apply for summary judgment within 10 days after a notice of intention to defend was delivered and 10 days' notice must be given to the defendant of the date on which the application will be heard. The notice of application must be in accordance with Form 7 of Annexure 1.

The notice of application must be accompanied by an affidavit, in accordance with Form 8 of Annexure 1, which is made by the plaintiff or any other person who can swear positively to the facts. The affidavit must verify the cause of action and the amount, if any, claimed. Summary judgment has been refused in some cases because the cause of action was not verified and in others because the amount was not verified. Without this verification, there is no evidence before the court in support of the plaintiff's claim – *Barclays National Bank Ltd v Swartzberg* 1974 (1) SA 133 (W); *Mmabatho Food Corporation (Pty) Ltd v Fourie* 1985 (1) SA 318 (T). The particulars of claim should, however, not be repeated in the affidavit, nor may any additional facts be introduced by way of the affidavit – *Trust Bank of Africa Ltd v Hansa* 1988 (4) SA 102 (W).

The affidavit must contain a statement that the deponent believes that the defendant has no bona fide defence to the claim and that appearance to defend has been entered solely for the purpose of delaying the action – rule 14(2).

The affidavit must be made by the applicant or by a person, on behalf of the applicant, who has knowledge of the facts. The deponent should state that the facts are within his own knowledge, but this statement is not conclusive. There are reported cases in which the application was dismissed because the court had reason to believe that the facts

were not within the knowledge of the deponent – *Paddy's Investments (Pty) Ltd v Moolman Bros Construction Co (Pty) Ltd* 1982 (1) SA 249 (D); *Trust Bank van Afrika Bpk v Haarhoff en 'n Ander* 1986 (4) SA 446 (NC). It has been held, however, that a deponent such as a bank manager or liquidator may derive knowledge of the facts from the records and documents under his control and should state in the affidavit that the knowledge has been so derived – *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 422--4; *Millman NO v Klein* 1986 (1) SA 465 (C).

Where the application is based on a liquid document, a copy of the document must be attached to the notice, but no affidavit needs to be annexed – rule 14(2)(b). This is different from High Court practice, which always requires an affidavit.

There are basically two avenues open to the defendant who wants to oppose an application for summary judgment:

- The defendant may abide by the result of the action and pay into court the sum claimed plus costs, or give security by a bank or financial institution or other persons that any judgment which may be granted will be satisfied – rules 14(3)(a) and (b). Where a defendant chooses to do this, the court has no option and must grant the defendant leave to defend. The trial will follow its normal course.
- Alternatively, the defendant may satisfy the court by way of affidavit, delivered not later than noon of the day preceding the hearing of the application, that he has a bona fide defence to the plaintiff's claim or that he has a *bona fide* counterclaim against the plaintiff – rule 14(3)(c).

It has been held that the words 'bona fide defence' mean a defence which is valid in law. Normally the words 'bona fide' relate to a person's state of mind, but in *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T) it was held, at 227–8, that, in the context of the summary-judgment rule, the requirement of bona fides cannot be given its literal meaning. The defendant does not have to establish his bona fides: it is the

defence that must be bona fide. It will be sufficient if the defendant swears to a defence, valid in law, in a manner which is not inherently or seriously unconvincing.

In terms of rule 14(3)(c) the court may allow the defendant to supplement the evidence contained in the affidavit by way of oral evidence. This subrule further provides that '[s]uch affidavit and evidence shall disclose the nature and grounds of the defence or counterclaim'. In *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426C--E the Appellate Division held that 'while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the Court to decide whether the affidavit discloses a *bona fide* defence'. This has now been confirmed by the Supreme Court of Appeal in *Tesven CC and Another v South African Bank of Athens* 2000 (1) SA 268 (SCA).

A counterclaim upon which a defendant relies to defeat an application for summary judgment may be liquidated or unliquidated. The defendant must set out the facts on which the counterclaim is based with sufficient particularity to satisfy the court that it constitutes a valid counterclaim. In *Citibank NA, South Africa Branch v Paul NO and Another* 2003 (4) SA 180 (T) the court considered the duties of a defendant in formulating his opposition. With regard to a counterclaim, it held that where the respondent relies on an unliquidated and unquantified counterclaim as a defence, the court is not obliged to refuse summary-judgment, because the rule that claims and counterclaims should be heard pari passu is not an absolute rule. In other words, the court has a discretion as to whether such a counterclaim should defeat the application for summary judgment.

There is no provision for the plaintiff to file an answering affidavit in answer to the defendant's opposing affidavit; nor is the plaintiff allowed to adduce any oral evidence at the hearing; nor may the plaintiff cross-examine any witness giving evidence for the defendant, but the court may examine such witness – rule 14(5). In other words the

plaintiff may rely only on the facts set out in the summons, as verified by the affidavit filed in support of the application.

7.2.3 Deciding the application

Where a defendant/respondent alleges a defence on affidavit in order to defeat a summary-judgment application, the onus on the defendant/respondent is to set out, with sufficient particularity, facts which if true would constitute a good defence in law. The defendant is not required to persuade the court of the correctness of the facts stated in the affidavit, or that there is a balance of probabilities in its favour. The court should not endeavour to weigh or decide disputed factual issues or try to determine whether or not there is a balance of probabilities in favour of the one party or the other. In *Marsh and Another v Standard Bank of SA Ltd* 2000 (4) SA 947 (W) it was held that it is sufficient if the defendant's affidavit shows that there is a reasonable possibility of the defence advanced succeeding at trial should the statements of fact be found to be correct.

If a defendant satisfies the court that it has a bona fide defence or counterclaim, the court must refuse summary judgment and grant the defendant leave to defend: the court has no discretion – rule 14(7). Where, however, the defendant fails to satisfy the court that it has a bona fide defence or counterclaim, the court has a discretion as to whether to grant summary judgment – rule 14(6). The court will generally exercise its discretion in the defendant's favour where there is any doubt as to whether the plaintiff's case is unanswerable - *Tesven CC and Another v South African Bank of Athens* 2000 (1) SA 268 (SCA). In *First National Bank of SA Ltd v Myburgh and Another* 2002 (4) SA 176 (C) it was held that even where the defendant fails to appear, the court can refuse to grant summary judgment if it is of the opinion, on the basis of the material before it, that an injustice may result if summary judgment is granted.

The reason why the discretionary rules favour the defendant is that summary judgment is an extraordinary remedy and a very stringent one, in that it permits a judgment to be

given against a defendant without a trial. This can be done only if it is clear that the plaintiff has an unanswerable case.

In terms of rule 14(9) –

- if there is more than one defendant in an action, the court may grant leave to defend to one defendant and grant judgment against another;
- grant leave to defend as to part of the claim against a defendant and give judgment for the balance; or
- make both such orders.

7.3 Applications for provisional sentence

See J & B Rule 14A--1 to 20; Harms section 23

7.3.1 Introduction

As explained in the overview of types of civil proceeding in s 1.7, provisional sentence is a sui generis procedure which can be used instead of the ordinary trial-action procedure when a creditor is in possession of a liquid document which is prima facie evidence of the indebtedness. This part focuses on the application aspects of the provisional sentence procedure. These applications are set down on the normal motion roll in Magistrates' Courts.

The term 'provisional sentence' is confusing because the word 'sentence' is generally used with regard to criminal proceedings. A more appropriate term would be 'provisional judgment' because, if the application succeeds, this is what the court grants – a provisional judgment in favour of the plaintiff, which will become final after two months if the defendant does not give notice that he intends to take the matter to trial. If, despite losing the provisional sentence application, the defendant wants to take the

matter to trial, the defendant must pay the judgment debt plus costs as required by rule 14(10), before giving notice requiring the matter to be taken to trial. The plaintiff may then be required to give security de restituendo for return of the amount paid in the event that the defendant succeeds at trial.

7.3.2 When may provisional sentence proceedings be used?

Rule 14A commences with the words: 'Where by law any person may be summoned to answer a claim made for provisional sentence, proceedings shall be initiated by way of a summons … in accordance with Form 2A of Annexure 1.' Provisional sentence proceedings are not mentioned in the MCA, since this procedure was introduced into the Magistrates' Courts by way of rule 14A only in 1994. The 'law' referred to is accordingly the common law, and it is well-established at common law that provisional sentence proceedings may be utilized only where the plaintiff's claim is based on a liquid document. The development of this procedure at common law is traced in *Harrowsmith v Ceres Flats (Pty) Ltd* 1979 (2) SA 722 (T). See also Herbstein and Van Winsen *The Civil Practice of the Supreme Court of South Africa (Now the High Courts and the Supreme Court of Appeal)* 4 ed (1997) at 960--2.

7.3.3 Procedure

Where a party has a claim which is based on a liquid document, that party may institute action by way of a provisional sentence summons (Form 2A), which calls upon the defendant either to pay the claim or to appear in court on a stated date to show reason why judgment should not be given for the amount claimed.

Where a defendant does not pay the amount claimed in response to the summons, the plaintiff may set the matter down on the court's application roll as an application for provisional sentence. Note that there is no notice of application in the usual form because the summons gives notice of the date of the hearing of the application.

If the defendant wants to show cause why payment should not be ordered, he must file an affidavit setting out what the defence to the claim is and, in particular, must state whether the validity of the signature on the liquid document, or the authority of the person who signed the document is disputed. The plaintiff may file a replying affidavit.

Thus, on the day when the matter is heard, if the matter is opposed, the court will have before it the provisional sentence summons with liquid document annexed, an affidavit or affidavits filed by the defendant, and possibly a replying affidavit filed by the plaintiff. On the basis of these documents, the court must decide whether to grant a provisional judgment in favour of the plaintiff.

7.3.4 Deciding a provisional sentence application

A court hearing a provisional sentence application is not required to exercise its discretion in favour of the defendant, as it is in summary-judgment applications, because if the application is granted, it is not a final judgment in that the defendant may still elect to take the matter to trial. In fact, once the plaintiff has established that its claim is based on a valid liquid document, the onus is thrown on the defendant to establish a defence, because the liquid document creates a presumption of indebtedness. It is a very heavy onus compared to the onus on the defendant in summary-judgment proceedings. The onus on the defendant in provisional sentence proceedings is to persuade the court, by way of facts set out in the opposing affidavit, that it has a defence which is likely to succeed at trial. In summary-judgment proceedings, all the defendant has to do is set out facts which, if true, would constitute a good defence in law.

The issues which a court may be called upon to decide in a provisional sentence application are:

- Is the claim based on a valid liquid document?

- Has the defendant discharged the onus of making out a defence which is likely to succeed at trial?

The onus of establishing the existence of a valid liquid document is on the plaintiff. Thus, if the defendant disputes the signature on the document or the authority of an agent who signed the document, the onus is on the plaintiff to establish that the signature is that of the person whose signature it purports to be, or that the person who signed had authority to do so. If the defendant alleges that the document has been forged in any way, the onus is on the plaintiff to prove that the document is valid. If the defendant raises the issue of whether the document is a liquid document, the onus is on the plaintiff to establish that it is.

7.3.5 Valid liquid document

There is a huge amount of case law as to what constitutes a liquid document for the purposes of provisional sentence – see Herbstein and Van Winsen 962--1006. In Jones and Buckle the types of liquid document most frequently met with in practice are listed and discussed at 14A--4 to 9. Harms deals with liquidity of documents from 23.2 to 23.7. Common examples of liquid documents are acknowledgements of debt, loan agreements, deeds of suretyship, credit sale agreements, mortgage bonds and covering or notarial bonds. A simple agreement of sale or lease which clearly evidences the obligation of one party to pay the other may also be a liquid document. In a nutshell, in order to be liquid, a document must be signed by the debtor or his duly authorized agent and must clearly evidence the indebtedness of the debtor to the creditor in a fixed and definite amount. The identities of debtor and creditor must be clear, the existence of the indebtedness must be clear, and the amount of the indebtedness must be fixed or easily ascertainable.

For a few years some courts accepted that an acknowledgement of debt subject to a maximum amount of indebtedness could be regarded as a liquid document if the

creditor furnished a certificate as to the actual amount of indebtedness, but those cases have now been held to be wrong on the ground that the very basis of provisional sentence is that the debtor acknowledges the extent of the indebtedness – *Harrowsmith v Ceres Flats (Pty) Ltd* 1979 (2) SA 722 (T), approved in *Wollach v Barclays National Bank Ltd* 1983 (2) SA 543 (A). As long as the debtor has stated that he is indebted in a fixed amount, the creditor may claim that amount or a lesser balance owing, but if the debtor does not make the statement of actual indebtedness and only undertakes liability subject to a maximum amount, the document will not be liquid. The *Wollach* case also held that, as far as liquidity of the document is concerned, it does not matter that at the time when the debtor signs the document money which constitutes the causa of the debt has not yet been advanced. As long as the document states that the debtor is indebted, it will be regarded as liquid. If the money is never advanced, that will be a defence on the merits.

The other problem which has cropped up as far as liquidity is concerned is whether a document is liquid if it is not clear from the document that payment is due. For instance, an acknowledgement of debt may allow the debtor to pay in instalments and state that if any one instalment is not paid on due date, the full amount will immediately become due and payable. This is called an acceleration clause. If the debtor does default, it will not be apparent from the document that he has defaulted – the plaintiff will have to tell the court this. Since the case of *Union Share Agency & Investment Ltd v Spain* 1928 AD 74 it has been accepted that where payment is conditional on the happening of an event, such as the default in the example given, the plaintiff may allege in his summons that the event has occurred, and that the onus of proving that the event has occurred is on the plaintiff.

7.3.6 Defence on the merits

Once the court is satisfied that the plaintiff's claim is based on a valid liquid document, it will proceed to consider on the merits the defence which has been advanced by the defendant by way of affidavit, if any. This is where the defendant bears a heavy onus.

In provisional sentence proceedings the court is required to weigh the probabilities and should refuse on the merits the defence the provisional judgment only if the probabilities of success at trial weigh in favour of the defendant. Where the defendant does not discharge the onus of establishing this, the court has no discretion and must grant provisional sentence. Thus, the rules regarding both the onus and the exercise of the court's discretion favour the plaintiff in provisional sentence proceedings, whereas in summary-judgment proceedings they favour the defendant. If the defendant discharges the onus, then provisional sentence should be refused.

7.3.7 Further procedure where application refused

If the court refuses to grant provisional sentence, it may order the defendant to file a plea within a stated time and may make such order as to the costs of the proceedings as to it may seem just. Thereafter, the provisions of the rules as to pleading and the further conduct of trial actions mutatis mutandis apply – rule 14A(8).

7.3.8 Further procedure where application granted

If the court grants provisional sentence, the provisional judgment will become final if the defendant does not give notice within two months of the judgment being granted that the matter should proceed to trial. In the majority of cases in which provisional sentence is granted, the defendant does not take the matter to trial and the judgment becomes final. If, however, such notice is given, the matter proceeds to trial in the normal way, with the opposing affidavit serving as a plea and any replying affidavit serving as a reply.

7.4 Applications for rescission of judgment

See J & B Act 147--156A, Rule 49--1 to 49--13; Harms section 20

7.4.1 Introduction

Section 36 of the MCA empowers a Court to

(a) rescind or vary any judgment granted by it in the absence of the person against whom that judgment was granted;

(b) rescind or vary any judgment granted by it which was void ab origine (from the outset) or which was obtained by fraud or by mistake common to both the parties;

(c) correct patent errors in any judgment in respect of which no appeal is pending; and

(d) to rescind or vary any judgment in respect of which no appeal lies.

The most common type of application for rescission of judgment is the first type – applications for the rescission of judgments granted in the absence of the person against whom the judgment was granted, commonly known as default judgments. The reason why applications for rescission of default judgments are so frequently brought in the Magistrates' Courts is probably that the rules relating to service of summons are not as strict as the High Court rules are, in that they allow service by registered post or by way of pinning the summons to the door of a domicilium citandi et executandi, and therefore the summons often does not come to the attention of the defendant.

7.4.2 Procedure generally

Rule 49 regulates applications for rescission of judgment. Rescission and variation of default judgments are dealt with by subrules (1) to (6). Applications for rescission or variation of other judgments are regulated by subrules (7) and (8). Subrule (9) provides

that a magistrate who of his or her own accord corrects errors in a judgment in terms of s 36(1)(c) of the Act shall, in writing, advise the parties of the correction. The provisions of rule 55 apply to these applications in so far as there are no specific provisions in rule 49.

7.4.3 Applications for rescission of default judgments

Default judgments are most frequently granted where the defendant fails to enter an appearance to defend, but may also be granted in other circumstances, such as:

- where the defendant fails to deliver a plea;
- where either party fails to appear at trial – rule 32 ;
- where either party, though in court at commencement of the trial, fails to remain in attendance until judgment; or
- where summary judgment is granted against a defendant in his absence.

In terms of rule 49(1) an application for rescission of a default judgment must be brought within 20 days after the person affected by the judgment obtained knowledge of the judgment. Rule 49(2) provides that it will be presumed that the applicant had knowledge of the default judgment 10 days after the date on which it was granted, unless the applicant proves otherwise.

Before 1997, rule 49 reflected the common-law principle that an applicant for a default judgment was always required to satisfy the court with regard to two things –

- that he was not in wilful default, in the sense of ignoring the summons or failing to take steps to deal with the matter despite having received the summons; and
- that he had a good defence.

In 1997 the Rules Board substituted a new rule which allows the court, in certain circumstances, to grant a rescission despite the absence of a defence to the claim. The rule was amended because the commercial practice of blacklisting people against

whom default judgments had been granted meant that blacklisted debtors were unable to obtain credit, or even to obtain salaried employment, even though they may have settled the debt.

Rule 49(4) caters for a defendant who was not in wilful default, but does not wish to defend the proceedings, and has satisfied the judgment or made arrangements to satisfy it. Rule 49(5) applies where a plaintiff has consented to rescission of a default judgment. In *Venter v Standard Bank of South Africa* [1999] 3 All SA 278 (W) it was held that rule 49(5) was ultra vires, because the common-law requirement that a debtor should have a defence in order to be able to obtain a rescission of a default judgment applied, and the Rules Board does not have the power to change the common law. Section 36 of the Act has now, however, been amended to empower courts to grant a rescission in these circumstances. Written proof of the consent needs to be attached.

Rule 49(3) caters for an applicant against whom default judgment has been granted, but who has a defence and wishes to defend the action. This subrule requires such an applicant to file an affidavit setting out the reasons for the defendant's absence or default and the grounds of the defendant's defence to the claim. This reflects the common-law principle that the applicant must show absence of wilful default and a good defence. It has been held that the defendant must furnish an explanation of the default which is sufficient to enable the court to understand how it came about and to assess the defendant's conduct. With regard to the grounds of defence, it is sufficient if the applicant (defendant) makes out a prima facie defence in the sense of setting out averments which, if established at the trial, will result in the plaintiff's claim being dismissed or judgment being given for the defendant. The defendant does not have to show a probability of success. See J & B Rule 49--8; Harms 20.1-2.

The refusal by a Magistrate to rescind a default judgment has the effect of a final and definitive judgment, and is therefore appealable in terms of s 83(b) of the MCA.

7.5 Applications for interdicts

See J & B Act 87--102

7.5.1 Introduction

An interdict is an order of court whereby a person is ordered to refrain from doing a particular act or is ordered to perform a particular act. An interdict is not an appropriate remedy for the past invasion of rights. It is a remedy which is appropriate where a person requires protection against ongoing unlawful interference with his rights, or in respect of threatened unlawful interference with his rights.

An interdict can be claimed either by way of trial action or by way of an application brought in terms of s 30 of the MCA and rule 56. Issues of jurisdiction relating to interdicts are dealt with in part 2.2.8. The remedy for breach of an interdict is committal for contempt of court – see J & B Act 101.

7.5.2 Categories of interdict

First, interdicts can be divided into prohibitory and mandatory interdicts. A prohibitory interdict is an order requiring a person to abstain from committing a threatened wrong or to desist from a continuing wrongful act. A mandatory interdict is an order requiring a person to do some positive act to remedy a wrongful state of affairs for which he is responsible, or to do something which he ought to do if the complainant is to have his rights.

