

Welcome to Waalburg

Magistrates' Court Practice

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[www.barnards.co.za](http://www.barnards.co.za)

<http://newmcrules.blogspot.com>

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**MAGISTRATES' COURT PRACTICE**

- INTRODUCTION
- PARTIES
- APPLICATIONS
- APPEALS
- EXECUTION
- INTERPLEADERS
- PRE-LITIGATION
- ACTIONS
- EXCEPTIONS
- OTHER PROCESS & ASPECTS
- NCA Debt Relief

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**ETHICS: Dual Relationship**

- 1 COURT - OFFICER OF THE COURT
- 2 CLIENT - REPRESENT HIM/HER/IT
  - COMMUNICATE + REPORT REGULARLY
  - EXPLAIN COSTS
  - AGREE ON PAYMENT BASIS
  - ADVISE ON THE PROSPECTS OF SUCCESS
  - COVER YOURSELF (FOLLOW UP INSTRUCTIONS & COMMUNICATIONS IN WRITING)

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**ETHICS: Dual Relationship**

IN BOTH  
RELATIONSHIPS  
BE

HONEST

OBJECTIVE

PROFESSIONAL

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**PROFESSIONAL CONDUCT**  
is to (be)

- Competent
- Know the law
- Constant research
- Honest (cf dual rel)
- Never be part of fraud or dishonesty
  - (despite client wishes that differ)
- Carry out client instructions
  - (but client does not have the right to dictate the method)
- Report on progress
- Confidential
- Serve truth & Justice

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## EFFECTIVE CONSULTING

- ICE BREAKER (set client at ease)
- FORMAL INFORMATION
- FORMALITIES
  - Confidentiality;Fica;Costs;Deposit;Mandate
- THE STORY (open ended questions)
- SPECIFIC QUESTIONS (to clarify)
- FORMULATE THEORIES OF THE CASE
- ADVISE
- CONFIRM INSTRUCTIONS

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## CONSULTATION & ADMIN

(AS A PROFESSIONAL)

- Write down all info as early as possible.
- Use STANDARD FORMS for formal detail
  - eg Client Info Sheet and Time Sheets
  - Make sure the forms request all details
- Get resolutions(Co,CC,Trusts,Clubs,etc.)
- IDDocuments
- Open file before consultation
- Get an account number

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## CONSULTATION & ADMIN

(AS A PROFESSIONAL)

- Always ask for documents to verify
  - CC Founding Statement CK1 or 2
  - (CO Memo+Articles of Association)
  - New CO Act = Memo of Incorporation
- MVA
  - Proof of vehicle ownership
  - Police Accident Report
  - Photos of Damaged Vehicle

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## CONSULTATION & ADMIN

(AS A PROFESSIONAL)

- Organise file into Sub-Files
  - Correspondence
  - Pleadings
  - Witness Statements
  - Evidence
    - (Docs,Photos,Plans,Reports etc.)
  - Accounts
  - Receipts
  - Drafts

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## CONSULTATION & ADMIN

(AS A PROFESSIONAL)

- Explain that litigation is about proof
- Collect+preserve evidence(file or store)
- Sub-files should be in date order
- Keep proper record of telephone calls etc. (eg. Standard message forms)
- Debit fees regularly
- Manage stress and paper properly

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## PAPER MANAGEMENT

- 1 DEAL WITH IT
- 2 DIARISE IT
- 3 THROW IT AWAY
- 4 FILE IT

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## CITATION OF PARTIES

- Rule 5(4) & (9)
  - “SHALL” = MUST
- Non-Compliance renders summons
  - An IRREGULAR STEP
  - Rule 5(11) and it may
  - Be set aside ito r60A(3) and
  - Further steps are stayed r60A(4)

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## CITATION OF PARTIES

- DEFENDANT [Rule 5(4)(a)]
  - SURNAME
  - FIRST NAMES/INITIALS(known to Plaintiff)
  - RESIDENTIAL ADDRESS or
  - PLACE OF BUSINESS
  - OCCUPATION and
  - EMPLOYMENT ADDRESS (if known)
  - If sued as REPRESENTATIVE, state CAPACITY

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## CITATION OF PARTIES

- PLAINTIFF [Rule 5(4)(b)]
  - SAME AS FOR DEFENDANT
  - THE PLAINTIFF'S FULL PARTICULARS ARE KNOWN!!

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## CITATION OF PARTIES

- CESSION [Rule 5(9)]
  - DATE of cession
  - CEDENT'S
    - NAME
    - ADDRESS
    - DESCRIPTION
  - as at date of cession

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## CITATION OF PARTIES

- MINORS 4 Scenarios:
  - 1GUARDIAN (IN REPRESENTATIVE CAPACITY)
  - 2MINOR (DULY ASSISTED BY GUARDIAN)
  - 3CURATOR AD LITEM APPOINTED
    - SECTION 33 APPLICATION
    - Only if guardian is incapable of managing minor's estate
    - Ex Parte Opper & anor 2002(5)SA125(C)
  - 4WITH COURTS CONSENT
    - Ex Parte Goldman1960 (1)SA 89 D

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## CITATION OF PARTIES

- MENTAL DISABILITY or
- PRODIGALS
  - For both also Apply ito s33
- NB Independent person in interests of the minor etc.
  - MartinNOvRAF2000(2)SA1023(W)
    - Attorney appointed must not also handle the legal proceedings

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## CITATION OF PARTIES

- SECTION 33
  - In the court where main proceedings
  - Notice must be given to opposing party
  - May be brought by
    - Minor (if old enough to understand)
    - a relative/friend or
    - opponent wanting to sue
  - Appointment may even made contrary to wishes of minor

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## CITATION OF PARTIES

- s33 NB FACTS to be alleged
  - Interest of
    - Applicant
    - Minor/Disabled/Prodigal
  - In the proposed action
  - Need for the appointment
  - Details of action to follow
  - Suggested suitable curator
  - That suggested curator consents

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## CITATION OF PARTIES

- COMPANIES & CLOSE CORPORATIONS
- “LIMITED LIABILITY”
- “DULY INCORPORATED IN TERMS OF ....”
- REGISTERED ADDRESS OR
- PRINCIPAL PLACE OF BUSINESS
- NB when acting for defendant
- INSIST ON CO/CC REG NUMBER

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## CITATION OF PARTIES

- FIRMS, PARTNERSHIPS & TRADE NAMES
- CAN BE CITED IN OWN NAME
- OFFICE ADDRESS or PLACE OF BUSINESS
- USE RULE 54 NOTICE WITH SUMMONS
- “At the time action accrued”
- r54 MAY ALSO BE USED BY DEFENDANT
- NEW DEVELOPMENT: T/A BUSINESS NAMES REGISTER ITO CPA s80

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## CITATION OF PARTIES

- TRUSTS
  - CANNOT SUE OR BE SUED IN OWN NAME (unless sanctioned thereto by statute)
  - TRUSTEES NOT TO BE SUED PERSONALLY (unless they are bound eg. As sureties)
  - ALL TRUSTEES MUST BE JOINED IN THEIR OFFICIAL CAPACITIES
  - “IN HER CAPACITY FOR THE TIME BEING OF THE ABC DEVELOPMENT TRUST”  
[see r5(4) re repr. capacity]

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## CITATIONS OF GOVERNMENT + STATE OFFICIALS

- READ THE RELEVANT STATUTE
- CITE OFFICIAL CAPACITY & NOT BY NAME
  - S34 (Genl Law Amendment Act62/1955)
- Cite the Minister of relevant Dept
- Also applies provincially
  - ie Cite the Member of Executive Council of a province
- May also use the name of the State
  - Regering van RSA v Santam 1964(1) SA 546 (W)

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### CITATION OF PARTIES

- CHANGE OF PARTIES [Rule 52(3)&(4)]
  - WHEN AFTER ACTION HAS COMMENCED
  - PARTY DIES OR BECOMES INCOMPETENT
  - APPLICATION TO SUBSTITUTE:
    - EXECUTOR OF DECEASED ESTATE
    - TRUSTEE OF INSOLVENT ESTATE
    - GUARDIAN
    - OTHER COMPETENT PERSON

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### CORPORATE REPRESENTATION IN COURT

- Mittal Steel South Africa Ltd t/a Verreeniging Steel v Pipechem CC 2008 (1) SA 640 (C)
- Sec 34 – access to court
- Sec 8(4) – juristic person is entitled to protection of the Bill of Rights

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### High Court

- The fact that default judgment can be taken just because it is not an attorney delivering a defence is tantamount to denial of right of access to court
- Not justifiable limitation
- Member of CC may therefore defend matter in his personal capacity as long as he has authority to do so

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### APPLICATIONS

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## DRAFTING PLEADINGS

- TYPE (unless settlement at court?)
- ON A4 PAPER
- DOUBLE SPACING
- 4 cm LEFT MARGIN
- NUMBER PAGES
- NUMBER PARAGRAPHS
- CHECK & RE-CHECK

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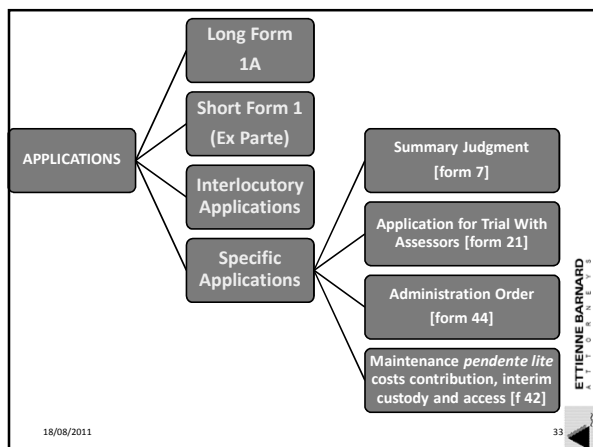
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## MANDAMENT VAN SPOLIE