A distinction should also be made between final interdicts and interlocutory interdicts. The distinction is important, because the requisites for a final interdict are different from those of interlocutory interdicts. A final interdict is an interdict which is granted (as a rule) without any limitation as to time. It is granted in order to secure a permanent

stopping of unlawful conduct or an unlawful state of affairs. Here, regard should be had to the substance rather to the form of the relief sought. Thus, in an application to enforce a restraint of trade for the full unexpired time of the restraint, the relief sought is final though the form of the order is for interim relief. An interlocutory interdict is one which is granted pendente lite. It is a provisional order designed to protect the rights of the complainant pending an action or application to be brought to establish the respective rights of the parties. It does not involve a final determination of the rights of the parties and it does not affect that determination. Its effect is to 'freeze' the position until the court decides where the right lies, at which point it ceases to operate.

7.5.3 The purposes for which an interdict may be granted

An interdict, whether it is final or interlocutory, may be granted for a variety of reasons and in respect of a variety of things. The following are examples:

- to prohibit the commission of a delict or a crime;
- to restrain infringements of an owner's rights of enjoyment of property;
- to restrain a breach of a statutory provision;
- to restrain a bank from handing over money;
- to restraining a debtor from dispensing with or concealing property, pending the outcome of the action (interdict in securitatem debiti).

7.5.4 Requirements for a final interdict

There are three requirements for the grant of a final interdict, which must all be present:

- a clear right on the part of the applicant;
- an injury actually committed or reasonably apprehended;
- the absence of any other satisfactory remedy available to the applicant.

The phrase 'clear right' relates to the degree of proof required to establish the right, and entails that the applicant must have a right in terms of the substantive law and that

he or she is able to prove the right on a balance of probabilities, as in all civil matters – *Webster v Mitchell* 1948 (1) SA 1186 (W) at 1188; qualified in *Gool v Minister of Justice* 1955 (2) SA 682 (C) 688D--E.

Injury committed or reasonably apprehended – the word 'injury' refers to an infringement or violation of rights. What must be established is proof of some act actually done showing interference with the applicant's rights or a well-grounded apprehension that acts of the kind will be committed by the respondent. The absence of any possible prejudice to the applicant will result in the refusal of the interdict.

No other remedy – an interdict will be granted only if there is proof that there is no other satisfactory remedy available to the applicant. An interdict is regarded as a drastic remedy and therefore a court will normally not grant an interdict where the applicant can obtain adequate redress by way of some other form of relief, such as damages. The applicant must allege and establish on a balance of probabilities that there is no alternative adequate legal remedy.

7.5.5 Requirements for an interlocutory interdict

The applicant for an interlocutory interdict has to establish the following:

- a *prima facie* right;
- a well-grounded apprehension of irreparable harm if the interim relief sought is not granted and the ultimate relief is eventually granted;
- a balance of convenience in favour of the granting of the interdict;
- the absence of any other satisfactory remedy.

Prima facie right – the degree of proof with regard to the establishment of a right on the part of the applicant is less exacting than is required for a final interdict. In *Webster v Mitchell* (above), it was held that it is not necessary for an applicant for a temporary

interdict to show a right on a balance of probabilities, but that if the right is 'prima facie' established, although open to some doubt, that would be sufficient.

Irreparable harm – the second requirement for an interlocutory interdict is a well-grounded apprehension of irreparable harm if the interim relief is not granted. An example would be the loss of property in circumstances where its recovery is impossible.

Balance of convenience – the third requirement is that there is a balance of convenience in favour of the granting of the interim relief. The court must weigh the prejudice to the applicant if the interdict is incorrectly refused against the prejudice to the respondent if it is incorrectly granted.

No other satisfactory remedy available – the fourth requisite for the granting of an interlocutory interdict is the absence of another adequate ordinary remedy. Within the context of interlocutory interdicts, this requirement is closely linked with that of irreparable harm, for if the injury envisaged will be irreparable should it be allowed to continue, then an interdict will be the only remedy. On the other hand, if there is some other satisfactory remedy, it follows that the injury cannot be described as irreparable.

The above requirements apply to all kinds of interdicts except

- vindicatory interdicts; and
- possessory interdicts.

These are matters in which the plaintiff claims delivery of specific property as owner or lawful possessor. Here the applicant need not show that he will suffer irreparable loss if the interdict is not granted, since there is a presumption, which may be rebutted by the respondent, that the injury is irreparable. It is also not necessary for the applicant to show that there is no other satisfactory remedy. Special provision is made in s 30 of the MCA for a possessory interdict (mandament van spolie) to be claimed by way of

application – see part 7.6 below. There is no special provision for vindicatory relief at the instance of an owner of property to be claimed by way of application. It may be that it was intended that vindicatory relief could be claimed only by way of issue of summons, but it is arguable that because a claim for an order restoring property to its rightful owner is a claim for a type of interdict, it can be sought in terms of s 30.

7.5.6 The court's discretion

The court has discretion whether to grant an interdict or not. The extent of the discretion depends upon whether it is a final or a temporary interdict that is applied for. The discretion to refuse a final interdict is limited, and is bound up with the question whether the rights of the party complaining can be protected in any other ordinary way. On the other hand, the court possesses a general and overriding discretion whether to grant or refuse an application for interim relief. The applicant who establishes all the requisites for interim relief is therefore not necessarily entitled to relief. The court must exercise its discretion judicially, taking all the facts into consideration – J & B Act 100.

7.6 Application to restore spoliated property

See J & B Act 102--114

7.6.1 Introduction

It is a fundamental principle of our law that a person should not be deprived of possession of property without the possessor's permission or without recourse to legal process. Where this happens, a court will consider an application for an order restoring the property to the possessor. Such an order is called a mandament van spolie and is a mandatory interdict. The mandament van spolie was designed to prevent people from

taking the law into their own hands when there is a dispute over possession of property. It is a speedy remedy which provides summary relief.

Spoliation has been defined as any unlawful deprivation by another of the right of possession, whether in regard to movable or immovable property. The mandament van spolie is an order to restore the position to what it was immediately before the illegal deprivation of possession. The court hearing a spoliation application will not enquire into the lawfulness of the applicant's possession before the spoliation took place, nor will it enquire into rights of ownership. The court will only enquire whether there was a spoliation and, if so, it will restore the position to what it was before the spoliation took place.

7.6.2 Requirements

In order to be successful in obtaining a spoliation order, the applicant must allege and prove the following:

(i) peaceful and undisturbed possession of the property; and

(ii) wrongful deprivation thereof without consent or a court order.

7.6.3 Possession

It is important to distinguish between the 'right of possession' (the ius possessionis) and the 'right to possession' (the ius possidendi). A person may have a right to possession without having the thing in his possession. On the other hand, a person may be in possession of a thing without having a right to possess it. Thus, it is important to distinguish between the fact of possession and the legal consequences of possession.

The following illustrates the difference:

- An owner of a motor vehicle who keeps it in her garage and herself drives it every day will have both a right to possession and a right of possession.

- If an owner of a motor vehicle enters into an agreement in terms of which he lets his vehicle to another person, and after he has delivered the vehicle to the hirer it turns out that the agreement is for some or other reason void, the hirer will not have a right to possession but only the right of possession.

- Even a thief and a mala fide purchaser will have a right of possession, though they do not acquire a right to possession.

- If a vehicle is stolen and sold to a bona fide purchaser, the purchaser does not acquire the right to possession (because a thief cannot transfer more rights than he himself possesses), although the purchaser will have a right of possession.

Possession for the purposes of the mandament van spolie is not possession in the juridical sense. It is enough if the applicant was holding property with the intention of ensuring some benefit for himself, accompanied with the physical element of detention. Therefore, not only true possessors, such as an owner-possessor, a *bona fide* possessor, a trustee or a pledgee, may avail themselves of this remedy, but also such holders as a lessee, a bailee, a credit purchaser or an agent.

To acquire possession, effective physical control must be exercised over the thing or property concerned. It is not, however, necessary for the possession to be continuous. Our courts have found, in the case of immovable property, that the continuous presence of the applicant or his servants is not a requirement if the nature of the operations which

are conducted on the premises do not require continuous presence – *Ntshwaqela and Others v Chairman, Western Cape Regional Services Council and Others* 1988 (3) SA 218 (C). It is also not necessary that the applicant controlled the whole of the property. For instance, in the *Ntshwaqela* case the applicants occupied portion of a farm.

Where there is a marriage in community of property, would one spouse have this remedy if the other spouse removed some of the household goods and a vehicle belonging to the communal estate? In *Manga v Manga* 1992 (4) SA 502 (ZS) it was held that the mandament van spolie is available to joint possessors and that exclusive possession is not a requirement for this remedy. Even in relation to the special situation of husband and wife, a joint possessor who has been deprived of his or her share of the possession of something will be entitled to a spoliation order if the other requirement for the grant of relief is present.

7.6.4 Deprivation of possession

The second requirement for the granting of a spoliation order is proof by the applicant that there has been a deprivation of possession. A partial deprivation of possession is sufficient to warrant the grant of a spoliation order, but the mere disturbance of possession is not. Deprivation of possession does not entail that the possession of the property despoiled must have passed over to the respondent, since spoliation takes place if the applicant is deprived by the actions of the respondent of control over the property or of the exercise of a right.

It is also not necessary for the deprivation to have taken place with force or stealth. It is necessary only that the wrongful deprivation must have taken place against the will of the person dispossessed, and without recourse to legal process. Therefore spoliation will take place whether the applicant has been deprived of possession forcefully, by trick, secretly, without his knowledge or consent, or where the respondent persuades a servant having no authority to hand it over – see *Mankowitz v Loewenthal* 1982 (3) SA 758 (A).

7.6.5 Spoliation of incorporeal rights

A spoliation order may even be obtained where an incorporeal right has been violated. An incorporeal right cannot be possessed in the ordinary sense. The possession is represented by the actual exercise of the right. Therefore the refusal to allow a person to exercise the right will amount to a dispossession of the right. In spoliation proceedings one must ask whether the applicant exercised the rights, rather than whether the applicant owned the rights, and whether the applicant has been unlawfully prevented from the further exercise of the right – *Tigon Ltd v Bestyet Investments (Pty) Ltd* 2001 (4) SA 634 (N); *Xsinet (Pty) Ltd v Telkom SA Ltd* 2002 (3) SA 629 (C). The *Tigon* case dealt with interference with the rights of a company shareholder by cancelling the issue of the shares and deleting the shareholder's name from the share register. Another example of an incorporeal right is the right of the holder of a servitude. It would not be necessary to prove the existence of a valid servitude, since proof of exercise of the servitude would be enough for the purposes of an application for the mandament van spolie – *Bon Quelle (Edms) Bpk v Munsipaliteit van Otavi* 1989 (1) SA 508 (A).

A person who occupies premises may be entitled to a spoliation order where a service such as the supply of electricity or water is cut off. In *Zinman v Miller* 1956 (3) SA 8 (T) the court granted this remedy where the electricity on the premises occupied by the applicant was cut off. See also *Naidoo v Moodley* 1982 (4) SA 82 (T) and *Froman v Herbmore Timber and Hardware (Pty)* Ltd 1984 (3) SA 609 (W). However, in *Zulu v Minister of Works, KwaZulu and Others* 1992 (1) SA 181 (D) and *Plaatjie and Another v Olivier NO and Others* 1993 (2) SA 156 (O) the courts refused a spoliation order on the grounds that the applicants had not established a right to the water supply. These decisions may now be regarded as incorrect in view of the decision in *Tigon Ltd v Bestyet Investments (Pty) Ltd* 2001 (4) SA 634 (N), in which it was held that the applicant is required to prove only interference with a factual position, not the physical existence of the right – at 641A--642E.

7.6.6 Defences

There are three defences that a respondent can raise in spoliation proceedings:

(i) denial; or

(ii) restoration impossible; or

(iii) counterspoliation.

Denial

The respondent can deny the facts alleged by the applicant by:

(a) Pleading that the applicant did not possess the property in dispute at the time of the alleged spoliation. This entails a denial that the applicant had the necessary physical control of the property or that the applicant exercised the right concerned.

(b) Denying that the act alleged was one of spoliation, or claiming that it was legally justified. The respondent may allege that the applicant had consented to the removal of the property or that his actions were lawful by virtue of an order of court or under a statutory provision. A public officer commits spoliation if he uses statutory powers given to him for one purpose in order to seize property for some other purpose.

Restoration impossible

Restoration may be impossible because:

(a) The property has been destroyed, irreparably damaged or lost. The question arises whether the court can order the respondent to replace the property destroyed with similar property, for instance

building materials. The court in the matter of *Fredericks v Stellenbosch Divisional Council* 1977 (3) SA 113 (C) was of opinion that this can be done. However, this decision has been strongly criticized. The essence of the mandament van spolie is to restore the same property, not to make good damage by replacing it with other, similar property.

(b) The spoliator has parted with the possession of the property to a third party. A spoliation order may not be granted against a third party to whom possession has passed, unless that third party is so closely associated with the spoliation that he can be regarded as a spoliator.

Counterspoliation

In certain circumstances, the law allows a despoiled possessor to retake possession from the spoliator without first obtaining the assistance of the court to do so. Here, although the respondent will admit that he despoiled the applicant, he avers that his act of spoliation amounted to a lawful counterspoliation. It is essential that the counterspoliation took place there and then – following immediately upon the spoliation. In such an instance, the respondent will be regarded as never having lost possession and the original spoliator cannot succeed in a spoliation application against the respondent. If, however, the dispossession has been completed, then the effort at recovery is regarded as a new act of spoliation.

For case law relevant to the defences which may raised, see J & B Act 111--114.

7.6.7 Onus of proof

It is not sufficient for an applicant for a spoliation order to make out a prima facie case for the relief sought. The facts necessary to justify a final order must be proved – J & B

Act 110. In other words, it must be proved that the applicant exercised control over, or the use of, what was spoliated; and that the interference with that factual position took place without the applicant's consent or the authority of a court order.

A spoliation order has been described as an extraordinary and robust remedy. Save for some recognized defences, the right is an absolute one, so that discretion and considerations of convenience do not enter into the matter. Once the applicant has discharged the onus of proving possession and deprivation thereof without consent, and no recognized defence has been raised with success, the court has no discretion at all to refuse the order.

7.6.8 The order

The object of a mandament van spolie is to restore the situation which existed before the spoliation (the status quo ante). Where the court orders restoration of the position which existed before the spoliation, the property must be restored to the applicant, or the applicant must be allowed to continue to exercise the right previously exercised. Although a spoliation order may be regarded as being of an interim or preliminary nature in the sense that it merely determines the question of immediate possession and is often followed by further litigation as to the rights of the parties to the property, it is not an order pending another process, and is therefore not truly interim. It need not be followed by further litigation and may stand alone. Although it may not resolve the ultimate rights of the parties, it is a final determination of the immediate right to possession.

The authors of Jones & Buckle at Act 105 state that the fact that the mandament van spolie is a final order has three important results:

- It is not sufficient for the applicant merely to make out a *prima facie* case – the applicant must prove its case on a balance of probabilities as in a normal civil trial.

- It is an order having the effect of a 'final' judgment.

- An order for costs should be made in spoliation proceedings – an order should never be made that to the effect that costs will depend on the outcome of some other action.

Although rule 56 provides that the application may be brought ex parte without notice to the respondent, in *Office Automation Specialists CC and Another v Lotter* 1997 (3) SA 443 (E) the court cautioned that an applicant who proceeds ex parte without making out a case for dispensing with notice to the respondent does so at its peril. Therefore, a court should not grant a spoliation order on an ex parte basis unless the applicant presents facts which convince the court that there is a real danger of the property being destroyed, harmed, spirited away or hidden in order to defeat the purpose of the application.

7.6.9 Delay and the discretion of the court

The court has a discretion to refuse an order for a mandament van spolie on account of delay in bringing the application, because no relief of any practical value can be granted after undue delay. The common-law bar of one year on the mandament van spolie is, according to Jones & Buckle Act 114, a guide to modern practice, and an application for the mandament which is delayed for more than one year will be granted only if there are special circumstances which justify this delay.

7.7 Applications for the attachment of things

See J & B Act 86--7.

7.7.1 Introduction

This kind of application is most commonly used where a supplier institutes action for the recovery of goods let to the defendant or sold to the defendant in terms of a credit agreement. At the time when the action is instituted, the plaintiff also brings an application in terms of s 30 to have the goods attached so that they can be held in safe custody pending the outcome of the action. For many years it was expected that courts would almost invariably grant such an order if the applicant alleged that continued possession of the goods by the respondent would be prejudicial to the applicant, for instance in that the goods will deteriorate by continued use – *Loader v De Beer* 1947 (1) SA 87 (W). This expectation has been upset by the decision in *BMW Financial Services (SA) (Pty) Ltd v Rathebe* 2002 (2) SA 368 (W), in which it was held that a real fear of risk of harm to property must be established.

The courts' willingness to grant applications for attachment in the circumstances described has been based upon the fact that the applicant who let goods to the respondent, or sold goods to the respondent in terms of a credit agreement, is, in terms of those contracts, the owner of the goods. Where the respondent is the owner of the goods sought to be attached, the courts would need to be convinced that there is good reason for an attachment pending the outcome of an action, since a court will not interfere lightly with a person's right to the use of his own property. It may be possible to apply for the attachment of assets for the purpose of having property to execute against once judgment is granted (attachment in securitatem debiti), but this is an order which a court will make only under exceptional circumstances, for instance if there is evidence that the defendant is about to remove the assets from the Republic to put them beyond the reach of attachment in execution of judgment – J & B Act 87 fn1.

7.7.2 Requirements

The requirements for obtaining an attachment of property pending the outcome of litigation are the same as those for obtaining a temporary interdict – see *Eriksen Motors*

(Welkom) Ltd v Protea Motors, Warrenton and Another 1973 (3) SA 685 (A) at 691A--E; and part 7.5.5 above. With reference to the requirements for such an order

- the prima facie right will generally be proved with reference to the contract and the respondent's breach thereof;
- the well-grounded apprehension of irreparable harm if the interim relief sought is not granted and the ultimate relief is eventually granted must now be strongly motivated in view of the decision in *BMW Financial Services (SA) (Pty) Ltd v Rathebe* 2002 (2) SA 368 (W);
- the applicant must establish a balance of convenience in favour of the granting of the attachment order;
- the applicant must satisfy the court that there is no other satisfactory remedy.

If the application is moved ex parte, the applicant must make out a good case for dispensing with the giving of notice to the respondent – *Office Automation Specialists CC and Another v Lotter* 1997 (3) SA 443 (E).

The Credit Agreements Act 75 of 1980 does not prohibit the granting of an order of attachment of the goods pendente lite – see J & B Act 87.

7.7.3 The court's discretion

The court must be satisfied that the applicant has established a prima facie right, a well-grounded apprehension of irreparable injury and the absence of any ordinary remedy. With regard to the balance of convenience, the court must weigh the prejudice to the applicant if the interdict is incorrectly withheld against the prejudice to the respondent if it is incorrectly granted.

In *Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton and Another* 1973 (3) SA 685 (A) at 691E--H the Appellate Division held that the above considerations are not individually decisive, but are interrelated. For instance, the stronger the applicant's

prospects of success, the less the need to rely on irreparable harm. Conversely, the greater the doubt as to the applicant's right to the relief to be claimed in the action, the more the need for the other factors to favour the applicant. The court must consider the interrelation of these considerations with reference to the affidavit/s before it and the facts and probabilities that emerge therefrom. This is what the courts did in both the *Eriksen Motors* case and the *BMW Financial Services* case.

7.7.4 The order

If the application is granted, the sheriff should be ordered to hold the goods until judgment is given and release them before then only if sufficient security is given.

Confirmation by the court of an interim attachment in the judgment granted in the action operates, in terms of s 30(2), as an extension of the attachment until execution or further order of the court – J & B Act 87.

7.8 Applications for arrest tanquam suspectus de fuga

See J & B 7 Act 82--6

7.8.1 Introduction

This is an application which can be brought by a creditor who believes that his debtor is about to flee the Republic for the purpose of evading payment of his debts. The purpose of an application for arrest tanquam suspectus de fuga is to assist the creditor to keep the debtor within the court's area of jurisdiction.