- SUBSTANTIVE LAW
  - The law protects the POSSESSOR
  - WHEN? Eg. MATRIMONIAL or RETENTION
- DOCUMENTATION
  - NOTICE OF MOTION
  - EVIDENCE by AFFIDAVIT/S (remember annexures)
  - DRAFT COURT ORDER (“WARRANT”)

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## Application Rules 55/56/57

- Must be
  - On **notice** of motion
  - Supported with facts in an **affidavit** [r55(1)(a)]
- Ex Parte Applications only if [r55(3)(a)]
  - notice would **defeat purpose** of application; or
  - **urgency** justifies dispensing with notice.
- Dispensing rule [r55(5)(a)]
- Court may on good cause shorten notice period Rule 9(12) [old 9(14)]

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## Urgency Case Law (HC examples)

- Relaxation must correspond with urgency
- Founding affidavit must
  - justify the extent of the departure,
  - show good cause why the time shorter
  - why hearing in due course will not suffice

*Luna Meubelvervaardigers v Makin anor* 1977 (4) SA 135 (W) at 137F

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## Urgency Case Law (HC examples)

- Also see
- I L N B Marcow Caterers v Greatermans anor; Aroma Inn v Hypermarkets anor 1981 (4) SA 108 (C) at 110F-111A
- Sikwe v S A Mutual Fire and General 1977 (3) SA 438 (W) at 440H
- Gallagher v Norman's Transport Lines 1992(3)SA 500 (W) at 502D-504C
- Cekeshe and Others v Premier, Eastern Cape anor 1998 (4) SA 935 (Tk) at 948A-E.
- Min Water Affairs and Forestry v Stilfontein Gold Mining Company anor (7655/05 , 7655/05) [2006] ZAGPHC 47 (15 May 2006) at para 11.3

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### MANDAMENT: NOTICE OF MOTION(1)

- LONG FORM v SHORT FORM
- LONG WITHOUT URGENCY
  - Double barrel dates
  - If opposed, Clerk or Registrar Supplies date
- LONG WITH URGENCY
  - Double barrel with shortened dates
- SHORT FORM
  - If giving notice will defeat purposes

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### MANDAMENT: NOTICE OF MOTION(2)

- COURT HEADING
- ORDER SOUGHT:
  - ✓ CONTENT of PRAYERS
  - ✓ COSTS PRAYER
  - ✓ ALTERNATIVE RELIEF
- REFER TO SUPPORTING AFFIDAVIT/S
- APPOINTED ATTORNEY & ADDRESS

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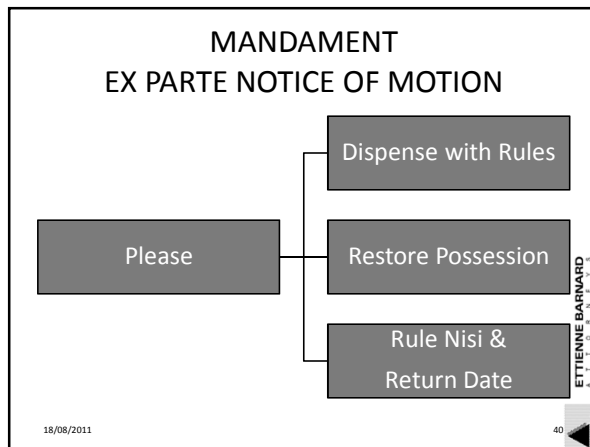
### MANDAMENT: NOTICE OF MOTION(3)

- RESPONDENT NOTIFIED TO
  - DELIVER
    - Notice of Opp. in 5 days
    - Answering Affidavit in 10 days
  - GIVE SERVICE ADDRESS
    - (in 15 km)
- DATE IF NO INTENT. TO OPPOSE FILED
- ENDING
  - Date, Sign, Parties & Clerk/Registrar Addr.

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### MANDAMENT: AFFIDAVIT (1)

- NB GOOD FAITH
  - Schlesinger v Schlesinger 1979(4)SA342WLD:
    - Non disclosure of material fact **in ex parte appl.**  
Could result in dismissal
  - Trackman NO v Livschitz anors 1995(1)SA 282 (A)
    - Non discl. of material fact **in notice proceedings**
      - Could result in adverse cost order,
      - but not dismissal.
- APPLICANT
- RESPONDENT

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### MANDAMENT: AFFIDAVIT (2)

- JURISDICTION
  - PERSON:
    - Where whole cause of action arose or
    - Where Respondent work or lives)
  - CAUSE OF ACTION: VALUE OF GOODS
- BACKGROUND

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### MANDAMENT: AFFIDAVIT (3)

- NB ALLEGATION (cause of application):  
**PEACEFUL UNDISTURBED POSSESS**
- NB ALLEGATION (cause of application):  
**POSSESSION WAS SPOILED**
- LINK RESPONDENT TO SPOLIATION

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### MANDAMENT: AFFIDAVIT (4)

- FACTS WHICH MIGHT INFLUENCE COSTS ORDER
  - eg. Letters,
  - warnings,
  - conduct of respond.
- URGENCY (facts to substantiate)
- ATTESTATION
  - CHECK PROPER OATH
  - DEP. MAY CONFIRM

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### MANDAMENT (5): DRAFT COURT ORDER(LONG)

- ECHO NOTICE OF MOTION relief
- WARRANT PORTION  
"WHEREVER GOODS ARE"
- COURT MAKES THE ORDER
- CLERK OF COURT SHOULD SIGN IT r55(8)

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### MANDAMENT (5a): DRAFT COURT ORDER(SHORT)

- ECHO NOTICE OF MOTION
- WARRANT PORTION  
"WHEREVER GOODS ARE"
- INTERIM ORDER CLAUSE (Rule Nisi)
- RETURN DATE, TIME, PLACE
- COURT MAKES THE ORDER
- CLERK OF COURT SHOULD SIGN IT r55(8)

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### MvS Procedure (6):

- TAKE INSTRUCTIONS
- ADVISE eg. RE NATURE OF SPOLIATION  
❖ POSSESSION v OWNERSHIP
- DISCUSS POSSIBLE DEFENCES
- DETERMINE WHETHER LONG OR SHORT FORM
- DRAFT PAPERS
- CONTACT MAGISTRATE (IF AFTER HOURS URGENCY)

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### Procedure Steps: Application on Notice

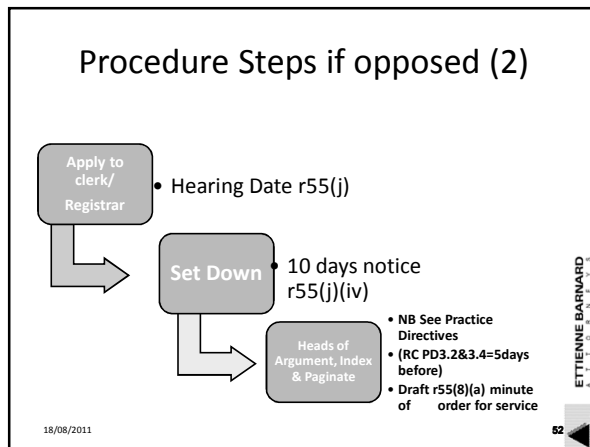
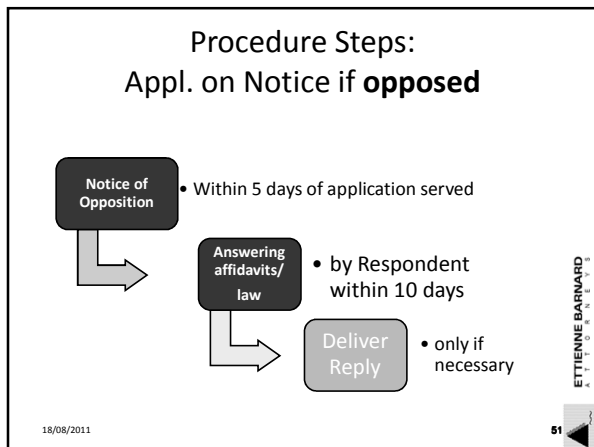
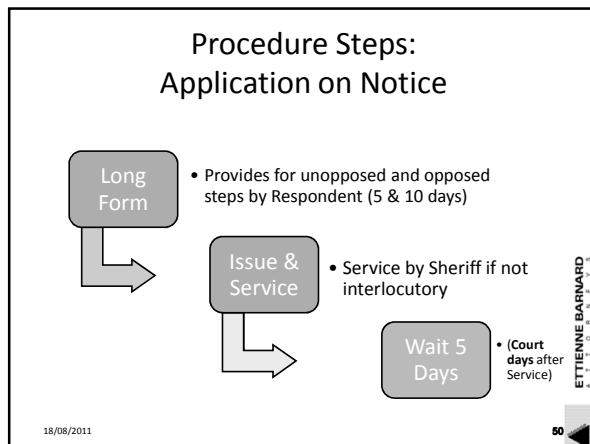
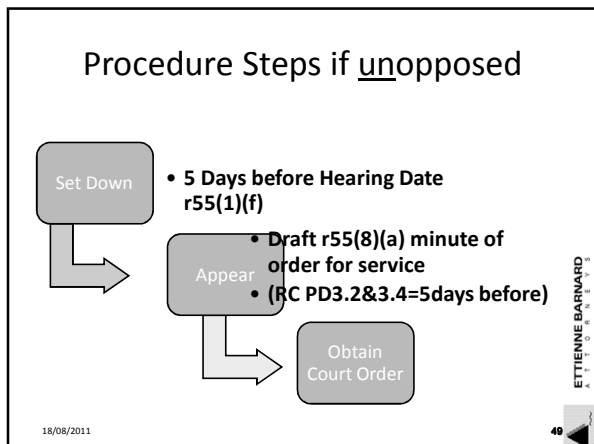
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    graph TD
      A[Long Form] --> B[Issue & Service]
      B --> C[Wait 5 Days]
  