The question whether arrests tanquam suspectus de fuga are constitutional was raised but not decided by Sachs J in *Coetzee v Government of the Republic of South Africa; Matiso and Others v Commanding Officer, Port Elizabeth Prison and Others* 1995 (4) SA 631 (CC) at 658A--D, but in *Himelsein v Super Rich CC and Another* 1998 (1) SA

929 (W) at 936B--D Cameron J expressed doubt as to the constitutionality of the procedure. See also *Alliance Corporation Ltd v Blogg: In re Alliance Corporation Ltd v Blogg and Others* [1999] 3 All SA 262 (W). For a detailed argument supporting the view that arrests tanquam suspectus are unconstitutional, see Mervyn Dendy 'Attachment to Found or Confirm Jurisdiction, and Arrest Tamquam Suspectus de Fuga: A Long-standing Lacuna Filled' (1999) 116 SALJ 586 at 603--10. In the discussion which follows, it will be assumed that such arrests may still lawfully be made, although this proposition must now be considered as open to serious doubt.

The right to attach property of a person in fuga or suspectus de fuga to protect the interests of creditors is very closely related to the right to attach the person of a debtor suspectus de fuga: the principles attaching to each are but the courts more readily authorize the attachment of property to provide security for the alleged creditor's claim than the attachment of the person of the alleged debtor. Courts have frequently attached money to protect a claimant until such time as a judgment is obtained (see part 7.7 above and J & B Act 115ff).

7.8.2 Jurisdiction

At the time when the application is brought, the debtor must be within area of jurisdiction of the court – *Ex parte Boshoff* 1972 (1) SA 521 (E). In *Mfeya v Wilson* 1995 (1) SA 420 (TK) it was held that such a writ could not be issued in respect of debtor who had already fled the Transkei. A court cannot grant such an application if it has no jurisdiction in respect of the claim which the creditor seeks to enforce – *Hermes Versekeringsmaatskappy v Dartnell* 1980 (4) SA 279(W). The main action against the defendant must be within the court's jurisdiction under ss 28 and 29, and the defendant must not yet have left the Republic. Once the arrest has been authorized, however, it may be carried out within the area of any district Magistrate's Court by virtue of s 4(3) of the MCA, which provides that every process issued out of a Magistrate's Court shall be of force throughout the Republic.

7.8.3 Procedure and requirements

The application must be brought in terms of rule 56. The applicant's affidavit must set out fully the grounds on which it is alleged that the respondent is indebted to the applicant. In terms of s 30(3) an order of arrest tanquam suspectus de fuga may be made only if the cause of action appears to amount, exclusive of costs, to at least forty rand and the applicant has no security for the debt or, if there is security, it falls short of the amount of the debt by at least forty rand.

The affidavit accompanying the notice of application should set out the name, address and occupation of the plaintiff, so that if the defendant desires to satisfy the plaintiff's claim, he knows where to reach the plaintiff, and also to enable the defendant to find the plaintiff should the arrest prove to be unlawful. It must contain the full name, address and occupation of the defendant, so that the sheriff may know whom to arrest, and the cause of the debt, the amount of it and the security, if any, held by the plaintiff. If the defendant is a peregrinus (foreigner of the Republic of South Africa), that fact should be stated.

The applicant must satisfy the court that it appears that the respondent is about to remove from the Republic – s 30(3)(c). In terms of case law (J & B Act 85), the applicant must establish that the respondent

- has an immediate intention of leaving the country;
- intends leaving the Republic permanently – *Roveda v Lorini* 1952 (3) SA 855 (T); *Green v James* 1973 (4) SA 114 (R); and
- is leaving with the object of evading payment of debts – *Sanddune CC v Catt* 1998 (2) SA 461 (SE).

This type of application will always be brought ex parte. Despite the fact that the reasons for proceeding ex parte are obvious, it is nevertheless good practice for the applicant to make allegations as to why notice has been dispensed with.

7.8.4 The order and writ of arrest

If the court grants the order, it does so in the form of a rule nisi which will operate as an order for the temporary arrest of the defendant, and which will call upon him to show cause on the return day named in it why the order should not be made final. The order should be drawn up in accordance with Form 17 of Annexure 1 to the Rules.

7.8.5 The return day

On the return day of the writ, unless security has been given earlier, the plaintiff moves for confirmation of the rule nisi and the defendant has an opportunity of showing cause why the writ should not be confirmed. If it is confirmed, the defendant returns to gaol until judgment is given or until he gives adequate security.

7.9 Attachment to found or confirm jurisdiction

See J & B Act 115--128A, Harms 6.7--8.

7.9.1 Introduction

Section 30bis of the MCA gives Magistrates' Courts the power to order the attachment of a person or property to found or confirm jurisdiction for the purposes of an action to be brought against a person who does not reside in the Republic (a peregrinus). The cause of action must be within the court's jurisdiction and the claim must amount to at least forty rand (exclusive of costs). The section also provides that the court may give directions as to the manner in which service is to be effected, since service cannot be effected in terms of rule 9 when the defendant is outside the Republic – J & B Act 115.

In the past the arrest of the person instead of attachment of property was competent, except for certain categories of person as set out in Jones and Buckle Act 120. Attachments of the person may, however, now be unconstitutional for reasons similar to those applicable to arrests tanquam suspectus de fuga (see part 7.8.1 above). Attachments of property, on the other hand, present no such difficulties, and appear to be constitutional. In the discussion which follows, it will be assumed that all attachments are constitutional, in the absence of binding case authority invalidating them.

The purpose of an attachment may be to found a jurisdiction which would not otherwise exist (attachments ad fundandam jurisdictionem) or to furnish some security for the execution of a possible order of court in a case where the court already has jurisdiction prior to the attachment on a ground other than that the defendant resides within the court's area of jurisdiction, for example where the whole cause of action arose within the area of jurisdiction (attachments ad confirmandam jurisdictionem).

An attachment to found jurisdiction has a twofold purpose:

a) to create jurisdiction where no other ground of jurisdiction exists at all, and

b) to provide an asset which may be executed against upon obtaining judgment.

An attachment to confirm jurisdiction serves only the second purpose. Where both parties are peregrini, in the sense that neither resides within the court's area of jurisdiction, then only an attachment to confirm jurisdiction is competent – ie there must be a basis on which the court has jurisdiction in terms of s 28.

The application for attachment of person or property in terms of this section must be brought before summons is issued and not during the course of the main proceedings.
If the plaintiff discovers only after summons has been issued that the defendant is a peregrinus, the summons must be withdrawn and the proceedings must be reinstituted. This is because the attachment is essential to the court's exercise of jurisdiction and must, therefore, be in place when the action is instituted.

7.9.2 When is attachment necessary?

Attachment is necessary where the claim sounds in money and where the respondent is resident outside the Republic. An attachment is unnecessary

- in proceedings in which delivery of property situated within the Republic is claimed;
- where the claim is for ejectment not coupled with a claim for arrear rental – *Sandton Square Finance (Pty) Ltd and Others v Biagi, Bertola and Vasco and Another* 1997 (1) SA 258 (W);
- in subsidiary proceedings if the court already has jurisdiction in the main action between the parties; or
- where the defendant submits to the jurisdiction of the court before the attachment is made – *American Flag plc v Great African T-shirt Corporation CC* 2000 (1) SA 356 (W); *Jamieson v Sabingo* 2002 (4) SA 49 (SCA) [21]–[23].

If a peregrinus is arrested and brought before a magistrate and it appears that he clearly has no assets or is in no position to provide security, then the purpose of the arrest falls away and no court should allow the arrest to continue – *Fillery's Home Utilities (Pty) Ltd v Easiwork Ltd and Another* 1940 NPD 118. This must also apply if there is no property to be attached.

7.9.3 Procedure

Rule 57 governs this type of application.
The applicant is required to show:

- a prima-facie cause of action against the defendant on affidavit;
- that the defendant is a peregrinus;
- that the defendant or the property is within the area of jurisdiction of the court; and
- that the property belongs to the peregrinus.

The court may require such additional evidence as it may think fit – rule 57(3)

There is generally good reason for these applications to be brought ex parte, but the applicant should nevertheless make allegations as to why notice to the defendant has been dispensed with.

7.9.4 The order and further proceedings

Form 18 of Annexure 1 to the Rules prescribes the order, in accordance with rule 57, which directs the sheriff to effect the attachment. Once property has been attached to found or confirm jurisdiction, the applicant cannot make a subsequent attachment if new property of the peregrinus is found. The moment security is furnished for the attachment, the property or person attached must be released. The court cannot, however, force the peregrinus to furnish security.

Applications for attachment are generally coupled with an application for directions as to how the summons should be served – rule 57(2)(c). The application usually suggests an appropriate mode of service, with reference to the relevant evidence as to the defendant's whereabouts, but the court is not bound to adopt the suggested mode of service.

The court may, before granting an order of attachment, require the applicant to give security for any damage which may be caused by such order.

The costs order usually made is that the costs be 'costs in the cause'.

On the return day of the writ, unless security has been given earlier, the plaintiff moves for confirmation of the rule nisi and the defendant has an opportunity of showing cause why the writ should not be confirmed.

7.10 Attachment of property in security of rent

See J & B Act 130--7.

7.10.1 Introduction

At common law a landlord has a tacit hypothec over the movable property on the leased premises for the rent due by the tenant, including, with certain qualifications, the movable property thereon belonging to subtenants and third persons. The hypothec is completed without judicial attachment, but operates only as long as the goods remain on the premises – as soon as the goods are removed from the premises, the hypothec is lost. There are two procedures in the MCA which are designed to enable the landlord to enforce the hypothec:

- In terms of section 31, a so-called rent-interdict summons can be issued by the landlord, containing a notice prohibiting any person from removing any of the furniture or other effects on the premises which are subject to the plaintiff's hypothec for arrear rental until an order relative thereto has been made by the court. However, this interdict is difficult to police, and if the tenant should decide to remove the movable property from the leased premises, the landlord will lose the hypothec over the goods. The section 31 summons is thus of little practical value without attachment of the goods in terms of section 32 to enforce it.

- Section 32 provides that a landlord may bring an ex parte application to the court for an order to attach the movable goods on the leased premises to serve as security for the arrear rental. An order in terms of section 32 to attach the property will prohibit the tenant or anybody else from removing the goods from the premises. Once the goods are attached and removed, the landlord's right in respect of the goods is effectively secured.

The sheriff does not usually remove the goods, but makes an inventory which is proof of what goods were on the premises. A criminal offence is committed if, after attachment of goods, the tenant removes those goods from the premises. The landlord or his legal representative may also request the Clerk of the Court when issuing the attachment order to authorize the sheriff to remove the goods from the premises immediately, but a court should be careful when weighing the prejudice which this may cause the defendant – see rule 41(7)(a). Rule 42(3) provides that the method of attachment of property under section 32 of the Act shall mutatis mutandis be the same as that of attachment in execution.

The purpose of the attachment is therefore to confirm the hypothec, so that the goods may be executed against once a judgment for arrear rental has been granted.

7.10.2 Procedure and requirements

The application may be brought ex parte in terms of rules 56(1) and (2). The landlord should allege that it is feared that if the tenant is given notice of the application, the goods may be removed before the attachment is effected.

The applicant must either already have issued a summons claiming, inter alia, the arrear rental or do it simultaneously with the bringing of the application. The Magistrate must make sure that this is the case.

Form 9 of Annexure 1 to the Rules sets out the affidavit to be made under section 32 of the Act. The applicant should allege:

- that the applicant is the landlord and the respondent is the tenant in respect of the premises, and what the terms of the lease are;

- that an amount of rent not exceeding the jurisdiction of the court is due and is in arrear – s 32(1);

- that the court has jurisdiction to entertain the order for attachment because the leased premises are situated in the district of the court to which the application in terms of section 32 is made;

- in terms of section 32(1) either:
  - that he has demanded the payment of the overdue rent in writing and that the rent has remained unpaid for a period of at least 7 days; or
  - if no such demand was made, that the tenant is believed to be about to remove the movable property from the premises in order to avoid the payment of the overdue rental.

  If the application is brought under the second ground, the court will not require the strictest proof that the tenant intended to remove the property, and comparatively slight evidence will be needed. It will be sufficient if the landlord shows he has reasonable grounds for his apprehension – *Timmerman v Le Roux* 2000 (4) SA 59 (W) at 65C--E.

Section 32 (1) requires that security must have been given to the satisfaction of the Clerk of the Court to pay all damages, costs and charges which the tenant or any other person may sustain or incur by reason of the attachment if the attachment be thereafter set aside. The manner of providing security is set out in Form 10 of Annexure 1 to the rules.

Before the applicant can apply for attachment, the rent must be due and unpaid: the rental must be in arrear. An order cannot be granted to secure the payment of rental which is about to become due.

Since the landlord's hypothec is only of force as long as the goods remain on the premises, the applicant must allege that at the time of the application, the goods are on the premises.

The value of the goods to be attached should be the same as the amount claimed for the arrear rental. It is important to note that the landlord's hypothec is available only in security of arrear rental and does not extend to the fulfilment of any other obligations of the tenant. Thus, arrear electricity, other levies or damages after cancellation of the lease agreement are not covered by the hypothec, and the landlord will only be able to attach sufficient property on the premises to satisfy the arrear rental and the rental alone. As far as damages are concerned, it is important to note that rental damages may be claimed only as long as the lease agreement is in existence.

7.10.3 Goods to be attached

Not all goods on the leased premises may be attached, but only those that are subject to the landlord's hypothec. This includes goods driven or carried on to the premises. In addition to goods as such furniture, appliances or motor vehicles belonging to the tenant, the hypothec will cover animals and crops growing or gathered. Money is subject to the landlord's hypothec, but apparently not securities such as cheques, incorporeal rights, etc.

The goods on the premises that are subject to the landlord's hypothec may belong to the tenant or to a subtenant (or a third person – see discussion below). The subtenant is liable to have his movables upon the leased premises attached in security of rent due by the tenant to the landlord. However, where the sublease is bona fide, the subtenant is liable to have his property attached only to the extent of the amount of rent owned to his own landlord, the tenant under the head lease. On the other hand, where the sublease is invalid or illegal, some courts have held that this liability may be for the same amount as that of the tenant, while others seemed to disagree with them – see J & B Act 134.

As far as the attachment of goods of a third person, who is neither lessee or sublessee, is concerned, such goods are subject to the hypothec if the following two conditions are fulfilled:

The goods must have been brought on to the premises with the third person's knowledge and consent (either express or implied) that they should be subject to the landlord's hypothec, for example if the owner of the goods allowed then to remain on the premises for the use of the tenant permanently or for an indefinite period, without giving notice to the landlord when in a position to do so. It follows that if the landlord knew that the goods belong to a third party, he cannot obtain a hypothec over it, and therefore to avoid the hypothec, the owner of the goods should notify the landlord, before the rental owed by the tenant falls into arrears. A registered letter will be sufficient. The consent of the owner may be implied. The onus of proving consent will be on the landlord, who must show that the owner of the goods knowingly allowed the goods to remain on the premises with some degree of permanence for the use of the tenant without the landlord being given notice of his ownership. Consequently, where the landlord, after having been notified by the owner, disposes of the goods without informing the buyer of the notice, such notice is effective against the buyer if the owner of the goods was unaware of the transfer of ownership. However, if the tenant moves the goods belonging to a third party to the premises of a new landlord, it is for the owner of the goods to notify the new landlord of his ownership, if he has knowledge or the means of acquiring knowledge of the move.

There is also a requirement that the goods must be on the premises with some degree of permanence. The goods need not be brought on to the premises for the duration of the lease, but must be there for an indefinite period. Goods on the premises for a necessarily temporary purpose are not subject to the hypothec, for example a TV set hired on a monthly basis, goods for sale in an auction room, etc. According to Jones & Buckle Act 135, goods bought on credit in terms of the Credit Agreements Act 75 of 1980 would be on the premises for an indefinite period and therefore would be subject to the landlord's hypothec. However, s 2 of the Security by Means of Movable Property

Act 57 of 1993 provides as follows:

> '(1) Notwithstanding anything to the contrary in the common law or in any other law, movable property –
>
> (b) to which an instalment sale transaction as defined in section 1 of the Credit Agreements Act, 1980 (Act 75 of 1980), relates, shall not be subject to a landlord's tacit hypothec.'

The remedy available to the third person whose goods on leased premises are attached will be to bring interpleader proceedings, provided for by MCA s 69 and rule 44.

7.10.4 Remedies available to the tenant

The tenant or any person affected by an attachment is empowered by MCA s 32(2) to oppose the interim order on the return date by filing an opposing affidavit. These people will also be able to anticipate the return date named in the order, on 12 hours' notice to the landlord. The landlord then has to discharge the onus of proving that the requisites for an attachment are present. The discharging of the interim attachment order may also be achieved by giving security for the amount claimed with costs.

7.10.5 The court's approach and the order

Where there are disputes of fact on the affidavits, they are to be resolved, if possible, on a balance of probabilities. The essence of the court's approach should be to determine whether the landlord has made out a prima facie case, even if it is open to some doubt.

The order is prescribed in Form 11 of the Annexure 1 to the Rules. It takes the form of a rule nisi, advising the respondent that he may appear before the court on a fixed day to show cause why the attachment should not be confirmed, but that the return date may be anticipated on 12 hours' notice to the applicant. It also advises that the attachment will be discharged if security is provided.

7.10.6 Consent to sale of attached property

Section 32(3) of the Act provides that a respondent whose property has been attached may by notice in writing to the Clerk of the Court admit that such property is subject to the landlord's hypothec for an amount to be specified in such notice and may consent that such property (other than property protected by s 67) be sold in satisfaction of such amount and costs. The notice has the same effect as a consent to judgment for the amount specified. Form 12 of Annexure 1 to the rules prescribes the wording of the consent-to-sale notice.

7.11 Applications for administration orders

See J & B Act 305ff; Harms part 37.

7.11.1 Introduction

Administration orders, which may be applied for in terms of section 74 of the MCA, are described by the authors of Jones and Buckle as a 'modified form of insolvency'. The procedure is designed to deal inexpensively with the affairs of debtors who have few assets and a low income, and who wish to cope with financial misfortune which has overtaken them. The underlying principle of the procedure is that the court can assist a debtor who is unable to discharge his financial obligations without sequestrating the debtor's estate.

In *Levine v Viljoen* 1952 (1) SA 456 (W) at 459H–460A, it was held –

> 'The section…provide[s] a cheap and easy method of administering the estate of a debtor who is unable to meet his liabilities, but in respect of the protection afforded to creditors and the assurance of equal distribution of assets it falls far short of the machinery of sequestration. It provides an inexpensive and

convenient means of dealing with the estates of small debtors of the salaried or wage-earning class or those whose business affairs have been simple…, but, … because of the limited facilities for investigation, it is unsuitable for use in the case of more elaborate estates where the transactions of the debtor may have been complex.'

Creditors do have certain rights in terms of s 74, including the appointment of an independent administrator and the opportunity of examining the debtor, and they are not debarred from sequestrating the debtor if necessary (s 74R).

The effect of an administration order upon the rights of creditors is that, as long as an administration order is of force and effect, creditors have no remedies against the debtor for collecting money owing, and legal proceedings which have already been instituted against the debtor are suspended – s 74P. The only debts exempted from this restriction are debts secured by a mortgage bond; debts rejected by the court which granted the administration order; and debts in respect of which the court grants leave to a creditor to proceed against the debtor. Section 74V provides for the interruption of prescription in respect of any debt listed in the debtor's statement of affairs.

Unfortunately, there is a fair amount of abuse of s 74 proceedings, because people who earn income from administering estates tend to persuade debtors that an administration order will solve all their problems. In fact, because the administrator's necessary expenses and remuneration are deducted from moneys collected before any distribution to creditors is made, it takes much longer for the debts to be settled, which tends to prejudice the debtor and the creditors. Often debtors do not understand this. Magistrates should be vigilant to ensure that the debtor understands what an administration order is and what its consequences are. The South African Law Reform Commission is presently investigating the administration-order procedure.