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- Provides for unopposed and opposed steps by Respondent (5 & 10 days)
- Service by Sheriff if not Interlocutory
- (Court days after Service)

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### Application on Notice: Time Period Checklist

• Founding docs	• When Complete	• Rule 55 (1)
• Notice of Opp.	• Within 5 Days	• 55(1)(e)(iii)+(g)(i)
• No Opposition	• 10 Days after Fdoc	• 55(1)(e)(iii)
• Set-Down	• 5 Days notice to R	• 55(1)(f)
• Answ. Affidavit	• Within 10 Days	• 55(1)(g)(ii)
• Reply. Affidavit	• Within 10 Days	• 55(1)(h)
• Set-Down	• No answ aff -w5d	• 55(1)(j)(i)
	• Answ aff-w5d from reply/expiry	• 55(1)(j)(ii)
	• Resp if Appl did not	• 55(1)(j)(iii)

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## SPOILIATION (7) DEFENCES:

- FACTS-DID NOT TAKE THE ITEMS
- TOOK BUT HAD CONSENT
- NOT IN POSSESSION  
(eg. Employee not in possession)
- ACTED IN CONTRA SPOILIATON
- PROCEDURAL DEFENCES (eg. Jurisdiction; Non joinder)
- NO CAUSE OF ACTION disclosed
- COURTS DISCRETION

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## MANDAMENT (8): WHAT CAN RESPONDENT DO?

- ANTICIPATION
  - R55(3)(d)-no less than **24**hrs notice  
(r56(5)-**12** hrs notice but only re arrest suspectus de fuga)
- OPPOSING AFFIDAVIT
  - NB GOOD FAITH
  - DON'T LEAVE ALLEGATIONS OPEN
  - COSTS?

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## OPPOSING AN APPLICATION: THE OPPOSING AFFIDAVIT(9)

- DESCRIBE RESPONDENT IN CONTEXT
- SUMMARIZE NATURE OF DEFENCE  
eg. Counter spoliation or deny the act
- THEN COMMENT ON EACH PARAGRAPH OF APPLICANT PAPERS
  - "The Respondent comments as follows on the allegations of the Applicant in his founding affidavit:  
1. REGARDING PARAGRAPH 1:  
The Respondent admits..... But denies..... "

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## OPPOSING AN APPLICATION: THE OPPOSING AFFIDAVIT(10)

- THE FACTS ALLEDGED MUST SUPPORT THE DEFENCE YOU HAVE SUMMARIZED
- REMEMBER ANNEXURES/ATTESTATION ETC.
- NB OTHER ASPECTS TO CONSIDER
  - JURISDICTION
  - JOINDER DEFENSES
  - APPLICATION TO JOIN
  - THIRD PARTY NOTICES

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## MANDAMENT

- ERRORS
  - eg. -NOT PROPER ATTESTATION
  - SHORT SERVICE
  - NOT ENOUGH TIME FOR OPPOSING PAPERS
- POSTPONEMENT
- COSTS (RE INDULGENCE REQUESTED)

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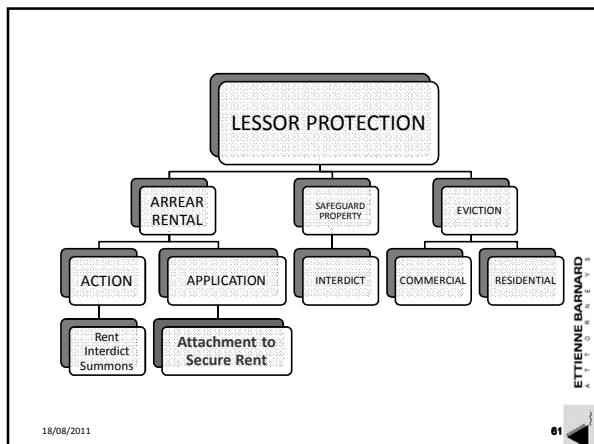
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### ATTACHMENT TO SECURE PAYMENT OF RENTAL

- s32 r56 & r55
- DOCUMENTS
  - NOTICE OF MOTION
    - **USUALLY SHORT FORM** AS GIVING PRIOR NOTICE MIGHT DEFEAT THE PURPOSE OF THE APPLICATION
  - AFFIDAVIT
  - DRAFT MINUTE OF COURT ORDER [r55(8)(a)]

### AFFIDAVIT TO ATTACH IN SECURITY:RENTAL ARREARS1

- SUBST. LAW:RENT HYPOTHEC
- APPLICANT: LANDLORD
- RESPONDENT: TENANT
- NB GOOD FAITH
- JURISDICTION
  - PLACE: PREMISES SITUATE IN COURT DISTRICT
  - AMOUNT: R100 000/300 000

### AFFIDAVIT TO ATTACH IN SECURITY:RENTAL ARREARS2

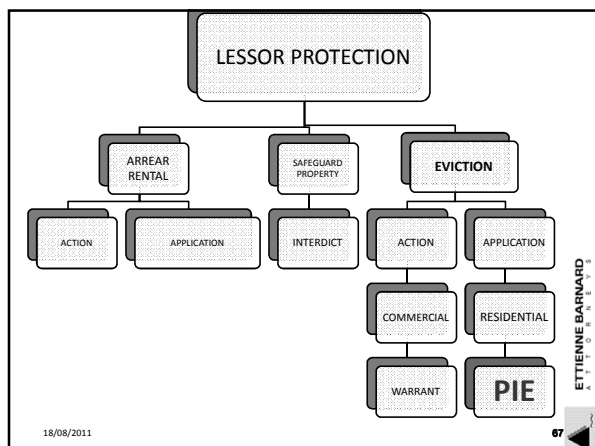
- AMOUNT OF RENTAL MUST BE DUE AND IN ARREARS
- NB ALLEGATION FOR CAUSE OF APPL:
  - BEEN DEMANDED IN WRITING (7 DAYS)
  - OR
  - LANDLORD **BELIEVES** TENANT IS ABOUT TO REMOVE PROPERTY(damage hypoth)
  - IN ORDER TO AVOID PAYING RENT

### AFFIDAVIT TO ATTACH IN SECURITY:RENTAL ARREARS3

- Is NCA s129&130 applicable?
  - Pareto Limited anor v Kalnisha Sigaban t/a KS Flowers N More (A3096/09 ) [2010] ZAGPJHC 21 (15 April 2010)
- SECURITY GIVEN (TO SATISFY THE CLERK OF THE COURT)
- PRAYER
  - (INTERIM, RETURN DATE if made ex parte)

### RENTAL ARREARS COURT ORDER

- Draft Court Order Required
- NB rule 42(3) states that the method of attachment under s32 must be the same as that of attachment in execution.



## RESIDENTIAL EVICTION: PIE

- Relationship between 2 Acts (MCA & PIE)
- Out:** Old form of application (Where applicant chose the court date)
- Theart and Another v Minnaar NO, Senekal v Winskor 174 (Pty) Ltd** 2010 (3) SA 327 (SCA);

Cf HC Rule 6

**Cape Killarney Property Investments (Pty) Ltd v Mahamba** 2001(4)SA1222 (SCA)

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## Cape Kilarney

- [12] Brand AJA: "...It is clear, in my view, that this notice in terms of the Rules of Court is required **in addition to** the s 4(2) notice..."
- [14] Brand AJA: "In High Court applications the hearing date is determined **only after all the papers on both sides have been served**. It follows...that it is **only at that stage that the section 4(2) notice can be authorised & directed** by the court

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## Cape Kilarney (2)

- [15] NB "Applicant can approach ...court for ... [the s4(2) notice] directions by ...ex parte application
- NB The mistake on the facts was they attempted to obtain eviction via rule nisi ex parte order & also did not prove urgency

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## Cape Killarney Impact toned down:

O D Thiam v Magee Investments CC t/a Magee Property Investments, Case no A516/2007  
WCHC Full Bench (19 March 2008)

- Oosthuizen AJ indicated that the dictum of Killarney does not impose a requirement of substantive law in all eviction proceedings

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## Cape Killarney Impact toned down:

- "As long as proper notice of intention to seek eviction...served on occupiers, and they ...given a **fair opportunity** of drawing all **relevant circumstances to the attention of the court**...Section 26(3) of the Bill of Rights and...PIE Act have been respected"

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### Cape Killarney Impact toned down:

Ansie Senekal v Winskor 174 (Pty) Ltd, case no A516/2007 WCHC Full Bench (23 July 2008)

Veldhuizen J indicated that the SCA in **Cape Killarney did not decide that the s4(2) notice could not be contained in the notice of motion** issued in terms of rule 6 of the Uniform Rules of Court.

- Ansie Senekal was confirmed by the SCA but with reservations that Killarney still applied.

18/08/2011 73

### Cape Killarney Impact toned down:

Unlawful Occupiers, School Site v City of Johannesburg 2005 (4) SA 199 (SCA)

Brand JA "Where formalities required by statute are peremptory it is not every deviation from the literal prescription that is fatal..."

"...whether ...deficient s4(2) notice achieved its pupose, cannot be considered in... abstract"  
 Facts (what respondent knew) relevant.

18/08/2011 74

### Cape Killarney Impact toned down:

Moela v Shoniwe 2005 (4) SA 357 (SCA)

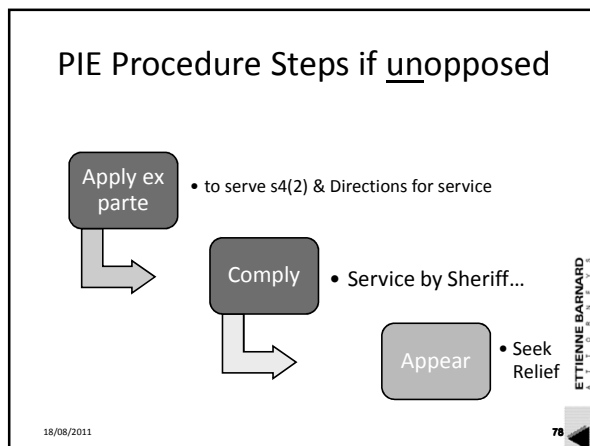
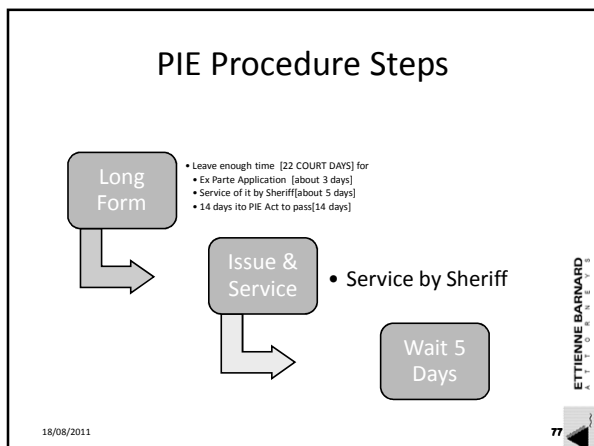
The object of s 4(2) may be achieved even though the service of the notice required by s4(2) had not been authorised by the court.

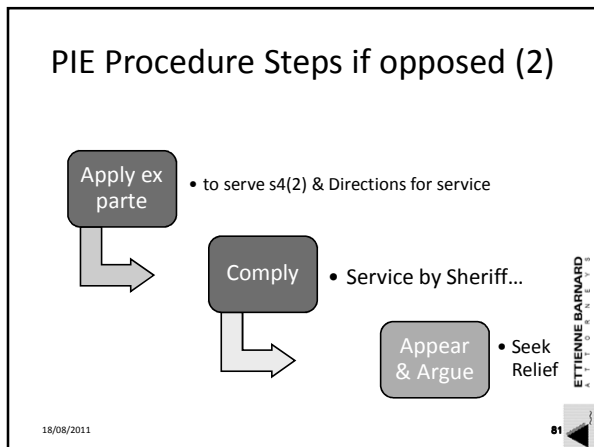
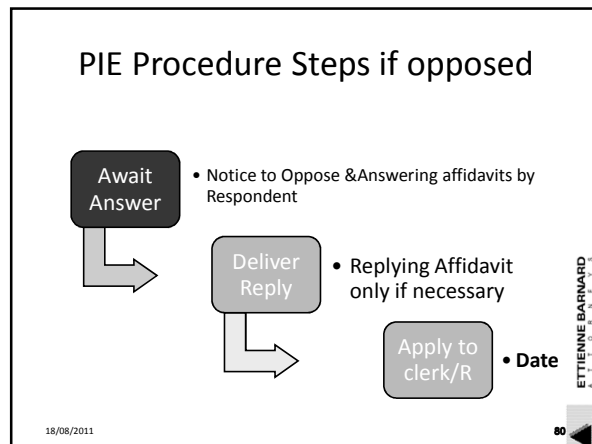
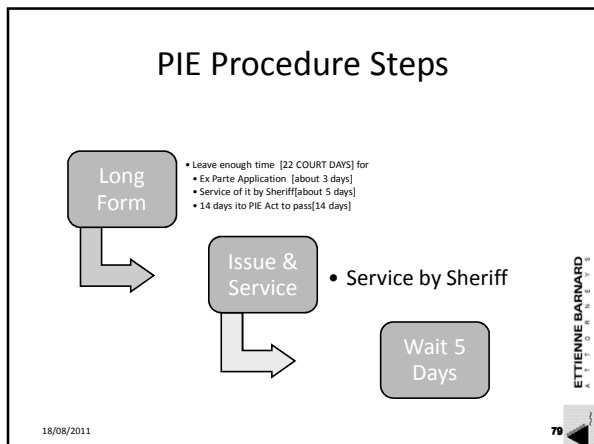
18/08/2011 75

### PIE Procedure Steps

1. Long Form Notice ito Rule 55(1)(d)
  1. NB Leave enough time for
    1. bringing the ex parte application,;
    2. serving it;
    3. plus 14 open days [PIE ACT]
2. Issued & served
3. If no opposition delivered, apply ex parte for consent to serve s4(2) notice & directions for service
4. If opposed, go through opposed process until date for hearing has been determined and then apply for consent to serve s4(2) notice & directions for service
5. Comply with directions
6. Appear

18/08/2011 76





### PIE Notice (1)

IN THE MAGISTRATE'S COURT FOR THE DISTRICT OF BELLVILLE  
HELD AT BELLVILLE

CASE NO:

In the matter between:

MRS PASSIVE INCOME Applicant

and

STICKY TENANT Respondent

---

**NOTICE OF MOTION FOR EVICTION IN TERMS OF ACT 19, 1998**

18/08/2011

### PIE Notice (2)

TAKE NOTICE that MRS PASSIVE INCOME (hereinafter called the applicant) intends to make application to this Court for an order:

- (a) Evicting the Respondent and any person occupying through the Respondent, from 3 North Street, Bellville ("the property");
- (b) Determining a just and equitable date on which the Respondent must vacate the property;
- (c) Determining a date on which the Sheriff may evict the Respondent if he and all persons under him have not vacated the property;
- (d) Directing the Respondent to pay the costs of the Applicant (on an attorney and client scale)
- (e) Further and/or Alternative Relief.

18/08/2011

### PIE Notice (3)

FURTHER TAKE NOTICE that you are hereby informed of the relevant provisions of the Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19, 1998, namely that:

1. The Application is brought in terms of its section 4;
2. The grounds for the proposed eviction are as set out in the affidavit attached to the application. They are summarised as:
  1. You have failed to pay your rent for the last two months;
  2. As a result of such failure, the lease agreement by which you obtained occupation, has been cancelled by the applicant;
  3. Your right to occupy has thus terminated;
  4. You are an unlawful occupier as defined in terms of the said act;
3. You have the right to oppose this application on the above date;
4. You have the right to apply for legal aid to oppose it.

18/08/2011

### PIE Notice (4)

The accompanying affidavit of **PASSIVE INCOME** will be used in support thereof.

TAKE NOTICE FURTHER that the applicant has appointed Barnard Labuschagne Inc t/a Etienne Barnard Attorneys, Ebrose Chambers, 5 Audas Street, Somerset West at which applicant will accept notice and service of all process in these proceedings.

ETTIEENNE BARNARD  
ATTORNEYS  
EBROSE CHAMBERS  
5 AUDAS STREET  
SOMERSET WEST  
TEL: 021 852 7780  
FAX: 021 852 4194  
REF: EB/kb/X21

18/08/2011

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### PIE Notice (5)

TAKE NOTICE FURTHER that if you intend opposing this application you are required:

- (a) to notify applicant's attorney in writing on or before the 25<sup>th</sup> November 2010;
- (b) and within 10 days after you have so given notice of your intention to oppose the application, to file your answering affidavits, if any;

and further that you are required to appoint in such notification an address referred to in rule 55(1)(g) at which you will accept notice and service of all documents in these proceedings.

**If no such notice of intention to oppose be given, the application will be made on the 14<sup>th</sup> of December 2010 at 09:00.**

ETTIEENNE BARNARD  
ATTORNEYS  
EBROSE CHAMBERS  
5 AUDAS STREET  
SOMERSET WEST  
TEL: 021 852 7780  
FAX: 021 852 4194  
REF: EB/kb/X21

18/08/2011

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### PIE Notice (6)

DATED at Somerset West this 18<sup>th</sup> day of November 2010 (signed) E Barnard.....

Attorneys for the Applicant  
BARNARD LABUSCHAGNE INC  
t/a Etienne Barnard Attorneys  
Ebrose Chambers, 5 Audas Street, Audas Estate, Somerset West, Tel: 021 – 852 7780;  
Fax: 021 – 852 4194; Ref: EB/kb/X21

To: THE CLERK OF THE COURT  
MAGISTRATE'S COURT  
SOMERSET WEST

And to: STICKY TENANT  
(full physical address)

And to: THE CITY OF CAPE TOWN  
(full physical address)

ETTIEENNE BARNARD  
ATTORNEYS  
EBROSE CHAMBERS  
5 AUDAS STREET  
SOMERSET WEST  
TEL: 021 852 7780  
FAX: 021 852 4194  
REF: EB/kb/X21

18/08/2011

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### Cape Killarney says:

- The long form notice must first be vented by the exchange of pleadings (if it is to be opposed).
- High Court applications the hearing date is determined only after all the papers on both sides have been served. It follows...that it is only at that stage that the section 4(2) notice can be authorised & directed by the court"
- If this has taken place or if no opposition filed, do the application into s 4(2)

ETTIEENNE BARNARD  
ATTORNEYS  
EBROSE CHAMBERS  
5 AUDAS STREET  
SOMERSET WEST  
TEL: 021 852 7780  
FAX: 021 852 4194  
REF: EB/kb/X21

18/08/2011

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### PIE Ex Parte Notice (1)

IN THE MAGISTRATE'S COURT FOR THE DISTRICT OF BELLVILLE  
HELD AT BELLVILLE

CASE NO:  
In the matter between:

MRS PASSIVE INCOME Applicant

and

STICKY TENANT Respondent

---

EX PARTE NOTICE OF MOTION FOR SERVICE DIRECTIONS  
IN TERMS OF SECTION 4(2) ACT 19, 1998

---

ETTIEENNE BARNARD  
ATTORNEYS  
EBROSE CHAMBERS  
5 AUDAS STREET  
SOMERSET WEST  
TEL: 021 852 7780  
FAX: 021 852 4194  
REF: EB/kb/X21

18/08/2011

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### PIE Ex Parte Notice (2)

TAKE NOTICE that application will be made on behalf of the above- named applicant on 14 December 2010 At 09:00 or as soon thereafter as the legal representative may be heard for an order in the following terms:

1. That the Court give written directions as to notice and service of the date of the hearing of an application to be brought by the Applicant for the eviction of the Respondent in terms of section 4(2) of Act 19, 1998
2. That the Respondent be informed that the date on which the said application will be heard will be the 4<sup>th</sup> of February 2011 at 09:00

ETTIEENNE BARNARD  
ATTORNEYS  
EBROSE CHAMBERS  
5 AUDAS STREET  
SOMERSET WEST  
TEL: 021 852 7780  
FAX: 021 852 4194  
REF: EB/kb/X21

18/08/2011

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### PIE Ex Parte Notice (3)

3. That the Respondent be notified that the Applicant will on that date apply for an order:

- a) Evicting the Respondent and any person occupying through the Respondent, from 3 North Street, Bellville ("the property");
- b) Determining a just and equitable date on which the Respondent must vacate the property;
- c) Determining a date on which the Sheriff may evict the Respondent if he and all persons under him have not vacated the property;
- d) Directing the Respondent to pay the costs of the Applicant (on an attorney and client scale)
- e) Further and/or Alternative Relief.