7.11.2 When may a court grant an administration order?

A Magistrate may grant an administration order where a debtor is unable to pay a judgment debt, or is unable to meet his financial obligations, and has insufficient assets capable of attachment to satisfy the judgment debt or his financial obligations: provided that the total amount of the debtor's obligations does not exceed the amount determined by the Minister from time to time in the *Government Gazette*. The debts which may be taken into account do not include obligations to pay money in the future (in futuro) – see J & B Act 306; *Cape Town Municipality v Dunne* 1964 (1) SA 741 (C); and *Cloete v Pearl Electric (Carletonville) (Pty) Ltd and Others* 1975 (3) SA 609 (T) at 611E.

The order may be made upon application by the debtor or when a Magistrate hearing a s 65 application relating to the execution of a judgment debt finds that the debtor has other debts and forms the opinion that the judgment debtor's debts should be dealt with collectively. In these circumstances, the Magistrate may postpone the proceedings and order the debtor to submit a full statement of his affairs, as prescribed by Form 45 of Annexure 1 to the rules, and give notice to each creditor at least 3 days before the date to which the matter is postponed for hearing – s 65I(2). The Magistrate may, in this way, effectively convert a s 65 procedure into a s 74 procedure.

The court may make an administration order subject to such conditions as it deems fit in respect of security, preservation or disposal of assets or realization of movables subject to hypothec or otherwise.

A court may not grant an administration order at the request of a debtor if it is proved that a previous administration order was rescinded within the last six months because of the debtor's non-compliance therewith, unless the debtor proves to the satisfaction of the court that the non-compliance was not wilful.

According to section 74(2) an administration order shall not be invalid merely because, at a particular time, the total debts are found to be more than the amount prescribed by

the Minister. However, the court is given a discretion to rescind the order. This subsection does not, it is submitted, give the court a discretion to grant an administration order where it is found, at the time of the application, that the debtor's debts exceed the prescribed amount. *Contra* J C du Plessis et al 1978 *De Rebus* 289, who incline towards the view that, as long as the debtor was bona fide unaware of the fact that the total amount of his debts exceeded the limit at the time of the application, the court has a discretion to grant the order. It is submitted that this view is unacceptable because the requirement is an objective one.

7.11.3 Territorial jurisdiction

The court of the district in which the debtor resides or carries on business or is employed has jurisdiction to grant an administration order upon application by the debtor, or in terms of s 65I. When the application is brought in respect of a judgment against the debtor, the court which granted the judgment will also have jurisdiction. See s 74(1).

7.11.4 Who may apply for the order?

Section 74(1)(b) makes it clear that the application must be made by the debtor, except where a magistrate hearing a s 65 application initiates proceedings under s 65I.

A question which arises is whether a person married in community of property may bring the application without the consent of his or her spouse. Section 11 of the Matrimonial Property Act 88 of 1984 was amended by section 29 of Act 132 of 1993. As a result, the matrimonial power was abolished, not only in respect of future marriages, but also marriages contracted prior to the coming into operation of section 11(2) on 1 December 1993. Section 17 of the Matrimonial Property Act deals with litigation by or against spouses. On the basis of the provisions of section 17(1), it may be argued that an applicant married in community of property must show that he or she has the written consent of the other spouse to make the application.

Section 17(1) reads as follows:

> 'A spouse married in community of property shall not without the written consent of the other spouse institute legal proceedings against another person or defend legal proceedings instituted by another person, except legal proceedings –
>
> (a) in respect of his separate property;
>
> (b) for the recovery of damages, other than damages for patrimonial loss, by reason of the commission of a delict against him;
>
> (c) in respect of a matter relating to his profession, trade or business.'

It is submitted that subsection (1) is inapplicable, as an application for an administration order clearly cannot be defined as 'legal proceedings against another person'.

Section 17(4) may, however, be applicable because it deals with an application for surrender of a joint estate, as well as an application for the sequestration of a joint estate. The provisions of this subsection are:

> '(a) An application for the surrender of a joint estate shall be made by both spouses.
>
> (b) An application for the sequestration of a joint estate shall be made against both spouses … .'

Since an administration order is a modified form of insolvency, the correct view is probably that the application for an administration order affecting a joint estate should be made by both spouses.

7.11.5 Application procedure

Section 74A requires that, together with an application, the debtor must submit a full statement of his affairs according to Form 45 of the Annexure 1 to the Rules. This form, read with s 74A(2), requires the debtor to furnish, inter alia, the following particulars:

- a detailed list of the debtor's assets and their market values;
- full particulars of the debtor's interests in property, claims in his favour, and moneys in savings or other accounts with a bank or elsewhere;
- details of income, including that of a spouse who lives with the debtor;

- particulars of deductions from income;
- a detailed list of the expenses of the debtor and his dependants;
- a complete list of the debtor's creditors, their addresses and the amount owing to each of them, making a clear distinction between debts wholly due and payable and obligations payable in futuro – see J & B Act 309;
- details of any security that any creditor has;
- full particulars of goods bought under a credit agreement;
- full particulars of any mortgage bond;
- full particulars of any asset purchased under a written agreement other than a credit agreement;
- whether an administration order was made in respect of the debtor's estate previously and, if so, details thereof; and
- the number and ages of the debtor's dependants.

The form must also state the amount that the debtor offers in instalments towards the settlement of his debts. The debtor must confirm the statements made in the form by way of an affidavit.

The Clerk of the Court must assist an illiterate debtor in the completion of the statement of affairs, upon payment of the prescribed fee – s 74A(4).

The application and statement of affairs must be lodged with the Clerk of the Court and delivered to each of the creditors (personally or by registered post) at least 3 days before the hearing – s 74A(5).

7.11.6 The hearing of the application

The hearing of the application is regulated by s 74B. The application is heard by a Magistrate. These applications may be set down on the normal application roll, or on a special roll for hearing in a court dedicated to the hearing of this kind of matter, or on the roll of the court hearing applications in terms of s 65. The debtor may appear in person or be represented by a legal practitioner. Any creditor, whether or not that creditor has

received notice in terms of section 74A(5), may attend the hearing or be represented at the hearing by a legal practitioner.

It has been suggested that applications for administration order should be held in camera. C F Eckard in *Grondtrekke van die Siviele Prosesreg in die Landdroshowe* 2ed (1990) at 351 refers to the fact that these applications are often dealt with in the so-called debtor's court (*"skuldhof"*), which deals with s 65 proceedings, and concludes from section 74B(1)(a) that only interested parties (i.e. debtors and creditors and their legal representatives) may be present. The general principle is that all proceedings are held in open court (section 5 of the MCA), except if otherwise provided for by law. While s 65 proceedings are required to be in camera, the wording of section 74B(1)(a) is not explicit on this point and there is no necessary implication that the hearing should be held in camera. Insolvency proceedings are held in open court. It submitted that that it is in the interest of creditors and potential creditors that the proceedings be held in open court. Eckard's view is therefore not supported although it is repeated in T J M Paterson *Eckard's Principles of Court Procedure in the Magistrates' Courts* 4ed (2001) at 325.

At the hearing, the court should investigate all the relevant facts with a view to deciding whether to grant the administration order. Creditors may provide proof of their debts or object to any debt listed by the debtor – s 74B(1)(a). Section 74B(1)(b) provides that every debt listed by the debtor in the Form 45 statement is deemed to be proved, subject to any amendments to the statement made by the court, unless any creditor raises an objection to the debt or the court rejects it or requires it to be substantiated by evidence. Any creditor to whose debt an objection is raised by the debtor or any other creditor, or who is required by the court to substantiate his debt with evidence, must provide proof of the debt – see s 74B(1)(c).

Where it is necessary for the court to take evidence with regard to any debt and this cannot be done immediately, the court may postpone the whole application, or it may

proceed to deal with the application and, if an administration order is granted, the debt may be added to the list of debts when it is subsequently proved.

In terms of s 74B(1)(e), the debtor may be interrogated by the court or creditors, or the legal representatives of creditors. Where a debt has been proved, that creditor may as of right examine the debtor. Where proof of a debt has been deferred, that creditor needs the leave of the court to interrogate the debtor. The debtor may be interrogated with regard to:

- his assets and liabilities;
- the present and future income of the debtor and of a spouse living with the debtor;
- his standard of living and the possibility of economizing; and
- any other factor that the court may deem relevant.

Where there is a dispute with regard to a debt other than a judgment debt, the court must decide whether to allow or reject the debt, or a part thereof – s 74B(2).

Where a debt is rejected, that creditor may institute action against the debtor for recovery of the debt or proceed with an action already instituted. If judgment is obtained, the debt must be added to the list of debts in the administration order – ss 74B(3) and (4).

7.11.7 Appointment of the administrator

Section 74E(1) provides that when an administration order has been granted, the court shall appoint a person as administrator, however, since Form 51 of Annexure 1 to the rules requires the administrator to be named in the order, it is clear that the court must have decided by the time the order is made who to appoint. The section contains no prescriptive provisions or guidelines as to who should be appointed as an administrator. In practice, the application is often drafted and/or presented to the court by or on behalf of a person who would like to be the administrator, and the debtor suggests that person as the administrator.

In *Oosthuizen v Landdros Senekal en Andere* 2003 (4) SA 450 (O) it was held that a Magistrate has a discretion as to who to appoint as administrator and is not obliged to appoint the person suggested by the debtor as administrator. In view of the widespread abuse of the procedure, it is suggested that Magistrates should give careful consideration to who should be appointed as administrator and the conditions on which the appointment should be made. In this respect, reference should be made to *Weiner NO v Broekhuysen* 2001(2) SA 716 (C), in which the court observed, at 726F--H, that the attorney who was appointed as administrator had himself drafted the administration order in such a way that it favoured him and deviated materially from standard administration orders.

A high percentage of administrators are attorneys, but people who are not attorneys, and even corporations, are sometimes appointed as administrators. Section 74E(3) requires that an administrator who is not an officer of the court or an attorney is required to give security to the satisfaction of the court for due and prompt payment of moneys acquired by virtue of the appointment to the parties entitled thereto. In *Weiner NO v Broekhuysen* 2001(2) SA 716 (C) at 725H--726C it was held that the provision in s 74E(3), which exempts a legal practitioner from furnishing security, applies to non-practising as well as practising attorneys. This is unfortunate since non-practising attorneys do not have to be in possession of a Fidelity Fund certificate, and there is therefore no claim against the Attorneys' Fidelity Fund if they misappropriate funds.

The court is responsible, in terms of s 74E, for fixing the amount of security that must be provided by the administrator. This is a responsibility which must be taken very seriously, because the Magistrate and the State may be held liable by creditors who suffer loss as a result of failure to take security at all or to take adequate security. Section 74E(4) provides that an administrator need not give security if he has given or gives security to the satisfaction of the court for the due and prompt payment to the parties entitled thereto of all moneys which may come into his possession by virtue of appointment as the administrator of the estate of any debtor, irrespective of whether the appointment was made before or after the date on which the security was given.

This refers to a blanket security which may be furnished by administrators of the estates of more than one debtor. Obviously, in fixing such security, the court must take into account the potential extent of the administrator's total liability to creditors in all the estates in respect of which he has been or may be appointed.

The appointment of the administrator becomes effective only once a copy of the order is handed or sent to the administrator by registered post, and after security has been given, if security is required to be given. The court may, for good cause, remove and replace an administrator – s 74E(2).

7.11.8 The administration order

Section 74C(1) states that an administration order must be in the form prescribed by the rules – see Form 51 and *Weiner NO v Broekhuysen* 2001(2) SA 716 (C).

The order must specify the amount of the payments to be made by the debtor to the administrator, as well as the frequency of payments. This amount must, according to section 74C(2), approximate (as nearly as possible) the difference between the debtor's income and the sum of the amount determined by the court as the reasonable amount required by the debtor and his dependants for their reasonable expenses, taking into account the debtor's obligations. The order may set out what obligations of the debtor the court took into account in determining the payments to be made – s 74C(1)(b)(iii).

The order may specify assets, if any, which may be realized by the administrator and assets, if any, which shall not be disposed of by the debtor except by leave of the administrator or the court – s 74C(1)(b)(i) and (iv). Any asset which is the subject of a transaction regulated by the Credit Agreements Act 75 of 1980 may not be realized without the written permission of the seller.

In terms of s 74D, where the administration order provides for payment of instalments out of future emoluments or income, the court must authorize the issue of an

emoluments attachment order in terms of section 65J. This section also empowers the court to authorize the issue of a garnishee order under section 72 in order to attach any debt at present or in the future owing or accruing to the debtor by or from any person (excluding the State). Further provisions relating to emoluments attachment orders and garnishee orders are to be found in s 74I.

A copy of the administration order must be handed or sent by registered post to the debtor and the administrator by the Clerk of the Court, and the administrator must then forward a copy by registered post to each creditor – s 74F.

7.11.9 Rights of creditors after the order has been granted

A creditor who receives a copy of the order from the administrator, but did not receive notice of the application for an administration order, may object and such an objection is considered by the court in terms of s 74F(4). Any creditor who wishes to provide proof of a debt owing before the making of the administration order and not listed in such order must lodge his claim in writing with the administrator, who must give notice thereof to the debtor. If the debtor disputes the claim, the matter may be placed before the court for a hearing in terms of rule 74G(5). Those who have sold and delivered goods to the debtor in terms of a transaction regulated by the Credit Agreements Act 75 of 1980 are given certain rights in terms of s 74G(7). The court may be approached to authorize the attachment and sale of such goods in terms of s 74G(8). Any person who becomes a creditor after the administration order has been granted and wants to be included in the list of creditors may proceed in terms of s 74H. If the debtor disputes the debt, the matter may be brought before the court. In this regard, it is important to note that s 74S makes it an offence for a debtor who is subject to an administration order to incur any debt without disclosing that he is subject to an administration order.

7.11.10 Failure by the debtor to make payments to the administrator

When a debtor fails to make payments as required by the administration order, the administrator may institute proceedings against the debtor in terms of s 65A to 65K of the MCA. In terms of this procedure, the debtor is given notice to appear before the court and, on failure to appear, may be arrested and brought before the court.

7.11.11 Suspension, amendment and rescission of administration orders

The court under whose supervision any administration order is being executed may at any time upon application of the debtor or any interested party reopen the proceedings and call upon the debtor to appear for such further examination as the court may deem necessary. The court may, on good cause shown, suspend, amend or rescind the order – s 74Q(1).

The court may at any time at the request of the administrator in writing and with the written consent of the debtor, amend any administration order – s 74Q(2). The court's powers on application for rescission are set out in s 74Q(3). The order for rescission must be in accordance with Form 52A.

7.11.12 Lapsing of the administration order

The administration order lapses as soon as the costs of the administration and all the listed creditors have been paid in full, and the administrator lodges a certificate to that effect with the Clerk of the Court and sends a copy of the certificate by registered post to all the listed creditors. The administrator must also inform the creditors of the debtor's last-known address.

Part 8 Execution Procedure

8.1 Introduction

The term ‘execution’ refers to the process by which a judgment creditor seeks satisfaction of the judgment debt. Satisfaction of the judgment debt may be obtained by the attachment and sale of assets owned by the judgment debtor. Where the judgment debtor does not own sufficient assets to satisfy the judgment debt, there are other procedures which may assist the judgment creditor, such as an inquiry into the financial position of the judgment debtor with a view to making an order that the judgment debt be paid off in instalments; an order for the attachment of emoluments which obliges the judgment debtor’s employer to deduct an amount from his wages and pay it to the judgment creditor; and a garnishee order in terms of which a debt owing to the judgment debtor is attached and the person owing the debt is ordered to pay the judgment creditor an amount to satisfy the judgment debt. Where a debtor has numerous creditors, the debtor may request the court to appoint an administrator to deal with payment to the various creditors, or a court enquiring into the financial affairs of the debtor may mero motu convert the proceedings into administration-order proceedings.

No judgment or order of a court would be of any use to a successful plaintiff if it were not enforceable, for the object of litigation is for the award that has been granted to materialize. If the defendant refuses to comply voluntarily with the judgment, steps must be taken to enforce the judgment.

In Roman-Dutch law and English law the two modes of execution were:

1. execution against the property of the judgment debtor, which consisted of the attachment of his property and the selling of that property; and
2. execution against the person of the judgment debtor, which consisted of the arrest and detention of the judgment debtor in order to coerce him to pay the judgment debt.

There was an important limitation on execution against the person in that execution had first to be instituted against the judgment debtor's property. Only if that was unsuccessful could execution against the person of the judgment debtor take place.

Our law today recognizes both these modes of execution. Execution against property still exists in the attachment and selling of the judgment debtor's property. Execution against the person existed until September 1995 when the imprisonment of a judgment debtor in terms of s 65F(1) of the MCA was found to be unconstitutional.

After the Constitutional Court judgment in *Coetzee v Government of The Republic of South Africa; Matiso and Others v Commanding Officer, Port Elizabeth Prison, and Others* 1995 (4) SA 631 (CC), which held that imprisonment in terms of s 65 was unconstitutional, the procedure in terms of ss 65A-M was rarely used. The main reason for this was the fact that no 'teeth' were left in the procedure. Judgment debtors could ignore s 65A(1) notices with impunity. If the judgment debtor did not arrive at court, the only option available to the Magistrate was to strike the matter off the roll. In the unlikely event that the judgment debtor arrived at court and an instalment order was made, no mechanism existed through which the judgment debtor could be forced to comply with the order made by the Magistrate. Wilful default in complying with the order did not even constitute statutory contempt of court, as the proviso in s 106 of the MCA had specifically excluded orders in terms of the s 65A--M procedures from statutory contempt of court.

To circumvent the abovementioned problem, the Magistrates' Courts Amendment Act 81 of 1997 was enacted. In terms of the provisions introduced by this Act, a warrant of arrest may be issued if the debtor fails to arrive at court. The failure of the debtor to comply with an order made by the court now constitutes statutory contempt of court in terms of s 106 of the MCA.

8.2 Execution against property

8.2.1 Executable property

Section 68 of the MCA defines the nature of the property that may be attached to satisfy a judgment debt:

- movable property – s 66(1) stipulates that execution must first be taken against movable property and then against immovable property;

- cash on hand, banknotes, cheques, bills of exchange, promissory notes, bonds or securities for money belonging to the execution debtor;

- the interest of the execution debtor in any movable property belonging to him but pledged to a third party or sold under a suspensive condition to the third party;

- the interest of the execution debtor in movable or immovable property let to him or sold to him under any hire-purchase contract or under a suspensive condition; and

- the interest of an execution debtor in a partnership or syndicate of which he is a member. It is the interest of the execution debtor and not the property itself that may be sold in execution. The only incorporeal movables capable of attachment are those enumerated in the Act. It has been held that an incorporeal right of occupation under a permit in respect of a piece of land does not fall within the scope of interest in immovable property let to the execution debtor. See *Kruger v Monala* 1953 (3) SA 266 (T).

The incorporeal right constituted by a member's interest in a close corporation was also not such a movable capable of attachment until 1997 when s 30 and s 34A of the Close Corporations Act 69 of 1984 were amended to define such an interest as a movable capable of attachment. See *Jones and Others v Trust Bank of Africa Ltd and Others* 1993 (4) SA 415 (C). If the property to be executed against falls outside this scope, the execution creditor has to approach the High Court to authorize execution.

8.2.2 Property exempt from execution

There are a number of statutory provisions that expressly exempt certain property from execution.

Pension-fund benefits

The general stipulations with regard to pension funds are found in the Pension Funds Act 24 of 1956 and the General Pensions Act 29 of 1979.

Section 37A(1) of the Pension Funds Act stipulates that no right or benefit may be attached and executed.