ETTIENNE BARNARD  
ATTORNEYS FOR THE APPLICANT

18/08/2011 91

### PIE Ex Parte Notice (4)

4. That the Respondent be informed of the relevant provisions of the Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19, 1998, namely that:

- a) The Application is brought in terms of its section 4;
- b) The grounds for the proposed eviction are as set out in the affidavit attached to the application. They are summarised as:
- c) The Respondent has failed to pay his rent for september and October 2010;
- d) As a result of such failure, the lease agreement by which the Respondent obtained occupation, has been cancelled by the Applicant;
- e) The right of the Respondent to occupy has thus terminated;
- f) The Respondent is an unlawful occupier as defined in terms of the said act;

ETTIENNE BARNARD  
ATTORNEYS FOR THE APPLICANT

18/08/2011 92

### PIE Ex Parte Notice (5)

5. The Respondent has the right to oppose this application on the above date;
6. The Respondent has the right to apply for legal aid to oppose it.
7. This application, together with the order made in this application must be served by the Sheriff on the Respondent at 3 North Street, Bellville as well as on the City of Cape Town before ??????????

ETTIENNE BARNARD  
ATTORNEYS FOR THE APPLICANT

18/08/2011 93

### PIE Ex Parte Notice (6)

DATED at Somerset West this 18<sup>th</sup> day of November 2010  
 (signed) E Barnard.....  
 Attorneys for the Applicant  
 BARNARD LABUSCHAGNE INC  
 t/a Etienne Barnard Attorneys  
 Ebrose Chambers, 5 Audas Street, Audas Estate, Somerset West, Tel: 021 - 852 7780; Fax: 021 - 852 4194; Ref: EB/kb/X21

To: THE CLERK OF THE COURT  
MAGISTRATE'S COURT  
SOMERSET WEST

And to: STICKY TENANT  
(full physical address)

And to: THE CITY OF CAPE TOWN  
(full physical address)

ETTIENNE BARNARD  
ATTORNEYS FOR THE APPLICANT

18/08/2011 94

### PIE NB AFFIDAVIT CONTENT

- Applicant is owner or in lawful control of land
- Right of Respondent to Possess
- A valid termination of such right
- Notice to Occupier & Local Municipality
- Discretionary facts:
  - ???
  - ???
  - ???
  - ???

ETTIENNE BARNARD  
ATTORNEYS FOR THE APPLICANT

18/08/2011 95

ETTIENNE BARNARD  
ATTORNEYS FOR THE APPLICANT

18/08/2011 96

## INTERLOCUTORY APPLICATIONS

### IRREGULAR STEPS RULE 60A

18/08/2011

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## WHAT IS AN IRREGULAR STEP?

- Something done which
    - Contravenes the **rules of court**
    - The other party has not knowingly accepted
      - Without objection
- A Notice of Intention to Defend is not an acceptance [r13(4)]

18/08/2011

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## WHAT IS NOT AN IRREGULAR STEP?

- Non-compliance with other legislation
  - Cochrane v City of Johannesburg 2011 (1) SA 553 (GSJ)
    - Institution of Legal Proceedings Against Certain Organs of State Act 40, 2002
    - Not to proceed ito “rule 30” (irregular proceedings), but rather
      - object to notice before institution of action or
      - deliver special plea after action instituted (so that issues relating to condonation can be properly ventilated)

18/08/2011

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## IRREGULAR STEP EXAMPLES NON-COMPLIANCE WITH RULE 5

- Service address 20km from court
- Summons does not comply with Form 2 or 2B
- Parties or cession details not set out
- Summons contains no
  - consent to judgment or appearance to defend form
  - Notices ito s57,58,65A, 65D or 109

18/08/2011

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## IRREGULAR STEP EXAMPLES NON-COMPLIANCE WITH RULE 5

- No particulars re Jurisdiction
  - Whole Cause of Action
  - Property in area
- Summons does not indicate
  - abandonment (ito s38) or
  - set-off (ito s39) where applicable
- Declaration does not allege compliance with legislation

18/08/2011

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## IRREGULAR STEP EXAMPLES NON-COMPLIANCE WITH RULE 5

- Summons to declare a residential home immediately executable does not contain constitutional warning

18/08/2011

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### IRREGULAR STEP EXAMPLES NON-COMPLIANCE WITH RULE 6

- Pleading not signed by Plaintiff/P's attorney
- Material facts not stated clearly or concisely so that opponent can reply
- An evasive denial
- Failure to set out averments required
  - Re Contract or legislation governing contract [r6(6),(11)]
  - Re divorce [r6(8)]
  - Re damages [r6(9)&(10)]
  - Re cession [r6(12)]

ETTIENNE BARNARD

18/08/2011

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### IRREGULAR STEP EXAMPLES NON-COMPLIANCE WITH RULE 17(2)

- A Plea
    - not admitting,
    - denying or
    - confessing and avoiding all material facts alleged
- or not
- clearly and concisely stating all material facts on which defendant relies.

ETTIENNE BARNARD

18/08/2011

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### IRREGULAR STEP EXAMPLES NON-COMPLIANCE WITH RULE 17(3) or (5)

- A Plea
    - not explaining or
    - qualifying a denial
 if such explanation or qualification is necessary [17(3)]  
 or  
 – Not detailing items to which part tender relates [17(5)(a)]
- Or
- A Plea of tender if amount tendered is not secured to the satisfaction of the plaintiff (or already paid) [17(5)(b)]

ETTIENNE BARNARD

18/08/2011

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### IRREGULAR STEP EXAMPLES NON-COMPLIANCE WITH RULE 20

- Counterclaim
    - filed out of time
- Or
- in any other respect not complying with Rule 20

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18/08/2011

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### IRREGULAR STEP EXAMPLES RECENT CASE LAW

- Dass NO v Lowewest Trading (Pty) Ltd 2011 (1) SA 48 (KZD)
  - A Plaintiff delivering a Notice of Bar while Summary Judgment Application pends.

ETTIENNE BARNARD

18/08/2011

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### IRREGULAR STEP DOCUMENTS TO BE DRAFTED

- NOTICE TO REMOVE CAUSE OF COMPLAINT
- NOTICE
  - Hybrid Short Form (as application is Interlocutory)
- AFFIDAVIT
  - Not requirement (Its Like an Exception)
    - Chelsea Estates... v Speed-O-Rama 1993(1) SA 198 D
  - Useful to persuade court
- DRAFT COURT ORDER

ETTIENNE BARNARD

18/08/2011

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### IRREGULAR STEP REQUIREMENTS TO BE MET

- Describe Parties
- Existing action/application between the parties before the court;
- Date Irregular Step occurred;
- Describe Irregular step;
- Applicant took no further step
- Date Notice to Rectify was served i.e.. in 10 days of Irregular Step
- Respondent did not rectify within 10 days of the notice
- Application is made within 15 days of time to rectify having expired
- Prejudice suffered by the Irregular Step and failure to rectify.  
(Details prejudice to persuade the Magistrate)

ETTIEENNE BARNARD  
18/08/2011

### IRREGULAR STEP PROCESS TO SET IT ASIDE (1)

ETTIEENNE BARNARD  
18/08/2011

### IRREGULAR STEP PROCESS TO SET IT ASIDE (2)

ETTIEENNE BARNARD  
18/08/2011

### IRREGULAR STEP PROCESS TO SET IT ASIDE (3)

ETTIEENNE BARNARD  
18/08/2011

### IRREGULAR STEP COURT MAY

- SET ASIDE
  - Whole step or
  - In part
 Against all parties or some of them
- GRANT LEAVE TO AMEND or
- MAKE ORDER IT DEEMS FIT [r60A(3)]

ETTIEENNE BARNARD  
18/08/2011

### IRREGULAR STEP OFFENDING PARTY

- MAY NOT
  - TAKE FURTHER STEPS IN THE CAUSE
  - REPLY
    - Chelsea Estates... v Speed-O-Rama 1993(1) SA 198 D
- MAY
  - APPLY TO COURT FOR TIME EXTENSION TO COMPLY

[r60A(4)]  
ETTIEENNE BARNARD  
18/08/2011



## RESCISSION & VARIATION of JUDGMENTS

- WHO MAY APPLY
  - SECTION 36
    - GRANTED IN ABSENCE
    - VOID AB ORIGINE (From the start)
    - COMMON MISTAKE
    - PATENT ERRORS & NO APPEAL PENDING
    - IN RESPECT WHEREOF NO APPEAL LIES
    - IF PLAINTIFF HAS AGREED (since 17/1/2003)
  - RULE 49: ANY PERSON AFFECTED BY SUCH JUDGMENT

## RESCISSION & VARIATION of JUDGMENTS

- WHEN?
  - WITHIN 20 DAYS AFTER KNOWLEDGE
  - WITHIN 1 YEAR AFTER KNOWLEDGE OF VOID AB ORIGINE/FRAUD/MISTAKE
  - 2010 amendment r49(1): AT ANY TIME AFTER OTHER PARTY (CREDITOR) HAS AGREED
- NB RULE 49(2) KNOWLEDGE PRESUMPTION OF 10 DAYS

## RESCISSION & VARIATION of JUDGMENTS

- HOW?
  - BY APPLICATION
  - NOTICE TO ALL PARTIES
  - AFFIDAVIT
  - RULES INDICATE 4 SCENARIOS

## RESCISSION & VARIATION SCENARIO 1

- DEFENDANT TO DEFEND
  - AFFIDAVIT CONTENT
    - REASONS FOR ABSENCE OR DEFAULT
    - GROUNDS OF DEFENCE
    - (GOOD CAUSE)
  - IF GOOD DEFENCE, COURT LESS STRICT RE DEFAULT

## RESCISSION & VARIATION SCENARIO 2

- DEFENDANT NOT TO DEFEND
  - AFFIDAVIT CONTENT
    - NOT WILFUL DEFAULT
    - JUDGMENT SATISFIED
  - OR
  - ARRANGEMENT TO SATISFY WITHIN REASONABLE TIME AFTER KNOWLEDGE

**RESCISSION & VARIATION  
SCENARIO 3**

- PLAINTIFF (OR DEFENDANT)
- IF OTHER PARTY CONSENTS
- ANNEX A COPY OF CONSENT
- MAY BE MADE AT ANY TIME AFTER PLAINTIFF AGREED IN WRITING [r49(5)(b)]

18/08/2011 **121**

ETTIEENNE BARNARD  
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**RESCISSION & VARIATION  
SCENARIO 3**

- PARTY OTHER THAN PLAINTIFF OR DEFENDANT
- AFFIDAVIT MUST STATE REASONS WHY OTHER PARTY IS INTERESTED

18/08/2011 **122**

ETTIEENNE BARNARD  
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18/08/2011 **123**

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[www.barnards.co.za](http://www.barnards.co.za)

<http://newmcrules.blogspot.com>

18/08/2011 **124**

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**Referring to Case Law in Argument**




18/08/2011 **125**

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18/08/2011 **126**

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## How to & How not to refer to the Opposing Counsel



ETTIENNE BARNARD  
A. T. O. R. N. E. E.

18/08/2011 127

ETTIENNE BARNARD  
A. T. O. R. N. E. E.

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ETTIENNE BARNARD  
A. T. O. R. N. E. E.

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### APPEALS (CIVIL MATTERS) TIMELINE CHECKLIST (1)

NB 2 ACTS AND SETS OF RULES APPLY +

Uniform Rules	WCHC Consolidated Practice Notes	MC Rules
---------------	----------------------------------	----------

↓

REQUEST WRITTEN JUDGMENT	
WITHIN 10 DAYS AFTER JUDGMENT	MC Rule 51(1)

↓

MAGISTRATE gives WRITTEN JUDGMENT	
WITHIN 15 DAYS AFTER REQUEST	MC Rule 51(1)

ETTIENNE BARNARD  
A. T. O. R. N. E. E.

18/08/2011 130

### APPEALS (CIVIL MATTERS) TIMELINE CHECKLIST (2)

NOTICE OF APPEAL	
WITHIN 20 DAYS AFTER JUDGMENT OR WRITTEN JUDGMENT	MC RULE 51(3)&(7)

↓

APPELLANT GIVES SECURITY	
with Notice of Appeal	MC RULE 51(4)

ETTIENNE BARNARD  
A. T. O. R. N. E. E.

18/08/2011 131

### NOTICE OF APPEAL IS ONLY COMPLETE WHEN ALL RULE 51 REQUIREMENTS ARE MET:

- 51(3) APPEAL IS NOTED
- 51(4) DELIVERY OF NOTICE
- 51(7) MUST STATE
 
  - WHOLE OR ONLY PART OF JUDGEMENT
  - GROUNDS OF FACT AND LAW

ETTIENNE BARNARD  
A. T. O. R. N. E. E.

18/08/2011 132

### NOTICE OF APPEAL

- In die Hof Verdaag, Judge Kees van Dijkhorst quotes the following grounds of appeal in a 1988 Californian case:  
*“Prosecuting attorney farted about 100 times during defence attorney’s argument”*

ETTienne BARNARD  
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18/08/2011 133

### APPEALS (CIVIL MATTERS) TIMELINE CHECKLIST (3)

NOTICE OF CROSS APPEAL	
IN 10 DAYS OF DELIVERY OF NOTICE OF APPEAL	MC RULE 51(6)

↓

MAGISTRATE SUPPLIES REASONS FOR JUDGMENT	
IN 15 DAYS AFTER NOTICE OF APPEAL	MC RULE 51(8)

ETTienne BARNARD  
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18/08/2011 134

### APPEALS (CIVIL MATTERS) TIMELINE CHECKLIST (4)

APPLY FOR A HEARING DATE TO THE REGISTRAR OF THE HIGH COURT	
WITHIN 40 DAYS AFTER NOTING APPEAL	HC RULE 50(4)(a)

↓

IF APPELLANT DOES NOT APPLY RESPONDENT APPLIES	
IN FOLLOWING 20 DAYS	HC RULE 50(4)(b)

ETTienne BARNARD  
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18/08/2011 135

### APPEALS (CIVIL MATTERS) TIMELINE CHECKLIST (5)

POWER OF ATTORNEY TO PROSECUTE APPEAL & APPOINT ATTORNEY/ADV.	
DONE WITH APPLICATION FOR DATE	HC r50(7)(2)&(3)

↓

LODGE RECORD WITH REGISTRAR	
DONE WITH APPLICATION FOR DATE	[HC r50(7)(a)]

↓

2 COPIES OF RECORD TO RESPONDENT	
----------------------------------	--

ETTienne BARNARD  
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### APPEALS (CIVIL MATTERS) TIMELINE CHECKLIST (6)

NB APPEAL LAPSES IF NOT PROPERLY PROSECUTED WITHIN 60 DAYS OF NOTING IT	
HC RULE 50(1)	

↓

CROSS APPEAL LAPSES 20 DAYS LATER	
HC RULE 50(3)	

ETTienne BARNARD  
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18/08/2011 137

### APPEALS (CIVIL MATTERS) TIMELINE CHECKLIST (7)

REGISTRAR SUPPLIES HEARING DATE	
At least 40 days after receipt of applicat.	[HC RULE 50(5)]

↓

APPELLANT DELIVERS <u>HEADS</u> OF ARGUMENT	
Not less than 15days before hearing	HC RULE 50(9)+ WCCons. Practice Note 46

ETTienne BARNARD  
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18/08/2011 138

### APPEALS (CIVIL MATTERS) TIMELINE CHECKLIST (8)

Heads must comply with WC Consolidated Practice Note 49(2) & Uniform r50(9)

- CONCISE & SUCCINCT STATEMENT OF MAIN POINTS (WITHOUT ELABORATION)
- succint=clear, precise & short
- CONTAIN A LIST OF AUTHORITY REFERRED TO r50(9)
  - USUALLY LISTED ALPHABETICALLY
- Original + 3 additional copies r50(9)

18/08/2011 ETIENNE BARNARD  
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### APPEALS (CIVIL MATTERS) TIMELINE CHECKLIST (9)

## Applicant must

- consult respondent & (together with heads)
- file statement setting out:  
Which portions of record are irrelevant for the appeal

18/08/2011 ETIENNE BARNARD  
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### APPEALS (CIVIL MATTERS) TIMELINE CHECKLIST (10)

**RESPONDENT DELIVER HEADS OF ARGUMENT**

Not less than 10 days before hearing	[HC RULE 50(9)]
--------------------------------------	-----------------

↓

**FINAL PREPARATION**

ARGUMENTS FOR <u>AND</u> <u>AGAINST</u>	CHECK COURT FILE
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### APPEALS (CIVIL MATTERS) TIMELINE CHECKLIST (11)