Section 37A (1) reads as follows:

> '(1) Save to the extent permitted by this Act, the Income Tax Act, 1962 (Act No. 58 of 1962), and the Maintenance Act, 1998, no benefit provided for in the rules of a registered fund (including an annuity purchased or to be purchased by the said fund from an insurer for a member), or right to such benefit, or right in respect of contributions made by or on behalf of a member, shall, notwithstanding anything to the contrary contained in the rules of such a fund, be capable of being reduced, transferred or otherwise ceded, or of being pledged

or hypothecated, or be liable to be attached or subjected to any form of execution under a judgment or order of a court of law, or to the extent of not more than three thousand rand per annum, be capable of being taken into account in a determination of a judgment debtor's financial position in terms of s 65 of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), and in the event of the member or beneficiary concerned attempting to transfer or otherwise cede, or to pledge or hypothecate, such benefit or right, the fund concerned may withhold or suspend payment thereof: Provided that the fund may pay any such benefit or any benefit in pursuance of such contributions, or part thereof, to any one or more of the dependants of the member or beneficiary or to a guardian or trustee for the benefit of such dependant or dependants during such period as it may determine.'

It is clear from the above that where a pensioner receives a monthly pension, it may only partially be taken into account for purposes of execution. This is the situation where there is an inquiry into the financial position of the judgment debtor in terms of s 65D. The pensioner's pension is protected up to the amount of R250 per month. Any amount exceeding R250 per month must be taken into account in determining his income.

Section 2(1) of the General Pensions Act reads as follows:

'**Prohibition on cession and attachment of annuities and benefits**

(1) No annuity or benefit or right in respect of an annuity or benefit payable under a pension law shall be capable of being assigned or transferred or otherwise ceded or of being pledged or hypothecated or, save as is provided in section 26 or 40 of the Maintenance Act 1998, be liable to be attached or subjected to any form of execution under a judgment or order of a court of law.'

If one considers the stipulation that no pension fund benefit is 'liable to be attached or subjected to any form of execution under a judgment or order of a court of law', the implication is that it may not even be taken into account during a financial inquiry in terms of s 65D even though s 37A(1) of the Pension Funds Act makes provision for it.

Despite what may seem to be the case, the stipulations in the two Acts are not incompatible. The stipulation in s 37A(1) of the Pension Funds Act enlarges on certain aspects that are not dealt with in the stipulation in s 2(1) of the General Pensions Act. The first stipulation deals with an additional point and, as such, is not in conflict with the second stipulation. The conclusion, therefore, is that the stipulation in the 1979 Act does not mean that the court is incompetent to take pension benefits into consideration during the s 65 procedure as referred to in the 1956 Act.

Other benefits exempt from execution

Section 63 of the Long-Term Insurance Act 52 of 1998 extends protection to policy benefits under certain long-term insurance policies.

Unemployment insurance benefits are protected in terms of s 44 of the Unemployment Insurance Act 30 of 1966. Section 102 of the Workmens' Compensation Act 30 of 1941 and s 32 of the Compensation for Occupational Injuries and Diseases Act 13 of 1993 protect compensation paid in terms of those Acts against attachment and execution. Section 31 of the Occupational Diseases in Mines and Works Act 78 of 1973 contains a similar stipulation.

8.2.3 When execution may take place

A warrant for execution may be issued immediately after judgment – rule 36(7). This rule applies to judgments by default and consent. Where judgment has been given in any other case (trial or application), a warrant of execution may be issued on the day

after judgment has been given, at the earliest. However, the court has the authority to approve the issuing of a warrant of execution on the same day as judgment.

The other party may, in terms of s 48(e), immediately after judgment petition the court to suspend execution. The court has the authority to grant such a suspension order on grounds of equity and reasonableness. See also s 48(f). The court may grant such an order irrespective of the manner in which the judgment has to be satisfied. This authority is helpful in the case of eviction orders, where it can be extremely inconvenient for the judgment debtor to evacuate the premises immediately after judgment. It may be necessary for the sake of fairness to determine a future date for the evacuation of the premises.

8.2.4 Effect of an appeal on execution

According to *Malan v Tollekin* 1931 CPD 214 at 215--16, the position at common law is that execution is suspended when an appeal is lodged against a judgment in a civil action.

Section 78, however, indicates that the respondent on appeal may petition the court by means of an application to procure immediate execution. Such an application must be directed to the Magistrates' Court that initially pronounced the judgment. There are no procedural instructions in this regard. It is difficult to see how any procedure other than an application in terms of rule 55 may be followed, especially in view of the fact that both parties' rights are seriously affected by such an order.

The court has discretion to make such an order. The decision in *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) is of great importance regarding the exercise of this discretion.

This case was not decided according to s 78 of the MCA, but on the basis of the High Court’s inherent jurisdiction to regulate the execution of its own judgments. The factors

that the court took into account should also be considered in the case of an application in terms of s 78. The reason for this is that the powers of the Magistrates' Courts are virtually identical to those of the High Court. At 545D--G Corbett JA, as he then was, stated the following:

> 'In exercising this discretion the Court should, in my view, determine what is just and equitable in all the circumstances, and, in doing so, would normally have regard, *inter alia*, to the following factors:
>
> 1. the potentiality of irreparable harm or prejudice being sustained by the appellant on appeal (respondent in the application) if leave to execute were to be granted;
> 2. the potentiality of irreparable harm or prejudice being sustained by the respondent on appeal (applicant in the application) if leave to execute were to be refused;
> 3. the prospects of success on appeal, including more particularly the question as to whether the appeal is frivolous or vexatious or has been noted not with *bona fide* intention of seeking to reverse the judgment but for some indirect purpose, for example to gain time or harass the other party; and
> 4. where there is the potentiality of irreparable harm or prejudice to both appellant and respondent, the balance of hardship or convenience, as the case may be.'

8.2.5 Setting aside and suspension of warrants of execution

Setting aside of warrants of execution

Section 62(3) of the MCA stipulates that a court may set aside its own warrants of execution. It reads: 'Any court may on good cause shown, stay or set aside any warrant of execution or arrest issued by itself, including an order under section seventy-two.'

The court's capacity to set aside warrants of execution is limited to warrants issued by the court of the district in question. These applications can never be brought *ex parte*. See *Louw v Riverside Ranches BK en 'n Ander* 2001 (2) SA 963 (NC) at 966H. The provisions of rule 9(12) read with rule 9(14) are still applicable. This will make it possible for the application to be brought on short notice.

This authority may be exercised only on good cause shown. The following are examples of 'good cause' that may justify the setting aside of a warrant:

1. where the warrant has not been issued in conformity with the judgment;

2. where the wrong person is named in the warrant as a party; and

3. where the debt in respect of which the judgment has been obtained has been extinguished before the judgment was obtained or where satisfaction of the judgment has been made or tendered, by payment or by set-off or by novation.

8.2.6 Suspension of warrants of execution

Sections 62(2) and (3) deal with the court's authority to suspend warrants. Section 62(2) reads as follows:

> 'A court (in this sub-section called a second court), other than the court which gave judgment in an action, shall have jurisdiction on good cause shown to stay any warrant of execution or arrest issued by another court against a party who is subject to the jurisdiction of the second court.'

Read together, these two subsections create an authority to suspend warrants of execution that is greater than its authority to set aside warrants of execution.

A court may, in terms of s 62(3), suspend its own warrants of execution and it may, in terms of s 62(2), suspend warrants of execution issued by a court of another district. This authority to suspend warrants does not include warrants of the High Court. A warrant may be suspended only on good cause shown ie on grounds of justice and fairness.

A court may stay or set aside a warrant of execution or a warrant of arrest on application only – that is, a substantive application to court with notice to the other party (including third parties with an interest in the matter) accompanied by the necessary founding affidavit and confirmatory affidavits where these are required. The application can be on short notice in terms of rule 9(14) but cannot be done *ex parte*. Refer to *Louw v Riverside Ranches BK en 'n Ander* 2001 (2) SA 963 (NC) at 966H.

Note that this section does not provide for the stay or setting aside of a warrant of ejectment. It would seem that the High Court would have to be approached in these instances.

8.2.7 Superannuation of civil judgments

Execution against the property of a judgment debtor has to take place within three years after judgment. If this does not happen, the judgment creditor will have to petition the court to renew the judgment before execution may be instituted.

Section 63 reads as follows:

> 'Execution against property may not be issued upon a judgment after three years from the day on which it was pronounced or on which the last payment in respect thereof was made, except upon an order of the court in which judgment was pronounced or of any court having jurisdiction, in respect of the judgment debtor, on the application and at the expense of the judgment creditor, after due notice to the judgment debtor to show cause why execution should not be issued.'

This time limit, which causes a judgment to superannuate after three years, is aimed at the speedy implementation of the execution process. It also benefits the judgment debtor, as he will not be troubled by execution after three years from judgment.

This time-limit stipulation applies only in cases where execution is directed against property and not where execution is levied by means of a garnishee order or an emoluments attachment-order.

Note that it is the judgment which superannuates and not the warrant of execution. If the judgment creditor failed to obtain a warrant of execution against property for a period of more than three years after judgment, he will be able to do so only through the intervention of the court.

8.2.8 Sequence of execution

Section 66(1)(a) of the MCA stipulates that execution must first be levied against movable property and only then against immovable property:

> 'Whenever a court gives judgment for the payment of money or makes an order for the payment of money in instalments, such judgment ... shall be enforceable by execution against the movable property and, if there is not found sufficient movable property ..., or the court, on good cause shown, so orders, then against the immovable property ....'

The implication of this stipulation is that execution against immovable property may take place only:

- where the movable property is insufficient to satisfy the judgment debt; or
- if the judgment creditor can show good cause for direct execution against immovable property.

8.2.9 Execution against immovable property

Execution against immovable property may be effected in the event of movable property being insufficient to satisfy the judgment debt. It is not necessary to approach the court or the Clerk of the Court for a warrant of execution against immovable property. All that needs to be done is that the sheriff must submit a nulla bona return of service where it is indicated what steps were taken to establish that there was insufficient movable property. Refer to *Sandton Finance (Pty) Ltd v Clerk of the Magistrate's Court Johannesburg, and Others* 1992 (1) SA 509 (W) at 512 where the following was held:

> 'In this regard I should state, as my interpretation of this subsection, that it implies that a proper search for and enquiry about the existence of movables was made. The fact that the said respondents were during the period covered by the return "not at home" or "were at home and did not respond" does not mean that an adequate search was undertaken. In terms of Rule 41(2) of the Magistrates' Courts Rules the sheriff may force the doors of the premises open if he deems it necessary to execute the warrant. The applicants complain that, if he does so, he will probably require security of them. That seems likely, but that circumstance presents no answer to the problem that without adequate search, which *in casu* may involve forcing entry, it cannot be said that insufficient movables were found.
>
> 'I certainly cannot subscribe to the proposition that the fact that the said respondents kept the doors of the residence locked or closed attracts the inference that they had insufficient assets to meet the claim. Indeed, the contrary inference might be drawn.'
>
> 'It was pointed out on behalf of the applicant that it is a cumbersome and costly procedure to obtain security to satisfy the needs of the sheriff should he contemplate using force to enter. That might be so, but that seems to me

to be an inevitable risk and expenditure which a creditor who wishes to proceed against immovables may have to take.'

On the strength of the original warrant, execution may then be instituted against the immovable property – *Lambton Service Station v Van Aswegen* 1993 (2) SA 637 (T) at 641E.

8.2.10 Removal of property attached

Removal of property attached in terms of rule 41

The normal procedure is that where property is attached, it remains in the possession of the judgment debtor. Rule 41(7)(a) has a proviso, however, which stipulates that the judgment creditor or his attorney may instruct the sheriff in writing to remove the attached property immediately. This may happen only if the Clerk of the Court has been satisfied of the need for immediate removal and has endorsed his approval on the document containing the instruction.

Note that the Clerk of the Court cannot authorize an immediate removal where a s 32 application is granted on the basis of the sending of a seven-day letter only – *Rosner v Nel NO and Others* [1996] 1 All SA 322 (W). A Magistrate is authorized to order immediate removal of property only in terms of the Credit Agreements Act 75 of 1980. In all other instances, the Clerk of the Court grants the authorization – *Letsoho Developers (Pty) Ltd v Messenger of the Magistrate's Court, Alberton, and Another* 1993 (2) SA 634 (W).

The Clerk of the Court may refuse such a request. If this is the case, the judgment creditor may apply to the court in terms of s 13(2) of the MCA:

> 'A refusal by the clerk of the court to do any act which he is by any law empowered to do shall be subject to review by the court on

application either *ex parte* or on notice, as the circumstances may require.'

The implication is that the court may be petitioned by means of an application to compel the Clerk of the Court. Since this is a substantive application, the Clerk of the Court in his capacity as respondent must be given the opportunity to respond.

Removal of property governed by the Credit Agreements Act 75 of 1980

Removal of this type of property is dealt with under s 30 of the MCA as well as under s 17(2) of the Credit Agreements Act (CAA).

Section 17(2) of the CAA provides:

> 'The Court shall, in addition to any other power, have the power, after the institution of any proceedings referred to in subsection (1) and pending termination thereof, upon application of the credit grantor, to make such orders as the court may deem just in order to have the goods in question valued or protected from damage or depreciation, including orders restricting or prohibiting the use of such goods or as to the custody thereof.'

Courts are frequently approached under s 17(2) of the CAA. The applicant normally approaches the court on the day on which the summons has been issued. The normal prayers in these applications are that the property in question be attached and that the property be removed and placed in the custody of the sheriff so as to prevent further depreciation or deterioration through continued possession by the credit receiver.

It is imperative in this case that the 30 days of s 11 of the CAA must have lapsed before an application under s 17(2) can be brought because this application only comes about after the institution of proceedings for the return of the goods.

Section 30(1) of the MCA provides that subject to the limits of jurisdiction prescribed 'the court may grant against persons and things orders for ... attachments, interdicts and mandamenten van spolie'.

The court will grant an attachment order once the following requirements have been established:

- a prima facie right;
- a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted;
- a balance of convenience in favour of the granting of interim relief; and
- the absence of any other satisfactory remedy.

The provisions of s 30 of the MCA may be applied before the issue of summons, and even before the expiry of the 30-day period in s 11 of the CAA. See *BMW Financial Services (Pty) Ltd v Mogotsi* 1999 (3) SA 384 (W).

8.2.11 Application to extend the period of attachment

Rule 41(7)(e) stipulates that attachment of movable property remains in force for a period of four months after which the property must be released by the sheriff, provided that a sale in execution is not pending. The period may be extended on an application made ex parte and such an order shall not be subject to confirmation.

The applicant will have to show good reason for the extension of the attachment period. If good reason is not shown, the application may be refused. If the court grants such an application, however, it will have to specify the new period of attachment.

If an interpleader summons is issued before the attachment lapses, then the attachment does not lapse but persists pending the outcome of the interpleader proceedings, or unless otherwise postponed by the court – s 69(1)(b) and rule 39(5). A magistrate

should, therefore, be hesitant to postpone these matters sine die or otherwise not finalize them.

8.2.12 Application to advance the date of the sale

Rule 41(9) stipulates that a period of at least 15 days has to elapse between the date of attachment and the date of the sale in execution. The date of the sale in execution may, however, be advanced:

- where the goods attached are of a perishable nature; or

- where the judgment debtor consents to an earlier date.

As the remedy is of an urgent nature and the judgment debtor (in the second instance) consented to it, the application should be ex parte and not be subject to confirmation.

In the latter case, the judgment debtor consents to the application being brought ex parte. In the case of perishable goods, however, the application must be brought on short notice.

8.2.13 Application to change the venue of the sale

An application in terms of rule 43(11) may be brought on good cause shown, usually by the creditor, for an order that the auction be held at a site other than the front of a courthouse. This type of application is brought when fixed property is sold so as to enable potential buyers to view the property.

8.2.14 Auction of the property

Generally, the sheriff appointed for the magisterial district will conduct the sale in execution. However, rule 43(9)(a) provides that any person having an interest in the outcome of the sale may within 15 days after attachment approach the sheriff and give notice to the sheriff requiring that the property be sold by an independent auctioneer. If the notice is not brought within 15 days, then the creditor or interested party is entitled to approach the court to extend the period in terms of rule 60(5). The applicant also needs to comply with rule 43(9)(b).

8.3 Execution in terms of sections 66 and 65A--M of the MCA

8.3.1 Introduction

Section 65 of the MCA enables a debtor to agree voluntarily to pay off the debt in instalments, but in practice debtors more often than not fail to make such offers. Section 65A therefore enables the judgment creditor to summon the judgment debtor to court where the judgment remains unsatisfied.

If, before or during proceedings in terms of section 65A, a judgment debtor lodges an application for an administration order, the court must, if the application complies with the requirements of section 74, postpone the section 65 proceedings – s65I(1). Applications for administration orders are dealt with above in part 7.11. If a judgment debtor does not lodge an application for an administration order and it appears at the hearing that the judgment debtor has other debts as well, the court must consider whether all the judgment debtor's debts should be treated collectively and if it is of the opinion that they should be so treated, it may convert the proceedings into administration-order proceedings in terms of s 65I(2).

8.3.2 Offer by the judgment debtor to pay in instalments

Section 65 provides that the judgment debtor may at any time after judgment, and before a s 65A(1) notice is issued, make a written offer to the judgment creditor to pay the judgment debt in instalments. If the offer is accepted, the Clerk of the Court orders the debtor to pay the debt in instalments. The order is considered to be an order of the court in terms of s 65A(1). Rule 45(7) sets out the particulars and requirements that the written offer should contain.

8.3.3 Notice calling upon the judgment debtor to appear before the court

In terms of s 65A(1) a notice may be issued which calls upon the judgment debtor to appear before court to show cause why he should not be ordered to pay the judgment debt in instalments or in any other way. If the judgment debtor is a juristic person, a director or officer of the juristic person may be called upon to appear before the court.

An order as to the payment of the judgment debt may be made only after a proper investigation into the judgment debtor's financial position. Section 65D(1) regulates such an investigation. It is clear from this subsection that a financial investigation may be held only in the presence of the judgment debtor. If the judgment debtor is absent, and he did not make an offer, or made an offer that was not accepted, then an order as to the payment of the debt may not be made. The investigation may not be postponed either, since it may be postponed only in the presence of the judgment debtor – s 65D(2).

Prior to the coming into operation of the 1997 Amendment Act, the court had no other option but to strike the matter from the roll. However, in terms of s 65A(6) of the MCA, the court may now authorize a warrant of arrest, the purpose of which is to bring the debtor before court for an investigation into his financial position with a view to a possible order in terms of s 65(E)(1). Therefore, the only option available to the court if the judgment debtor is absent is to authorize a warrant of arrest, if requested to do so by the judgment creditor.

A question that is frequently asked is whether the court may continue with s 65A proceedings in the absence of the judgment creditor. The answer to this question may be found in s 65D(1), which provides that the court may mero motu call the judgment debtor to give evidence regarding his financial position. The judgment debtor is the court's witness, and the role of the judgment creditor is limited to cross-examination. The court can, therefore, proceed in the absence of the judgment creditor if the judgment creditor's evidence is not needed.

If the judgment debtor is present, the judgment debtor will give evidence regarding his financial position and if the judgment creditor is not present, the judgment debtor's evidence will be unchallenged and the court may make an order in terms of s 65E(1) for the payment of the debt.

If the court is in doubt regarding the evidence of the judgment debtor, the court may postpone the matter in terms of s 65D(2) in order to give the judgment creditor the opportunity to cross-examine the judgment debtor.

8.3.4 The postponement of section 65A proceedings

Section 65D(2) provides for the postponement of the proceedings for the purpose of enabling the court to obtain further information regarding the judgment debtor's financial position so that an order in terms of s 65E(1) may be made.

This postponement will be used only in the following circumstances:

1. The judgment debtor appears in court.

2. The court starts with the investigation into the judgment debtor's financial position.

3. It appears that the court needs further information before it may consider a s 65E(1) order (for example, the judgment debtor has applied for a job and is at the moment awaiting the outcome of his job application, or the judgment debtor has no proof of his income and expenses at court).

The court may postpone the proceedings, but only in the presence of the judgment debtor and to a specific date, not sine die.

Section 65E(1) obliges the court to postpone the hearing if it makes an order in terms of that section. In sections 65E(1)(a), (b) and (c) there are three different orders that the court may make. These orders are aimed at execution against the property of the judgment debtor. In other words, where an order is made that may lead to the satisfaction of the judgment, proceedings are postponed pending the execution of that order. At the stage when the s 65E(1) order is made, it is uncertain what the result of the order will be. The proceedings are, therefore, postponed to a later stage.