**APPEAR AT HEARING**

ARRANGE WITH OPPONENT FOR INTRODUCTION TO PRESIDING JUDGES (SENIOR INTRODUCES) BEFORE HEARING

↓

**IF YOU INTEND USING COUNSEL OR ATTORNEY TO APPEAR,**

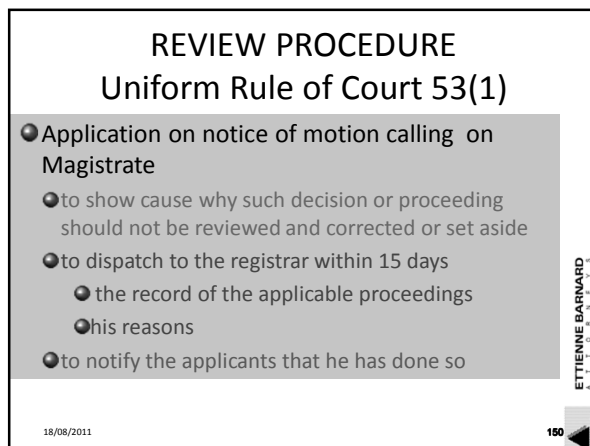
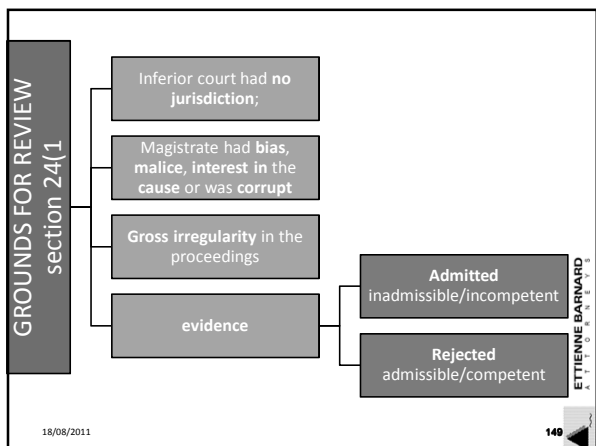
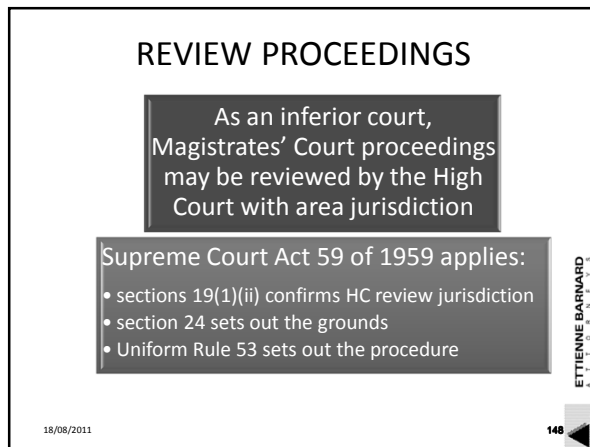
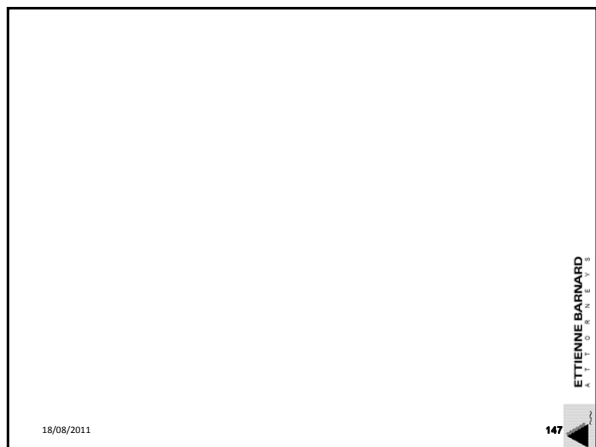
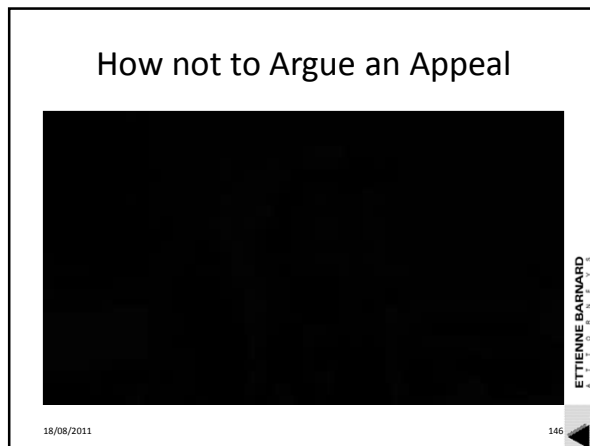
BRIEF HIM/HER WELL IN ADVANCE WITH A COPY OF THE COMPLETE RECORD (FINALLY NUMBERED AND PAGINATED)

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### How to argue an Appeal

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## REVIEW PROCEDURE

### Uniform Rule of Court 53(2)

- The notice of motion must:
  - identify decision/proceeding reviewed
  - be supported by affidavit setting out
    - grounds &
    - facts
 relied on
- r53(3): Registrar sends record to applicant
- Applicant makes 2 copies for the registrar and 1 for each other party

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## REVIEW PROCEDURE

- r53(4): Within 10 days after record made available, applicant may amend/amplify review notice by:
  - a further notice and
  - supporting affidavit
- r53(5)(a): Within 15 days of original notice Magistrate must deliver notice of intention to defend

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## REVIEW PROCEDURE

- r53(5)(b) Magistr. must (in 30 days of expiry of time within which appl. may amend), deliver **Answering Affidavit**.
- r53(6) & r6(e) Appl. may **reply** within 10 days of receipt of answering affidavit
- r53(7) & r6(5)(f) Applicant **applies for a hearing date** within 5 days of reply delivered or of reply time expiring.

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## REVIEW PROCEDURE

- Remember to
  - prepare, paginate, index and number record
  - prepare for hearing
  - brief practitioner who will appear
  - tidy court file
  - attend hearing

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## EXECUTION: TYPES OF WARRANTS

- EXECUTION [Form 32]
- EJECTMENT [Form 30](commercial prop)
- DELIVERY [Form 31]
- ARREST-Witness in default
  - Fine or Arrest[Form 25]
  - Arrest and bring before court [Form 26]
- ARREST-Debtor in default [Form 40A]
  - Arrest and bring before court

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## EXECUTION: TYPES OF WARRANTS

- Re: APPLICATIONS (miscellaneous)
  - eg. Spoliation; Interdicts, etc.
- NB Annex the Warrant in triplicate to application for default judgment (to get warrant issued together with judgment)
- COSTS RISK ITO SEC 65E(4) for Nulla Bona unless court on good cause shown orders otherwise

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## WHICH MOVABLES MAY BE ATTACHED

- SECTION 68 (1) INCLUDES
  - MONEY, BANK NOTES, CHEQUES, BILLS OF EXCHANGE, PROMISSORY NOTES, BONDS
  - SECURITIES FOR MONEY (belonging to the debtor)
- SECTION 68(2) allows creditor to sue on such cheques etc. in name of debtor

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## WHICH MOVABLES MAY BE ATTACHED

- SECTION 68 (3)
  - DEBTORS INTEREST IN MOVABLE PROPERTY PLEGGED OR SOLD UNDER SUSPENSIVE CONDITION TO THIRD PARTY
  - DEBTORS INTEREST IN MOVABLE PROPERTY SOLD TO DEBTOR UNDER 'HIRE PURCHASE' AGREEMENT OR SUSPENSIVE CONDITION (But see National Credit act for amendments)

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## WHICH MOVABLES MAY BE ATTACHED

- SECTION 68(3)
  - DEBTORS INTEREST IN IMMOVABLE PROPERTY LEASED OR SOLD TO DEBTOR UNDER SUSPENSIVE CONDITION
- s68(5): DEBTORS INTEREST IN PARTNERSHIP
- MEMBERS INTEREST IN CC
  - Jones & anors v Trust Bank 1993(4) SA 415(C)
  - NOW SEE s34A & s7 OF CC Act
- s68(4) SHERIFF TO SIGN TFR DOCSetc.

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## WHICH MOVABLES MAY BE ATTACHED

- NOT DEBTS DUE TO THE DEBTOR
  - Garnishee Order
    - SEC 72 (EX PARTE)
      - The Act allows so should not be affected by New Rule 59
    - SEC 65 E(1)(b)

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## Collection Risks

- Poor preparation
  - Get info from clients, own & court file
  - Deeds office searches
  - CIPC searches
  - Credit Bureaus
- Fraud or bribes at Clerk of the Courts office
- Debtor dishonesty

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## MAGISTRATES' COURT PRACTICE

Slides compiled by



[www.barnards.co.za](http://www.barnards.co.za)

<http://newmcrules.blogspot.com>

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## PROCEDURE RE MOVABLE PROPERTY(1)

- Draft warrant [form 32]
- Submit to Clerk of Court to issue
  - endorse: 'attach and remove immediately'
- Check that clerk has issued, signed and initialed endorsements/changes
- Hand to Sheriff

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## PROCEDURE RE MOVABLE PROPERTY(2)

- Sheriff attaches and supplies:
  - return of service
  - inventory (if goods found)
  - CAVEAT: QUERY SHERIFF ON EACH WARRANT
- Request sheriff to give sale date, time and place

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## PROCEDURE RE MOVABLE PROPERTY(3)

- If Newspaper Advertisement is required, the Sheriff directs date, time and place and what security required (if any)
  - If sheriff values goods in excess of R5000 [r41(8)(c)]
- Draft notice of sale
  - 3 copies to sheriff
  - 1 copy to newspaper Rule 41(8)(c)

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## PROCEDURE RE MOVABLE PROPERTY(4)

- Draft detailed statement showing balance owing by debtor- Remember
  - Advertising costs and disbursements
  - fees for security, notice of sale and copies
- Give security
  - (if required)
- Supply copy of Newspaper with advert to the sheriff

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## WHEN MAY IMM. PROPERTY BE ATTACHED (sec66(1)(a))

- Insufficient movable property to satisfy judgment eg. Nulla Bona Return
- If Court so orders ON GOOD CAUSE SHOWN eg. 'could not find'
- If Court so orders as SECTION 65 FINANCIAL ENQUIRY
- If it is declared immediately executable in the judgment eg. Mortgage Bonds

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## ATTACHMENT PROCEDURE IMMOVABLES(1)

- Deeds Office Search
- If Nulla Bona, annex Return to warrant
- Re-Issue Warrant
  - "see Annexure A" in section 3
  - Full Property Description
  - Debtors Full Names, Status and I D
  - Names and Addresses of Interested Parties
  - Place for signature of Attorney and Clerk of the court

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## ATTACHMENT PROCEDURE IMMOVABLES(2)

- Letter to Sheriff instructing service in terms of Rule 43 on the:
  - Debtors
  - Occupants of the attached property
  - Local Authority
  - Bond Holders
  - Registrar of Deeds
- ANNEX ENOUGH COPIES (AT LEAST 6)

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## ATTACHMENT PROCEDURE IMMOVABLES(3)