Although there are no procedural instructions with regard to an offer in terms of s 65E(1)(c), the two points set out below must be kept in mind:

- An order as to the payment of a judgment debt may be made only after a proper investigation into the judgment debtor's financial position. Section 65D(1) regulates such an investigation.

- The postponement of the proceedings contemplated in s 65D(2) is to enable the court to obtain further information regarding the judgment debtor's financial position so that an order in terms of s 65E(1) may be made. Therefore, the offer in terms of s 65E(1)(c) must contain information regarding the judgment debtor's financial position. If not enough information has been obtained, the court is unable to make an order.

8.3.5 Orders that may be made in terms of s 65E

The following orders may be made in terms of s 65E(1):

Execution against movable and immovable property

The court may, in terms of s 65E(1)(a), and if it is convinced that the judgment debtor has attachable property, authorize the issue of a warrant of execution with or without an order in terms of s 73.

Attachment of debts

Where it appears that a debt is owing to the judgment debtor, the court may order that such a debt be attached in terms of s 72.

Orders as to the payment of the judgment debt in instalments

An instalment order may be made in two instances:

1. where the judgment debtor makes an offer in writing to the judgment creditor after receiving the s 65A(1) notice; and

2. where an offer has not been made, but the court is satisfied that the judgment debtor can pay the debt and costs in instalments.

If the judgment debtor offers to pay in instalments, the court may make an order for execution against the property in the absence of the judgment debtor. There are no procedural instructions with regard to an offer in terms of s 65E(1)(c). It only has to be in writing and to be made to the judgment creditor or his attorney after the s 65A(1) notice has been received.

This offer should, however, not be confused with the offer in terms of s 65. The s 65 offer is made before the issuing of the s 65A(1) notice and must be in the form prescribed by rule 45(7).

If the judgment debtor makes no offer to pay in instalments, the court may, if it is satisfied that he can pay, order the judgment debtor to pay the debt in instalments. The way in which the court determines a reasonable instalment is regulated by s 65D(4). The court considers the factors set out below.

(a) Where the judgment debtor is a natural person:
    (i) the nature of his income;
    (ii) the amounts needed to cover the necessary expenses of the debtor and his dependants; and
    (iii) the amounts needed for the making of periodical payments that the judgment debtor is obliged to make in terms of:
        (a) a court order;
        (b) an agreement; and
        (c) other commitments as disclosed in evidence presented at the hearing.

(b) Where the judgment debtor is a juristic person:
    (i) the amounts required to meet its necessary administrative expenses; and
    (ii) the amounts required for the making of periodical payments that it is obliged to make in terms of:
        (a) a court order;
        (b) an agreement; and
        (c) other commitments as disclosed in evidence presented at the hearing.

The court places the judgment debtor under oath or affirmation and questions him about his income and expenses in order to determine the amount the debtor will be able to pay monthly or weekly. Normally the judgment debtor's net income is determined. The total of the amounts in s 65D(4)(a) or (b) is subtracted from the debtor's net income. The balance is normally the amount that the judgment debtor can pay.

8.3.6 What order should be made in terms of s 65E(1)?

A question that is often asked is whether more than one order may be made at the same time. The answer to this is obvious since the word 'or' is inserted between s 65E(1)(a), (b) and (c). It is clear that only one of these orders may be made at a time. If such an order does not have the desired effect, the judgment debtor may be brought before court in terms of s 65E(3). The initial order may then be suspended and another order made in its place.

If there is a choice between two or more orders, the aim of sections 65A--M should be kept in mind, ie to get the judgment debtor to pay the judgment debt. Since the aim of these subsections is to satisfy the judgment debt in the shortest time possible, preference will be given to the order that best meets this aim. However, the judgment debtor should not be forced to do the impossible.

A sale in execution will generally produce more money than an instalment order, but this will depend on the circumstances of each case. In some instances, an instalment order in terms of s 65E(1)(c) will best meet the aim of the s 65A--M proceedings. For example, it might be the case that the whole debt and costs could be satisfied in two monthly instalments, whereas execution against the assets of the judgment debtor would take longer than two months.

8.3.7 Warrants of arrest in terms of s 65

In terms of s 65A(6), the court may authorize a warrant of arrest if the judgment debtor fails to:

- attend court on the date specified in the s 65A(1) notice; or
- attend court on the date to which the proceedings were postponed in his presence; or
- remain in attendance at the relevant proceedings.

The court will authorize a warrant only if it is satisfied on evidence that the judgment debtor had knowledge of the court date or that he failed to remain in attendance without being released by the court. A warrant of arrest authorized in terms of s 65A(6) is prepared and signed by the judgment creditor, signed by the Clerk of the Court, and executed by the sheriff – s 65A(7). A sheriff's return is prima facie evidence of the service of the warrant (s 17).

In terms of s 65A(8)(a), any person arrested under a warrant in terms of s 65A(6) shall be brought as soon as reasonably possible before the court within the district of which he was arrested. If it is not possible to bring him before court, the judgment debtor may be detained at any police station pending his appearance before court.

Instead of arresting the judgment debtor, the sheriff may, if the judgment creditor or his attorney consents, hand to the judgment debtor a notice in writing that calls upon the judgment debtor to appear before the court on the date and time specified in the notice. The notice must contain the name, residential address and occupation or status of the judgment debtor, as well as a certificate by the sheriff to the effect that the original of the

notice has been handed to the judgment debtor and that the importance of the notice has been explained to him – s 65A(8)(b).

The sheriff must forward a duplicate of the original to the Clerk of the Court concerned and the production of such a duplicate in court shall be prima facie proof that the original was handed to the judgment debtor – s 65A(8)(c). If the judgment debtor fails to appear in court on the date and time specified in the notice, a warrant of arrest may be authorized in terms of s 65A(6) – s 65A(8)(d).

8.3.8 Procedure when judgment debtor appears before court pursuant to a warrant of arrest or a s 65A(8)(b) notice

Section 65A(9) makes it an offence for a judgment debtor willfully to fail to appear before court:

- on a s 65A(1) notice;
- on a s 65A(8)(b) notice; or
- on the date and time to which the proceedings were postponed in his presence.

It is also an offence for a judgment debtor wilfully not to remain in attendance at the proceedings.

Upon conviction the judgment debtor may be sentenced to a fine or imprisoned for a period not exceeding three months.

The court which authorized the warrant and the court of the district in which the judgment debtor is arrested (if these are not the same court) have jurisdiction to inquire in a summary manner into the offence created by s 65A(9). The court has jurisdiction, upon proof beyond reasonable doubt, to convict the judgment debtor and to impose on him the penalty provided for in s 65A(9) – s 65A(10)(a)(i).

If the court before which such proceedings are pending is not the court that authorized the warrant, the Clerk of the Court in which the inquiry is held notifies both the Clerk of the Court that authorized the warrant and the judgment creditor or his attorney of the judgment debtor's appearance.

The Clerk of the Court that authorized the warrant must furnish the court before which the proceedings are pending with whatever records and documents relating to such proceedings the latter court may require – s 65A(12)(b).

On appearance before court, the judgment debtor is informed by the court of the following:

- that the court intends to inquire in a summary manner into the debtor's alleged wilful failure to appear before court or to remain in attendance;

- that the court may, upon conviction, impose the penalty provided for in s 65A(9);

- that he has the right to legal representation – s 65A(10)(b).

The court upholds the right of an accused to be presumed innocent, to remain silent and not to testify, to adduce and to challenge evidence, and not to be compelled to give self-incriminating evidence – s.65A(10)(c)(i). The court may also postpone the abovementioned proceedings to any date and on such conditions (not inconsistent with the Criminal Procedure Act 51 of 1977) as it considers fit – s 65A(10)(c)(ii).

At any time before the judgment debtor is convicted or acquitted of the offence in s 65A(9), the court may suspend the proceedings if it is of the opinion that it will be in the interests of justice to do so. The court may also refer the matter to the public prosecutor for a decision on the prosecution of the judgment debtor – s 65A(10)(c)(iii).

8.3.9 Financial investigation when judgment debtor brought before court pursuant to a warrant or a s 65A(8)(b) notice

The court of the district in which the judgment debtor is arrested, and in which the inquiry into his failure is conducted, has jurisdiction to conduct the financial investigation – s 65A(10)(a)(ii).

After the court has dealt with the inquiry into the judgment debtor's failure to appear before court, it proceeds with the financial investigation in accordance with the s 65A–M procedure. If this court is not the court authorized the warrant, and if the court is of the opinion that it is in the interests of the administration of justice to do so, then it may transfer the matter to the court which authorized the warrant – s 65A(11).

If the court before which the financial investigation is held is not the court that authorized the warrant, the Clerk of the Court in which the inquiry is held notifies the Clerk of the Court that authorized the warrant of the judgment debtor's appearance, and also notifies the judgment creditor or his attorney. The Clerk of the Court who authorizes the warrant must furnish the court before which the financial investigation is held with whatever records and documents relating to the proceedings the court may require – s 65A(12).

8.3.10 Non-compliance with a s 65E order

Prior to the coming into operation of Magistrates' Courts Amendment Act 1997, a judgment debtor could wilfully ignore any order made by the court after the financial investigation. The reason for this was that the non-compliance with any order made in terms of the s 65A–M procedure did not constitute statutory contempt of court in terms of s 106 of the MCA. The 1997 Amendment Act amended s 106 so as to provide that wilful failure to comply with an order in terms of s 65E constitutes statutory contempt of court.

8.3.11 Application by debtor to pay judgment debt in instalments

Whenever a court makes any order for the payment of a debt in instalments, and the debtor has failed to pay the instalment as the court has ordered, then execution may be effected in respect of the whole judgment debt and costs to the extent that they are as yet still unpaid. This is the case unless the party who is liable has made an application to court and the court has ordered otherwise – s 66.

8.4 Emoluments attachment-orders

8.4.1 Introduction

A judgment for the payment of money can be executed upon by obtaining an emoluments-attachment order. In terms of such an order, the employer of the judgment debtor has to deduct a specified amount of money from the salary of the judgment debtor and pay it over to the judgment creditor until the judgment debt and costs have been paid in full. Once an emoluments-attachment order has been served, the employer is obliged to deduct the amount specified in the order. This makes it a very effective collection procedure, since the judgment creditor does not have to deal with an unwilling judgment debtor, but deals directly with his employer.

Emoluments- attachment orders are regulated by s 65J, rule 46 and Form 38.

8.4.2 Jurisdiction

A judgment creditor may issue an emoluments-attachment order from the court of the district in which the employer of the judgment debtor resides or carries on business – s 65J(1)(a). However, if the judgment debtor is employed by the State, the emoluments attachment order is issued from the court of the district in which the judgment debtor is employed.

When an emoluments-attachment order is issued out of any court other than the court that gave judgment, a certified copy of the judgment has to be lodged with the Clerk of the Court from which the emoluments-attachment order is to be issued – rule 46(1).

8.4.3 Requirements and procedure

In terms of s 65J(2) an emoluments-attachment order shall not be issued unless:

1. the judgment debtor consented to the order in writing; or

2. the court has authorized an emoluments-attachment order, whether on application to the court or otherwise, and such authorization has not been suspended – such an authorization by the court can be obtained on application or in terms of s 65E(1)(c) or s 74D; or

3. the judgment creditor or his attorney has:

    - sent a registered letter to the judgment debtor informing him of the judgment debt and costs as yet unpaid and warning him that an emoluments-attachment order will be issued if the outstanding amount is not paid within ten days of the date on which the letter was posted; and

    - filed with the Clerk of the Court an affidavit or an affirmation by the judgment creditor or a certificate by his attorney setting forth the amount of the judgment debt at the date of the order laying down the specific instalments, the costs (if any) which have accumulated since that date, the payments received since that date, and the balance owing.

The procedure in 3 above presupposes that an order was previously made for payment of the judgment debt in instalments. This could have been an order made in terms of s 65, s 65(A)(1), s 65E(1)(c), s 57, s 58, s 48 and/or rule 11.

An affidavit or affirmation by the judgment creditor or a certificate by his attorney has to be filed with the Clerk of the Court – s 65J(2)(b)(ii). This affidavit, affirmation or certificate should set out the amount of the judgment debt at the date of the order, setting out the specific instalments, costs (if any) which have accumulated since that date, payments received since that date, and the balance owing.

The provisions of s 57(3) and s 58(2) are applicable where judgment was granted in the absence of the judgment debtor. The notices referred to in these subrules have to be sent out before commencement of s 65J proceedings.

In *Minter NO v Baker and Another* 2001 (3) SA 175 (W), it was held that the procedure in ss 65J(2)(a) and (b) is applicable only where there was an antecedent order for payment of the judgment debt. It was also held that the onus is on the judgment creditor to show that the judgment debtor will be able to maintain himself and his dependants after satisfaction of the monthly instalments. This was, however, not the view of the Natal Provincial Division in *University of Natal, Pietermaritzburg v Ziqubu* 1999 (2) SA 128 (N).

An emoluments-attachment order has to be issued in the prescribed form (Form 38). The following wording appears in the prescribed form:

> 'Whereas it has been made to appear to the above-mentioned Court that emoluments are at present or in future owing or accruing to the judgment debtor by or from the garnishee and that after satisfaction of the following order sufficient means will be left to the judgment debtor to maintain himself and those dependent upon him ….'

The only way in which the court can be satisfied that the judgment debtor will have sufficient means to maintain himself is for evidence to be placed before court in accordance with rule 45 to indicate the judgment debtor's income and expenses.

In the *Minter* judgment (above) it was also held that the creditor bore the onus to prove to the court that the debtor would have sufficient means to maintain himself and his dependants after payment of the monthly instalments.

8.4.4 The order

An emoluments-attachment order is prepared and signed by the judgment creditor or his or her attorney – s 65J(3). Rule 46(2) stipulates that an emoluments-attachment order has to be issued in accordance with the prescribed Form 38, and must contain sufficient information to enable the employer to identify the judgment debtor. Such information includes the judgment debtor's identity number or work number or date of birth.

After the Clerk of the Court has issued the emoluments-attachment order, the order must be sent to the sheriff who serves it on the employer in the manner prescribed by rule 9 for the service of process. Service by any other means is invalid.

Although the law does not require it, it is suggested that an explanatory letter should accompany the emoluments-attachment order. Employers are often unsure about what to do when an emoluments-attachment order has been served on them. The letter should mention that an emolument-attachment order is a court order against the employer in terms of which he is obliged to deduct a specified amount from the judgment debtor's salary and pay it over to the judgment creditor. The letter should also mention that deductions should continue until the debt, interest and costs have been paid in full.

The judgment creditor or his attorney is obliged to furnish free of charge, at the reasonable request of the employer or the judgment debtor, a statement containing particulars of the payments received up to the date concerned and the balance owing – s 65J(4)(b).

The order will take effect in the month after it was served.

Deductions are made:

- on the specific day mentioned in the order, if the judgment debtor is paid monthly; or
- at the end of the second week of the month following the month in which the order is served on the employer, if the judgment debtor is paid weekly.

Even if the debtor is paid weekly, payment to the attorney of the judgment creditor is made monthly – s 65J(4)(a).

The employer may retain a commission of up to five percent of all amounts that he deducts – s 65J(10). This commission is deducted from the monthly amount paid to the judgment creditor.

An emoluments-attachment order has the effect of a judgment of court – s 65J(5). If the employer fails to comply with the emoluments-attachment order by not paying over instalments due, the judgment creditor may obtain a warrant of execution against the employer and execute for the arrear instalment amounts due in terms of the emoluments-attachment order. Failure by the employer to pay over a due instalment does not, however, entitle an execution creditor to levy execution against the employer in respect of the whole of the judgment debt as would be the case against a debtor in terms of s 66(1)(b).

Execution is subject to the right of the judgment debtor, the employer or any interested party to dispute the existence or validity of the order or the correctness of the balance claimed.

An emoluments-attachment order may at any time on good cause shown be suspended, amended or rescinded by the court – s 65(J)(7).

If any of the parties wish to suspend or vary the amount of the order, they must bring a substantive application, on notice, to all parties, including the employer, in terms of s 65(J)(7).

If it is shown that the judgment debtor, after satisfaction of the emoluments-attachment order, will not have the means to maintain himself and any dependants, the court will:

- rescind the emoluments-attachment order; or

- amend it in such a way that it will affect only the balance of the emoluments over and above the money needed for such maintenance – s 65J(6).

The amount of an emoluments-attachment order can also be increased on good cause shown.

When a judgment debtor to whom an emoluments-attachment order relates leaves the service of the employer before the judgment debt has been paid in full, he must advise the judgment creditor in writing of the name and address of his new employer.

The judgment creditor may then serve a certified copy of the emoluments-attachment order on the new employer, together with a certificate specifying the payments already received since the order was issued, the costs, and the outstanding balance.

An employer on whom a certified copy of an emoluments-attachment order has been served is bound by the order and is considered as a substitute for the original employer (s 65J(8)). This is the situation if the new employer is resident, carries on business or is employed in the same district as the former employer.

This procedure can, however, not be followed where the new employer is in another court district. Here a certified copy of the judgment (CCJ) should be used to transfer the matter to the other court and a fresh emoluments-attachment order should be issued.

In practice, the former employer notifies the creditor that the judgement debtor is no longer in his employ. If the creditor does not accept this notification, the employer will then have to bring an application to set aside any order or warrant. If an application is subsequently brought for a rescission of the emoluments-attachment order, it must be brought in the district where the new employer of the judgment debtor is situated. An emoluments-attachment order can also be obtained on judgments transferred from the Small Claims Court or the High Court.

If the judgment debtor becomes self-employed, he is obliged to continue paying under the emoluments-attachment order. If he is employed by someone else before the judgment debt is paid in full, he is obliged to comply with the original order pending service of the order on the new employer – s 65J(9)(a).

Note that it is not possible to have an emoluments-attachment order issued against a self-employed person.

The fees involved in emoluments-attachment orders are found in Part 1 of Table B of Annexure 2 to the Magistrate's Court rules. An attorney may recover the prescribed fees for correspondence, telephone calls and attendance as party-and-party costs. An attorney may recover a fee of ten per cent on each instalment collected in redemption of the capital and costs of the action, subject to a maximum amount of R300 on every instalment.

An employer may not dismiss or terminate the services of a judgment debtor who does not occupy a position of trust in which he handles:

- moneys;

- securities; or
- other articles of value.

An employer who dismisses such a judgment debtor is guilty of an offence and, on conviction, will be liable to a fine not exceeding R300 or, in default of payment, to imprisonment for a period not exceeding three months (s 106A).

An employer who fails to furnish a statement containing full particulars of an employee's salary to the employee, or who wilfully or negligently furnishes incorrect particulars, is guilty of an offence and, on conviction, is liable to a fine not exceeding R300 or, in default of payment, to imprisonment for a period not exceeding three months – s 106B.

In *S v Raseemela* 2000 (2) SACR 98 (T) the Magistrate authorized an emoluments-attachment order in terms of s 28 of the Maintenance Act 99 of 1998. The court held that before an order for the attachment of emoluments is made, the court should afford an employer an opportunity to comment upon the feasibility of such an order. As the employer is a party to the matter, he is entitled to be heard.

Although an emoluments-attachment order can be brought against the State as an employer, a warrant of execution in terms of s 65J(5) cannot be issued. Contempt-of-court proceedings must follow in such a case.

8.5 Garnishee orders

8.5.1 Introduction

A garnishee order enables the judgment creditor to attach a debt owing to the judgment debtor, and orders the person who owes the debt to pay it to the judgment creditor.

8.5.2 Jurisdiction

Only the court of the district in which the garnishee resides, carries on a business or is employed has jurisdiction to hear an application for a garnishee order. The fact that the creditor (judgment debtor) of the garnishee is subject to the jurisdiction of the court is irrelevant. No garnishee order can be made against the State as the State is specifically excluded in terms of s 72 of the MCA.

8.5.3 Requirements and procedure

In terms of rule 47(1) the application for the attachment of a debt must be supported by an affidavit or affirmation by the creditor, or a certificate by his attorney, stating:

- that judgment has been granted to the judgment creditor in a specific amount;
- that the court is not barred by the provisions of s 19 of the Credit Agreement Act 75 of 1980 from issuing such an order;
- that the judgment is still unsatisfied and the amount is still payable;
- that the garnishee resides, carries on business or is employed within the district of the court;
- that a debt is at present or in future owing to the judgment debtor from the garnishee; and
- the amount of the debt.

If the application is pursued in a court other than the one of the district in which the judgment was granted, the matter must be transferred in the normal fashion by using a CCJ, which should accompany the application.

Although s 72 stipulates that such an application may be made *ex parte*, there is nothing that prohibits the applicant from bringing an application in terms of rule 55 in order for the garnishee and judgment debtor to receive prior notice of the application.

If the application is made ex parte, the normal common-law requirements for ex parte applications apply. The court must be convinced by evidence on affidavit by the applicant why the matter is urgent or why notice to the other party should not be given. A certificate on its own will not, therefore, be sufficient.

The court may, before an interim order is made, require such further evidence as it may see fit. After that the court may make an interim garnishee order and set a date for the confirmation of the interim order. After the granting of the interim order, the judgment debtor and the garnishee must be notified, by proper service, of the interim order and the return date in order to grant them the opportunity to oppose the confirmation of the interim order.

The affidavit or the attorney's certificate that supports the ex parte application must be served on the judgment debtor and the garnishee in terms of rule 56(7).

8.5.4 Confirmation of the interim order

Rule 47(9) determines in which circumstances the court will confirm the interim order. The subrule reads as follows:

> 'If the garnishee does not dispute his indebtedness to the judgment debtor, or allege that he has a set-off against the judgment debtor or that the debt sought to be attached belongs to or is subject to a claim by some other person, or if he shall not appear to show cause as

> provided in subrule (5), the court may order the garnishee to pay the debt (or such portion of it as the court may determine) to the judgment creditor or his attorney on the dates set out in the said order; and should the garnishee make default, execution for the amount so ordered and costs of the said execution may be issued against the garnishee. The provisions of rules 36 to 43, inclusive shall *mutatis mutandis* apply to execution in terms of this subrule.'

This subsection specifically applies where the garnishee does not oppose the application and later states that the amount was paid over to the judgment debtor because of some or other bank-client relationship. A warrant of execution against property for the amount ordered can still be executed against the garnishee.

8.5.5 Disputes arising from an application for a garnishee order

The validity of the judgment upon which the applicant applies for a garnishee order may not be queried at the hearing of such an application. Other factors, however, may give rise to a dispute.

Section 75(1) of the MCA reads as follows:

> 'If the garnishee disputes that the debt or emoluments sought to be attached are owing or accruing or alleges that they are subject to a set-off or belong to or are subject to a claim by some third person, the court may determine the rights and liabilities of all the parties and may declare the claim of that third person to be barred, provided that the claim or value of the matter in dispute is otherwise within the jurisdiction of the court.'

An application for a garnishee order may be opposed if:

- the debt is not due; or
- the debt is subject to set-off; or
- the debt belongs to or is subject to a claim by a third party.

Regarding this third point, the court might, under certain circumstances, not have jurisdiction to hear a garnishee-order dispute. Section 75(2) stipulates:

> 'If it be proved that such third person neither resides nor carries on business nor is employed within the Republic and that he has a *prima facie* claim to the debt, the court shall not have jurisdiction under this section.'

If the garnishee disputes his liability on any of the abovementioned grounds, the court will adjudicate the dispute in terms of rule 47(10) which reads as follows:

> 'If the garnishee disputes his liabilities to pay the said debt or alleges that he has any other defence, set-off or claim in reconvention which would be available to him if he were sued for the said debt by the judgment debtor, the court may order the garnishee to state, orally or in writing, on oath or otherwise, as to the court may seem expedient, the particulars of the said debt and of his defence thereto and may either hear and determine the matters in dispute in a summary manner or may order –
>
> (a) that the matters in issue shall be tried under the ordinary procedure of the court; and
>
> (b) that, for the purpose of such trial, the judgment creditor shall be plaintiff and the garnishee defendant, or vice versa.'

If the garnishee alleges that the debt in question belongs to or is subject to a claim by some other person, the court may deal with the matter in terms of rule 47(11) as if the judgment creditor and the other party were claimants in interpleader proceedings. It is interesting to note that a simple application for the attachment of a debt may lead to a dispute and eventually to a full-blown trial.

In terms of rule 47(13) the court may do the following after hearing a dispute relating to a garnishee order:

(a) order payment by the garnishee in terms of subrule (9);
(b) declare the claim of any person to the debt attached to be barred;
(c) dismiss the application; or
(d) make such other order as may be just.

Note that any money received by a judgment debtor in respect of maintenance for his children may not be attached under a s 72 garnishee order.

8.6 The use of more than one execution procedure

Can the judgment creditor, after obtaining judgment, proceed with a warrant of attachment against the judgment debtor's movable property and also, simultaneously, make an application for an emoluments-attachment order or an order in terms of s 72 (for attachment of debts due to the judgment debtor) or use the s 65A--M procedure?

The general practice is that if the judgment creditor is unsure about the financial status of a judgment debtor or if the judgment debtor has no assets that may be attached, the judgment creditor will normally utilize the s 65A--M procedure. Basically in terms of this procedure the judgment debtor is brought to court for a financial inquiry, after which an appropriate order is made. If it transpires at this inquiry that the judgment creditor indeed has attachable movable property, the court may authorize the issue of a warrant of execution.

Sections 66, 67 and 68 deal with property against which execution may be levied. Section 66(1) quite specifically and unambiguously states that a judgment creditor, on failure by the judgment debtor to satisfy the judgment or an order to pay in instalments, must first proceed against the debtor's movable property. If, however, it is found that the debtor has insufficient movable property to attach, then only may the creditor proceed against the immovable property of the judgment debtor. It is quite clear that the legislature intended the execution procedure against property (whether movable or immovable) to be followed sequentially.

If, as is stated above, after issue and service of a warrant of attachment, the sheriff has issued a nulla bona return (ie the debtor has no property, whether movable or immovable, to attach), then the procedure to be followed is the s 65A–M procedure.

From this section it is clear that the legislature intends the execution procedure to be carried out in a step-by-step, orderly process, and in a manner that is thorough and informed.

If one looks at s 65E, which deals with the postponement of proceedings, it will be observed that in dealing with the possible orders the court can make in terms of s65(E)(1)(a)–(c), the legislature makes use of the word 'or', signifying that it is not intended that more than one execution procedure be followed simultaneously. This is obviously true in the case of a decision about execution made immediately after judgment and in the case of the same decision made after a financial inquiry.

It envisages

- either the authorization of a warrant of execution; or
- the issue of a warrant and an order for payment to be made in instalments; or
- the attachment of debts due to a debtor; or
- an order in terms of s 65E(1)(c).

Section 73 provides that a court may suspend execution if it appears that the judgment debtor is able to pay reasonable periodic instalments towards fulfilment of the judgment debt. Thus, it does not appear to be envisaged that the warrant of execution will be utilized at the same time as an order for periodic payments of the judgment debt by the debtor.

It seems unfair to utilize more than one execution procedure against the debtor's property at the same time. If the debtor's property is sold in execution but the proceeds of the sale are insufficient to cover the judgment debt plus costs and the debtor is working, or is owed money by a third person, the debtor will first have to be summoned to court in terms of s 65A for a financial inquiry, and then an appropriate inquiry order will be made to satisfy the balance of the judgment debt and costs as yet unpaid. Even if an emoluments-attachment order is applied for, it may be necessary first to call the debtor to court for a financial inquiry. This sentiment is reinforced by the decision in *Minter NO v Baker and Another* 2001 (3) SA 175 (W).

It is no doubt true that more than one execution procedure is available to be utilized by the judgment creditor, but that does not mean that more than one procedure can be utilized at the same time. This situation could lead to harsh results for a debtor and his family, and could even, in light of the *Coetzee* and *Matiso* case be found to be unjust and contrary to public policy.

8.7 Lost warrants of execution, emoluments-attachment orders or garnishee orders

Warrants that have been lost or mislaid are often the subject of an application to court. Rule 37(1) and (2) state:

> '(1) Where any warrant or emoluments attachment order or garnishee order has been lost or mislaid, the court may on the application of

any interested party and after notice to any person affected thereby, authorise the issue of a second or further warrant or emoluments attachment order or garnishee order, as the case may be, on such conditions as the court may determine and may make such order as to costs as it may deem just.

(2) Notice of such application shall be on not less than 5 days' notice and shall state the reasons for the application.'

The following points regarding a further warrant need to be noted:

- The court may issue a second or further warrant only after a substantive application has been made. The application procedure in terms of rule 55 will have to be followed, with the exception that the period of notice is five days as stated in rule 37(2).

- All interested parties must receive notice of such an application. An interested party may, apart from the judgment debtor, be a garnishee in terms of an emoluments order or a garnishee order.

- Unless the respondent opposes such an application on grounds held to be unfounded or vexatious, the applicant will normally bear the costs of such an application.

Part 9 Costs

9.1 Meaning of 'costs' and purpose of awards of costs

In civil litigation the term 'costs' refers to the fees which parties pay to their legal representatives for their services, and all other disbursements relating to the litigation. The fees and disbursements payable by a client to his attorney for services rendered and disbursements are known as attorney-and-own-client costs. The general rule in civil proceedings is that the party who loses the case will be ordered by the court to reimburse the successful party for the costs incurred as a result of the litigation according to a tariff of costs prescribed by the rules of court. These are called party-and- party-costs. The order made by the court is called a 'costs award'.

9.2 The court's discretion in awarding costs

The award of an order for costs requires the exercise of a *judicial discretion.* Such discretion is conferred upon a judicial officer by the provisions of section 48 which reads as follows:

> 'The court may, as a result of the trial of an action, grant…
>
> (d) such judgment as to costs (including costs as between attorney and client) *as may be just'* (author's italics).

This discretion is repeated in rule 33(1), which provides as follows:

> 'The court in giving judgment or in making any order, including any adjournment or amendment, may award such costs *as may be just'* (author's italics)

Thus, although costs are generally awarded to a successful litigant, in *Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd* 2003 (1) SA 204 (T) it was held that in the light of the aforegoing discretion, it cannot be regarded as an immutable rule that costs will always automatically follow the result. Rather, and in keeping with a judicial discretion, a presiding officer may in fact base a costs award exclusively upon the equities of the action. The test in making a ruling on costs is always to enquire what is just in the circumstances.

Thus, whereas a judicial officer is always constrained to follow the law in delivering a judgment, no matter how unjust the result may be, an opportunity to rectify any inequity may well be afforded in the court's award of costs: *Van der Merwe v Strydom* 1967 (3) SA 460 (A); *Gore and Another NNO v the Master* 2002 (2) SA 283 (E).

9.3 Nature of costs awards

9.3.1 Party-and-party costs

> 'Party-and-party costs are those costs that have been incurred by a party to legal proceedings and that the other party is ordered to pay to him. They do not include all costs that a party to a suit might have incurred, but only those costs, charges and expenses that appear to the taxing master to have been necessary or proper for the attainment of justice or for defending the rights of any party.' – Herbstein and Van Winsen – *The Civil Practice of the Supreme Court of South Africa (Now the High Courts and the Supreme Court of Appeal*) 4 ed (1997) at 702.

The costs to which a successful party in an action will ordinarily be entitled are those of a *party-and-party* nature. Included herein are the expenses or disbursements that the party, in whose favour the costs are awarded, had to incur.

9.3.2 Attorney-and-client costs

> 'Attorney-and-client costs are the costs that an attorney is entitled to recover from his client for the disbursements made by him on behalf of his client, and for the professional services rendered by him. These costs are payable by the client whatever the outcome of the matter in which he engaged the attorney's services, and are not dependent upon any award of costs by the court. In the wide sense, it includes all the costs that the attorney is entitled to recover against his client on taxation of his bill of costs, but in the narrow and more technical sense, the term is applied to those costs, charges and expenses as between attorney and client that ordinarily the client cannot recover from the other party.' – Herbstein and Van Winsen at 703.

In the light of the new costs order which has evolved over the past two decades, namely *attorney-and-own-client costs,* the above definition is largely outdated, but continues to apply in so far as it accentuates the distinction between party-and-party and attorney-and-client costs.

Today, it is recognized that attorney-and-client costs reflect those costs that a winning litigant may recover from the unsuccessful adversary, in excess of the party-and-party costs. An award of attorney-and-client costs is normally made on the basis of the existence of special circumstances.

In *Hawkins v Gelb and Another* 1959 (1) SA 703 (W) at 705G--H the difference between party-and-party and attorney-and-client costs was stated thus:

> 'The two differences, therefore, between a bill for attorney and client costs and one for party and party costs, are, firstly, that the former while containing all the items which appear in the latter, may also contain some additional items.… It is not possible that the bill for party and party costs may contain items which do not

appear on the bill for attorney and client costs or that the former may stipulate a higher amount than the latter for the same item."

Rule 33 (8) provides guidelines as to the court's award of costs on any scale other than that as between party and party:

> 'The court may on request made at or immediately after the giving of judgment in any contested action or proceeding in which –
>
> (a) is involved any difficult question of law or of fact; or
>
> (b) the plaintiff makes two or more claims which are not alternative claims; or
>
> (c) the claim or defence is frivolous or vexatious,
>
> award costs on any scale higher than that on which the costs of the action would otherwise be taxable.'

As far as attorney-and-client costs are concerned, the words of Foxcroft J in the Full Bench judgment of the Cape High Court in *Law Society of the Cape of Good Hope v Windvogel* 1996 (1) SA 1171 (C) at 1180C is all-important:

> 'I do not understand it ever to have been said that there is a fixed rule of practice requiring attorney and client costs to be ordered. Such a fixed rule would, of course, fetter the discretion of the Court to decide on an appropriate costs order on the particular facts of the case.'

This dictum confirms that the award of attorney-and-client costs is, and remains, within the exclusive discretion of the court. In the case of *Ridon v Van Der Spuy and Partners (Wes-Kaap) Inc* 2002 (2) SA 121 (C) the court held that the conduct of the defendant,

an incorporated firm of attorneys, in failing to inform the plaintiff of the withdrawal of their mandate to pay the plaintiff, despite the existence of an undertaking by the attorneys on behalf of their client to pay the plaintiff, was unworthy of an officer of the court and justified an order of costs on the attorney-and-client scale.

Attorney-and-client costs have a punitive effect. In *MT Argun; Master and Crew of the MT Argun v MT Argun* 2003 (3) SA 149 (C) the court held that it was inappropriate to award a punitive order of attorney-and-client costs, since there was no evidence suggesting that the defendant acted maliciously or was guilty of misconduct.

It is most important, however, to distinguish this from the situation that regularly arises in the courts where a defendant in a default-judgment application has contractually agreed to an award of attorney-and-client costs.

In the matter of *Credex Finance Pty Ltd v Kuhn* 1977 (3) SA 482 (N) the plaintiff had sued the defendant for moneys lent and advanced, together with interest, collection commission and costs. The agreement of loan provided that in the event of the defendant defaulting, he would pay the costs as between attorney and client. In a request for default judgment the Magistrate refused to award costs on the attorney-and-client scale. The Magistrate based his conclusion on the following:

(1) a Magistrate's Court has no jurisdiction to award attorney-and-client costs otherwise than as provided in s 48 of the MCA ie s 48 applies only to matters concluded as a result of the trial of an action;

(2) the rules do not and cannot overrule the express provisions of the Act (s 48(d)), and any judicial interpretation purporting to give jurisdiction to the Magistrate's Court which it does not possess is based on a false premiss (ie the disparity between s 48 (d) and rule 33 (1));

(3) the particular clause of the agreement on which the plaintiff relied constituted an unenforceable penalty.

On appeal the court held that the Magistrate's first and second conclusions above belonged together. This is in direct conflict with a decision of the full bench of the NPD in *Claude Neon Lights (SA) Ltd v Schlemmer* 1974 (1) SA 143 (N), where it was held that the Magistrates' Courts have jurisdiction to award attorney-and-client costs when default judgment is given. It was held in the *Claude Neon Lights* case at 150G--H as follows:

> 'It may be that, notwithstanding an agreement to pay attorney and client costs, a court, in the exercise of its discretion, could decline to make an order therefor, for example, because of a plaintiff's misconduct: assuming (without deciding) that to be so there are no circumstances here which would justify the refusal of such an order.'

In a nutshell, in the absence of special circumstances, the court is obliged to award attorney-and-client costs in default-judgment proceedings where a defendant has previously agreed to this. The third contention of the magistrate was dismissed on the basis of established case law.

9.3.3 Attorney-and-own-client costs

The only reported definition author is aware of is that of Van Dijkhorst J in his judgment in *Ben McDonald Ingelyf and Another v Rudolph and Another* [1996] 3 All SA 591 (T) at 595 g--h, where it was held that the term attorney-and-own-client costs

> 'means all costs incurred except where unreasonable.'

The judgment qualified this by stating:

> 'This presumption of reasonableness cannot be irrebuttable as this would open the door to clients agreeing to exorbitant fees with attorneys or counsel in the knowledge that the opponent will foot the bill' (at 595 h--i).

It should be mentioned here that this qualification was obviously formulated so as to provide expressly for the situation of one party recovering costs from another. As such, it should be distinguished from the de facto attorney-and-own-client special agreement referred to above.

It is doubtful whether a Magistrate's Court is empowered to make an order of attorney-and-own-client costs. These costs flow from the actual relationship between an attorney and his own client, and such an order seems to be excluded by the wording of section 48(d).

In the unreported decision by Satchwell J in *Els v Els* (case number 4591/96 WLD), the client complained of inaction on the attorney's part, and also complained that excessive fees had been charged. On review, the attorney relied on a written agreement pertaining to fees and disbursements as between himself and the client. The attorney was, however, unable to explain how the tariff was applied in his bill, and certain items had been duplicated. The concept of overreaching was explored in this matter and it was held that the client's complaints were justified. The necessary adjustment was accordingly effected to the attorney's bill.

In *Laerskool Middelburg en 'n Ander V Departementshoof, Mpumalanga Departement van Onderwys, en Andere* 2003 (4) SA 160 (T), Bertelsmann J made a punitive order of attorney-and-own-client costs against the respondents. The reason for this was that the respondents had contested the respondent's application even though they should have known that their administrative conduct was wrong. The respondents' attitude had lacked acknowledgement of the applicants' rights, showed no respect for the applicants'

opinions or attachment to their language and culture, and ignored the interests of the individual learners who were involved in the process by the respondents.

9.3.4 Specific costs orders

Costs: This means party-and-party costs unless the contrary appears – *Francis v Dutch Reformed Church, George* 1913 CPD 179. See also *Whelan v Whelan* 1990 (2) SA 29 (E).

Taxed Costs

This expression means the same as 'costs', explained above.

All costs

This also only refers to party-and-party costs unless the contrary is expressed – *Tshabalala v Hood* 1986(2) SA 615 (O) at 619.

Costs of the day

This are usually occasioned where a party is made to pay the costs resulting from a postponement for which that party is responsible. This is a final order on a party-and-party basis.

Costs to stand over

This means that the costs of interlocutory proceedings are reserved to be adjudicated upon in the main action. Until such time as the court has made a specific order as to these costs, the case remains incomplete.

Reserved costs

These are costs of interlocutory proceedings that are postponed for adjudication to the main action. Until such time as the court has made a specific order as to these costs, the case remains incomplete.

No order as to costs

This is a final order meaning that the parties are each responsible for their own costs.

Each party to pay own costs

This also means that the parties are each to pay their own costs.

Wasted costs

These are costs resulting from a situation whereby the services provided by the attorney are no longer of use to a party, or useless to the continuation of the action, as where there has been a postponement in order to apply for an amendment. Where the case has had to be postponed, the party who caused the postponement often has costs of the day awarded against him. In the matter of *Westbrook v Genref Ltd* 1997 (4) SA 218 (D), the defendant had to apply for the postponement of a trial because of the death of an expert witness whom it intended calling. The court considered that a triable issue had been raised, but that the death of a witness on the day before the trial was one of the hazards of litigation. The court specifically considered the question of a costs award following the event, viz costs in the cause, and held that it would be inappropriate and that a value judgment was necessary. The court exercised its discretion in favour of the plaintiff and ordered that the defendant pay the wasted costs occasioned by the postponement.

Costs in the cause

This is an award encountered at an interlocutory stage, which has the effect that these costs are to be paid by the party who is ultimately ordered to pay the costs of the main action. The term ‘costs in the cause’ is not found anywhere in the MCA or rules. It has developed as a rule of practice and largely replaces the term ‘costs in the action.’

Costs in the action

This means the same as ‘costs in the cause’.

Costs of appeal

These are costs which commence upon the filling of a notice of appeal. All awards relating to these costs can made by the court of appeal only.

Costs here and below

This is an award made by the court of appeal which supersedes the costs award of the trial court.

Costs de bonis propriis

Here the attorney (or other party acting in a representative or official capacity) is ordered to pay the costs out of his or her own pocket. Such an award is usually made against a vexatious, dishonest or seriously negligent attorney. It can also be made against an executor of a deceased estate, liquidator of a company, interpreter, Magistrate, etc (ie any party acting in a representative or official capacity.) *Washaya v Washaya* 1990 (4) SA 41 (ZH) the court awarded costs de bonis propriis against an advocate who obtained a judgment by consent without authority from his client to do so. In an application for rescission it transpired that he had acted on his own initiative, in the mistaken belief that his client would ratify his actions.

In *Michael v Caroline's Frozen Yoghurt Parlour (Pty) Ltd* 1999 (1) SA 624 (W), the applicant's attorneys displayed a reckless disregard for the rules of court in an application for condonation. The application was duly granted. The court held that there was no good reason why the applicant's attorney should not bear the costs of the application for condonation.

In the Magistrates' Courts costs de bonis propriis may be awarded either on a party-and-party or on an attorney-and-client basis. If the court does not specify on what scale the award is made, then it is deemed to be on a party-and-party basis. See also *Manana and Others v Johannes* 1999 (1) SA 181 (LCC).

9.4 Abuse of process

A judicial officer has a discretion to deprive a successful party of all or a portion of his costs where the court is of opinion that that party has burdened the court with irrelevant issues or has followed an unnecessarily prolix course in bringing the matter to finality.

In this connection rule 33 (10) and (12) are applicable, which read as follows:

> Rule 33(10): 'Where the court is of opinion that at the hearing the party to whom costs are awarded has occupied time unnecessarily or in relation to matters not relevant to the issue, the court may disallow a proportionate part of the hearing fee payable to his attorney or counsel.'
>
> Rule 33(12): 'Where the court is of opinion that expense has been unnecessarily incurred because of the successful party's failure to take a course which would have shortened the proceedings and decreased the costs it shall award only such costs as would have been incurred if the successful party has taken such course.'

The court may also, on a request made at or immediately after the giving of judgment in any contested action or proceeding in which the claim or defence is frivolous or vexatious, award costs on any scale higher than that on which the costs of the action would otherwise be taxable – rule 33(8). Generally, therefore, it may be stated that a court will not order a litigant to pay the costs of another litigant on an attorney-and-client scale, or penalize a litigant by depriving him of his costs at all, unless some special grounds are present.

In *Palley v Knight NO* 1961 (4) SA 633 (SR) at 638--9 the court stressed that it is unusual to order that a successful party should pay the costs of an unsuccessful party, and that such orders are usually made in cases in which the court disapproves of the actions of the successful party.

In *Vilakazi v Malevu and Another* 1979 (1) SA 737 (N) the plaintiff in a third-party claim had successfully resisted a special plea raised by the Motor Vehicle Accident Fund but in so doing the plaintiff got himself involved in an 'unnecessary dog fight' with the Fund resulting in an unnecessary appearance in court. In the circumstances, and as a mark of disapproval of the conduct of both parties in various respects, the court made no order as to costs.

In closing, it is emphasized that a successful litigant can as a rule be deprived of costs only on the ground of some fault on his part. See *Rosenthal v Leibenguth* 1930 WLD 272 and *Abbott v Theleman* 1997 (2) SA 848 (C).

9.5 Taxation of costs

Taxation is a function which is performed by Clerks of the Court. Judicial officers are precluded from taxing bills of costs, but require knowledge of the law relating to taxation because they may be called upon to review decisions made by taxing officials.

9.5.1 Nature and process of taxation

Taxation is the process whereby the quantum of the successful litigant's costs is determined. According to the dictum in *Mouton and Another v Martine* 1968 (4) SA 738 (T) at 742 A--B, the purpose of a taxation is twofold: first, to fix the costs in a certain amount so that execution can be levied on the judgment; and secondly, to ensure that the party who is condemned to pay the costs does not pay an excessive amount and that the successful party does not receive an insufficient amount.

Where costs or expenses are awarded to any party by the court, otherwise than by a judgment in default of the defendant's entry of appearance to defend or on the defendant's consent to judgment before the time for such appearance has expired, the party to whom such costs or expenses have been awarded must deliver a bill of such costs or expenses and give at least five days' notice of taxation for an hour to be fixed (generally or specially) by the Clerk of the Court. He or she may include in such a bill all such payments as have been necessarily and properly made. The formalities to be complied with as to notice of the taxation are dealt with in subrules (16) and (19) of rule 33.

In the matter of *Luck Agencies v Els NO and Another* 1996 (3) SA 1011 (SE) the court held that rule 33 (19) is not applicable in every case in which a bill of costs is to be taxed on the scale as between attorney and client, but relates specifically to those cases where a bill of costs in respect of an attorney's services to his/her own client is to be taxed (ie attorney-and-own-client costs). Rule 33 (19) accordingly does not qualify rule 33 (16), and does not import into the latter the requirement that notice of taxation be given where a bill of costs on the scale as between attorney and client is to be taxed against a defendant in pursuance of a judgment in default of entry of appearance to defend or a judgment by consent.

A bill of costs may include all costs, charges and expenses as have been necessarily and properly incurred for the attainment of justice or defending the rights of any party – *President of the Republic of South Africa and Others v Gauteng Lions Rugby Union and Another* 2002 (2) SA 64 (CC) para 15.

It was held in *City Deep Ltd v Johannesburg City Council* 1973 (2) SA 109 (W) at 119G--H, that the charges in a bill of costs must be specified item by item. Each item must be dated, and should state its subject matter precisely and not in vague and general terms.

9.5.2 Operation of rule 33(3)

This rule provides that, unless the court shall for good cause otherwise order, costs of interim orders shall not be taxed until the conclusion of the action, and a party may present only one bill for taxation up to and including judgment or any other conclusion of the action. Only in exceptional circumstances should a court allow a party to have interim bills taxed.

9.5.3 Discretion of the taxing master

The discretion to be exercised by a taxing master is a judicial one, which must be exercised reasonably and justly on sound principles with due regard to all the circumstances of the case: *Van der Merwe v Randryk Beleggings (Edms) Bpk* 1976 (2) SA 414 (O) at 416B.

It was held in *Cobb v Levy* 1978 (4) SA 459 (T) at 464H and 465A that in judging the reasonableness and necessity of a particular item in a bill of costs, the item must be considered against the background of the issues involved in the case at the time when the step in question was taken. At 463 it is stated that where a person is enjoined by statute to exercise a discretion, he ought not to preclude himself from doing so by following a rigidly preconceived policy.

Thus, a taxing master should never slavishly follow a preconceived approach to the rules, or rules of practice that exist in a particular jurisdiction. By so doing, the taxing master is in fact depriving him/herself of the very discretion conferred on him/her by law. Every matter should be separately adjudicated upon by the taxing master in the light of the particular merits of the matter at hand.

Before a court will interfere with the decision of a taxing master it must be satisfied that the taxing master's ruling was clearly wrong, as opposed to the court being clearly satisfied that the taxing master was wrong. This means that the court will not interfere

with the decision of the taxing master merely because its view of the matter in dispute differs from that of the taxing master, but only when it is satisfied that the taxing master's view of the matter differs so materially from its own that it should be held to vitiate the ruling – *Ocean Commodities Inc and Others v Standard Bank of SA Ltd and Others* 1984 (3) SA 15 (A); *Legal and General Assurance Society Ltd v Lieberum NO and Another* 1968 (1) SA 473(A) at 478G; *President of the Republic of South Africa and Others v Gauteng Lions Rugby Union and Another* 2002 (2) SA 64 (CC) para 13. This rule will, however, not apply 'where the point in issue is a point on which the Court is able to form as good an opinion as the Taxing Master and perhaps, even a better opinion' – *Gauteng Lions* case para 14 quoting Millin J in *Wellworths Bazaars Ltd v Chandlers Ltd and Others* 1947 (4) SA 453 (T) at 457.

The duty of the taxing master is to give effect to the order for costs, not to vary it to suit his/her perceptions of what the order should have been: *Vercuiel v Magistrate of Wynberg and Another* 1928 CPD 532. This is especially important when it comes to deciding whether or not the successful party may recover his qualifying fees. (See the discussion of qualifying fees below.) This function of the taxing master is founded in the maxim judicis est jus dicere non dare.

9.5.4 Procedure during taxation of a bill of costs

Both parties may be represented at the taxation. The taxing master is, however, entitled to proceed with the taxation even if both parties fail to appear – rule 33(21).

The taxing master is not a court of law and may, therefore, not call for evidence under oath or otherwise. He or she is entitled only to access to the attorney's file to confirm any information that may be required. Only the taxing master is entitled to look at the attorney's file, not the other party.

9.6 Witness fees

The tariff of allowances payable to witnesses in civil cases is set out in Appendix A to the rules. Where a judicial officer is satisfied that the payment of the prescribed allowances may cause a witness hardship, he may approve payment to the witness of an allowance at a higher tariff than that prescribed. The decision of the judicial officer concerning amounts payable to witnesses in respect of the above is final.

Any person who has forfeited income as a result of attending a civil case is, in addition to witness fees, entitled to an allowance equal to the actual amount of income so forfeited, subject to a maximum of R1000 per day. It is important to note that a party to a suit can claim these expenses if he has been declared a necessary witness by the court – *Krull v Bursey* 1966 (4) SA 448 (E). The amount payable in respect of expenses is subject to review from time to time.

A necessary witness who is present at court but is not called, for instance because the case is settled on the day of the hearing, is entitled to claim fees and expenses – J & B Rules Appendix A--4 to 5. This applies also where the defendant was present and would have testified had absolution from the instance not been granted – *Solomon's Insolvent Estate v Solomon* 1923 OPD 236.

9.7 Counsel's fee

In terms of general provision 6 of Annexure 2 Table A Part I to the rules of the Magistrates' Courts, fees to counsel are recoverable on taxation only in defended trial cases falling within Scales B or C of Part III of Table A, Annexure 2 to the rules, or where the court has made an order in terms of rule 33(8), and shall not be allowed unless payment thereof is vouched by the signature of counsel. This effectively means that a litigant who elects to use the services of an advocate will not be able to recover the fees paid to the advocate where the services of an attorney would have sufficed.

On a trial brief for the first day, a counsel's fee may not exceed R937. A refresher fee not exceeding R 563 is allowed the costs awarded in respect of for every day exceeding one on which evidence is taken or argument is heard – Part IV of Table A, Annexure 2.

In all matters other than defended trials or interpleader actions, a fee to counsel may on application be allowed only where the court certifies that the briefing of counsel was warranted. Should the court so certify an advocate's brief to argue an exception or application, the total fee for such brief is presently fixed at R330 – item 21, Part IV. Note that this is a fixed fee and no provision is made for a refresher should the application proceed to a second day, nor does the court have authority to increase this fixed amount – item 26 (b) of Part IV Table A, Annexure 2.

Each necessary consultation with counsel may presently be charged for at R67 per quarter of an hour. A charge of R150 is allowed for the drawing of pleadings (items 24 and 26 of Part IV Table A, Annexure 2). Note that these charges may be increased by the court on request.

Note that the tariff items are subject to change from time to time. The tariff amounts for items 21–6 changed with effect from 18 November 2002.

In the absence of any express authorization allowing the Magistrates' Courts to award costs of two counsel, it is doubtful whether this can be done. The lower courts, being a creature of statute, are seemingly precluded from so ordering – *Cape Town Municipality v Yeld and Others* 1978 (4) SA 802 (C).

A fee for traveling time by counsel is allowed at the same rate as for attorneys: item 26 (c) of Part IV Table A, Annexure 2. This is subject to the provisions of rule 33 (9), computed in terms of item 25 of the defended tariff, Part III of Table A, Annexure 2.

9.8 Contributory negligence

Our courts have experienced considerable practical difficulty with regard to costs awards in claims involving contributory negligence where there is a claim and a counterclaim falling under the provisions of the Apportionment of Damages Act 34 of 1956.

Where a plaintiff and a defendant are both substantially successful in respect of the claim in convention and the claim in reconvention, respectively, it follows that each should be awarded his costs. This has the effect that the defendant will have to pay the plaintiff's costs and the plaintiff will have to pay the defendant's costs.

Where the plaintiff is awarded the costs of the claim in convention and the defendant is awarded the costs of the claim in reconvention, rule 33(13) applies. This provides that the taxing master must allow as costs in convention all such costs as would in his judgment have been incurred if no claim in reconvention had been made and as costs in reconvention all other costs allowed. This tends to lead to an unfair result. Courts have tried various formulas to achieve an equitable result.

In *Basson v Pietersen* 1960 (1) SA 837 (C) the court a quo held that the parties were equally to blame on the issue of negligence and gave judgment in favour of each for half of their respective agreed damages with costs. In an appeal by the defendant against the order as to costs, the defendant claimed that there should have been no order as to costs. The court duly allowed the appeal, holding that the Magistrate's order was inequitable, for in terms of the provisions of rule 33(13) (then rule 49(12)), the defendant would have to pay the general costs of the action but in turn would only be entitled to such costs as were attributable to his counterclaim. The Magistrate's judgment was altered to one of 'no order as to costs'.

Another way of dealing with this kind of situation is to award costs to the party who has been the most successful. This was done in *Bhyat's Store v Van Rooyen* 1961 (4) SA 59 (T). The defendant's driver had, at night, on a country road, collided with a flock of sheep in the charge of plaintiff's shepherd, killing eighteen sheep. The sheep, a large flock, were supposed to have been bedded down on an outspan but some had wandered on to the road or across it. The court a quo had found that the major portion of the blame rested upon the shepherd who had failed to take appropriate action to warn approaching traffic. The negligence of the driver was regarded as the lesser because it might have been due to a momentary lapse on his part that he failed in good time to see the sheep whose colour blended in with the countryside, and had failed to take appropriate action.

The court of appeal held that the blameworthiness of the shepherd should be estimated at 80 percent and that of the driver at 20 percent. It was further held that the costs should not be awarded in the proportion of the blameworthiness of fault of the parties' agents, but that the costs of whole action should be awarded to the party in whose favour the final balance between the opposing claims was found to be, ie to the defendant.

The decision in the *Bhyat case* was, however, subjected to severe criticism, and in *Venter v Dickson* 1965 (4) SA 22 (E) the proportionate success of claim and costs approach was adopted. This set a trend that has found widespread application in the courts.

A case which illustrates the application of the proportionate success of claim and costs approach is *Stolp v Du Plessis* 1960 (2) SA 661 (T) in which the court, on appeal, awarded the plaintiff one-third of the damages claimed by her and the defendant two-thirds of his damages. The court further awarded the plaintiff one-third of all her costs in the court a quo against the defendant and the defendant two-thirds of all his costs

against the plaintiff. Costs were awarded in the same proportions as the damages recovered claim. If the plaintiff is 70% successful in his claim, he will get 70% of his costs, and if the defendant is 30% successful with her claim, she will get 30% of her costs.

In matters where only one party sues and an apportionment follows, the situation is naturally different. For example, in *Goss v Crookes* 1998 (2) SA 946 (N) the plaintiff was the successful party even though he obtained only half of his damages, owing to the court apportioning negligence. It is obvious that the plaintiff nevertheless had to sue to recover his loss. The court accordingly held that where the costs of the action are not increased by the inquiry into the negligence of the plaintiff, or the person acting on behalf of the plaintiff, and there is no tender or claim in reconvention, there is no good basis upon which to depart from the general rule that the costs should follow the result. Thus, even though plaintiff was only partly successful, he nevertheless was awarded his full party-and-party costs.

In *Faiga v Body Corporate of Dumbarton Oaks and Another* 1997 (2) SA 651 (W) the plaintiff instituted action against both the first and second defendants, but succeeded only against the first defendant. The court held that, although both defendants had been correctly joined in the action, justice demanded that the plaintiff and the first defendant each pay half of the second defendant's costs.

9.9 Where more than one firm of attorneys acts for a party

In *Fanels (Pty) Ltd v Simmons NO and Another* 1957(4) SA 591 (T) at 593A Boshoff J held as follows:

> '[W]here a litigant resides away from the place where legal proceedings are instituted, he is entitled to employ an attorney in the place where he lives as well as

the place where the proceedings are instituted. The reason for the practice is that it is desirable for a litigant to have an attorney at the place where he lives with whom he can consult'.

The attorney whom the party initially approaches is known as the instructing or country attorney, and the attorney who continues the work at the instructing attorney's instance is referred to as the correspondent attorney, or the attorney at the seat of the court.

Where more than one attorney is necessarily engaged, each attorney may draw up a bill of costs for taxation. However, even where more than one attorney has been employed, it is still regarded as being only one bill presented for taxation, comprising the two separate accounts. In practice, this has the effect that, although both attorneys actually submit accounts for their respective portions of the work done, there is only one taxation at which both accounts are simultaneously taxed and where only one allocatur is signed – see rule 33 (3); *Scott v Nel NO and Another* 1963 (2) SA 384 (E); *Grindlays International Finance (Rhodesia) Ltd v Ballam* 1985 (2) SA 636 (W).

Although a litigant may employ two firms of attorneys, the rule remains that that litigant, if successful, can still only recover such costs, charges and expenses as are reasonably necessary for the attainment of justice or defending the rights of any party. Therefore, with the exception of the 'taking of instructions', there should be no unnecessary duplication of items in the bills submitted by the attorneys – *Du Preez v Mostert* 1981 (2) SA 515 (T) at 518G.

A ubiquitous problem is encountered with regard to enterprises having more than one place of business. The matter of *Santambank Bpk v Dimo* 1993 (1) SA 702 (O) illustrates the problem and the approach of our courts. The plaintiff had instituted action against the defendant in the Magistrate's Court in Kroonstad. The action was later settled. The plaintiff's 'legal branch' in Bloemfontein took all legal steps on behalf of the plaintiff and gave instructions in Bloemfontein to its Bloemfontein attorneys that

summons was to be issued in Kroonstad against the defendant. The summons was then issued by attorneys in Kroonstad. Notwithstanding the defendant's objection, the judicial officer in the Magistrate's Court had allowed the costs of two sets of attorneys in the matter. On review of the taxation, the court held that as the plaintiff, which was a banking institution, had its 'legal branch' in Bloemfontein and did business in Kroonstad where the litigation was conducted, the plaintiff would, unless special circumstances existed (which had not been shown in the present case), be entitled to make use of the services of Bloemfontein attorneys as well as Kroonstad attorneys.

In the case of *Niceffek (Edms) Bpk v Eastvaal Motors (Edms) Bpk* 1993 (2) SA 144 (O) the court held, in answer to the question when two sets of attorneys may be employed, that it could not be emphasized sufficiently that each case had to be considered in the light of its own particular circumstances, and that it was impossible to lay down a fixed rule as to when two sets of attorneys could be employed.

In *Van der Burgh v Guardian National Insurance Co Ltd* 1997 (2) SA 187 (E) the court held that the attorney at the seat of the court, who has been instructed by another attorney in another centre, generally performs an extremely valuable function in litigation which goes far beyond his merely operating as a 'post-box' and indexing and paginating papers. If he is unable to deal with problems arising during the hearing of a matter on account of the terms of the mandate extended to him by the correspondent from another centre (the correspondent in *Van der Burgh* being on holiday out of the country at the time of the hearing) and the matter is therefore postponed, the litigant who engaged the correspondent should, as a general rule, bear the costs occasioned thereby.