- Notify the Sheriff if your client requires own auctioneers
- Sheriff supplies sale date and time
- R 43(11) – sale be held at place deemed fit by the sheriff – (old rule was in front of court house unless court ordered otherwise)
- Once the attachment is completed, the sale must be arranged

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## Arranging the Sale: Immovable Property (1)

- The process same save that
  - The advertisement newspaper must be registered with
    - the Audit Bureau of Circulations of South Africa [r43(6)(c)]
    - The bureau web address is <http://www.abc.org.za>
  - Sale may be held at place deemed fit by the sheriff unless court orders otherwise "on good cause shown"
    - old rule: in front of court-house unless court ordered otherwise [R 43(11)]

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## Arranging the Sale: Immovable Property (2)

- Constitutional developments on the right to housing changed the process
- JAPHTA v SCHOEMAN...2005(2) SA 140 (CC)
  - **failure in s66(1)(a) to provide judicial oversight was declared unconstitutional & invalid.**
  - the words "a court, after consideration of all relevant circumstances, may order execution" had to be read into the section

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### Arranging the Sale: Immovable Property (3)

- Application (ito r55) setting out
  - all the relevant circumstances
  - Requesting court consent to sell must be brought before execution against immovable property may proceed.
- Sale in execution where homes were sold without judicial oversight are retrospectively invalid
  - Menqa & another v Markom 2008(2) SA 120 SCA.
  - Gundwana v Steko Development CC and others Case CCT 44/10 [2011] ZACC 14 on 11/4/2011

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### Arranging the Sale: Immovable Property (4)

- Standard Bank of SA Ltd v Sauderson & others 2006(2) SA 264 (SCA)
  - Claims for arrear bond payments
  - Held clerk/registrar may grant the warrant of execution for immovable goods without an application to court
- Gundwana v Steko Development CC and others Case CCT 44/10 [2011] ZACC 14 on 11/4/2011 held SCA was wrong

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### Arranging the Sale: Immovable Property (5)

- Standard Bank of SA Ltd v Sauderson also held that the summons must
  - Contain a prayer declaring the mortgaged properties executable
  - Inform defendants that the order to execute might infringe their right of access to adequate housing
- Gundwana v Steko Development CC and others Case CCT 44/10 [2011] ZACC 14 on 11/4/2011 held SCA confirmed the latter safeguard

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### Arranging the Sale: Immovable Property (6)

- This constitutional warning is built into new rules.
- Such summons must state
  - “The defendant’s attention is drawn to section 26(1) of the Constitution of the Republic of South Africa which accords to everyone the right to have access to adequate housing. Should the defendant claim that the order for eviction will infringe that right it is incumbent on the defendant to place information supporting that claim before the Court”. [r5(10)]

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### Arranging the Sale: Immovable Property (7)

- South Gauteng High Court refused execution of Imm. Property in
  - FirstRand Bank Limited v Motingoe Case 638/2009
  - Peoples Mortgage Ltd v Mofokeng & Zulu Case 8830/2009
  - FirstRand Bank Limited v Mudlaudzi Case 8941/2009
- Mkhize v Umvoti Municipality and others 2010 (4) SA 509 (KZP)
  - Judicial oversight only required when property is a debtor’s home

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### ARRANGING SALE- IMMOVABLES(8)

- Prepare NOTICE OF SALE in execution
  - Court Heading
    - Location of court & Case NO
    - Parties Names
  - Notice Portion
    - Date, Time and Place of sale (if not at court)
  - Advert Portion
    - Deeds office description

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## ARRANGING SALE- IMMOVABLES(9)

- Physical address
- Improvements (caveat incorrect or too little detail)  
NBNBNB to avoid damages claims
- Summary of contract (Most NB Conditions of sale)
  - Refer to full conditions of sale
  - State sale subject to Mag Court Act & Rules
  - NB Payment aspects:
    - Deposit eg) 10%

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## ARRANGING SALE- IMMOVABLES(10)

- Balance of Purchase Price
  - To be guaranteed
  - Due on Registration
  - Preferent creditors (eg. Bond Holder)
- Date
- Address of creditor's attorney
  - Remember telephone number
- Draft the CONDITIONS OF SALE

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## IMMOVABLE PROPERTY

- ERF 10202 SANDBAAI
- 97 MOON ROAD SANDBAAI
- 685 M SQUARE
- 2 RONDAWEL STYLE BEDROOMS
- LOUNGE, KITCHEN, 1 BEDROOM WITH EN-SUITE BATHROOM, HALF MOON VERANDA, OUTSIDE TOILET

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## Section 66(2): No Imm Prop sold in execution if

- Subject to claim preferent to that of judgment creditor (eg a bond) unless
- Written notice of intended sale served personally (or as ordered) on the preferent creditor

AND

- Proceeds enough to settle preferent claim or
- Preferent creditor confirms sale in writing

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## EXECUTION SALE CONDITIONS: IMMOVABLE PROPERTY

- IT IS AN AGREEMENT
- AIM IS TO CONTRACTUALLY BIND THE PURCHASER
- AND TO PROTECT THE
  - EXECUTION CREDITTOR
  - THE SHERIFF
  - THE AUCTIONEER
  - THE ATTORNEY OF THE AUCTIONEER

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## ARRANGING SALE- IMMOVABLES(11)

- Hand Conditions to Sheriff at least 20 Days prior to sale
- Section 66(2)
- Give Security (If Required)
- Conveyancer Certificate
- Advertise in
  - Government Gazette, and
  - 1 Paper circulating in district

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## ARRANGING SALE- IMMOVABLES(12)

- New rule 43(6)(c) – newspaper registered with the Audit Bureau of Circulations of South Africa
- NB Constantly watch the time limits
- Regular Deeds Office Searches
- Calculate Balance Owing and deliver statement to sheriff
- Attend the sale
- Appoint the conveyancer

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## INTERPLEADER CLAIMS

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## INTERPLEADER CLAIMS

Section 69 and Rule 44

This is a procedure used by persons with contradictory claims

Two situations are possible

STAKEHOLDER

SHERIFF

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## INTERPLEADER CLAIMS STAKEHOLDER

- Section 69(2) & Rule 44(1)
- A party possesses property to which **two other opposing parties** lay claim
- The 3 parties are referred to as
  - The Applicant (Stakeholder)
  - First Claimant
  - Second Claimant
- Use form 36: INTERPLEADER SUMMONS

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## INTERPLEADER CLAIMS STAKEHOLDER

- Applicant must
  - by affidavit state that
    - Claims no interest except for costs
    - Not Colluding with Claimant
    - In case of property other than money, Applicant will deal with as the court directs
  - in case of money, PAY IT INTO COURT

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## INTERPLEADER CLAIMS STAKEHOLDER

- Normal TRIAL PROCEDURES APPLY
- Except that the procedure is quicker (no exchange of pleadings and discovery..)
- HEARING on the date set out in the summons
- Court can decide who should start
  - (usually it is the first claimant)

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## INTERPLEADER CLAIMS SHERIFF

- Applicable where claim is made to
  - PROPERTY, or
  - PROCEEDS of such property
- By a person other than the Execution Debtor
- (Affidavit sequence has changed into New Rules)

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### Interpleader claims – R 44 page 67

R 44 (2)  
Person other than execution debtor claims property

↓ Within 10 days of claim

Claimant must lodge affidavit in triplicate with sheriff

↓

Affidavit must contain:  
 • Claimant's full names, id and occupation  
 • Residential and employment address  
 • Nature and ground claim

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### Interpleader claims page 67

↓ 15 days of claim

Sheriff notify the execution creditor and debtor of claim and give affidavit

↓ Within 10 days

Execution creditor must inform sheriff if accepts claim

↙ ↘ Within 10 days

If accepts sheriff withdraws from process      If not - sheriff must issue summons

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## Interpleader

- Form 35 still the same
- Sheriff shall inform other sheriff's in the area of date
- Rest of provisions are the same as the old rule

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## ACTION PROCEEDINGS

DEMAND

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## 7 PHASES OF ACTIONS

1. Before Summons
2. Summons
3. Exchange of Pleadings
4. Preparation for Trial
5. Trial
6. Execution
7. Appeals & Reviews (Remain unchanged)

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## PRE-SUMMONS STEPS

DEMAND

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## DEMAND

- Definition: (Nel v Cloete 1972 (2) SA 150 AD)
  - a notice
  - by or on behalf of a creditor
  - to a debtor
  - unambiguously requesting (demanding)
  - debtor comply with his/her/its obligations
  - by a certain (or ascertainable) date

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## DEMAND: CONTENTS

- Introduce yourself
- Refer debtor to cause of action
- Costs and section 56 Mag Court Act
- Demand Payment
- Warning
  - costs of process
  - Judgment
  - Credit Bureaus

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To be used for s57 &58 Demand must state

- The nature of the claim &
- The amount of the claim [s4(1)(a)]
- In NCA matters
  - Each of the requirements of
    - s129 &
    - s130
  - That each of the requirements have been met [s4(1)(b)]

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## DEMAND: PRACTICAL

- CLIENT: e-Data (Pty)(Ltd)
- DEBTOR: TEMBA JONES
- CAUSE OF DEBT: Debtor bought Buchner Data Projector for R40 000
- DATE OF PURCHASE: 20 APRIL 2010
- AMOUNT STILL DUE: R12500-00
- DEBTORS ADDRESS: 3 Eden Road, Parow

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## DEMAND

- Can be WRITTEN or ORAL
  - LETTER OF DEMAND RECOMMENDED
  - TO ASSIST PROOF
  - BECAUSE OF MANY STATUTES PRESCRIBING WRITTEN DEMAND
- DEMAND IS NOT ALWAYS NECESSARY
  - BUT IT MIGHT ACHIEVE RESULTS QUICKER CHEAPER
  - IN PRACTICE IT IS OFTEN USED BEFORE FORMAL PROCEEDINGS

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## DEMAND IS ESSENTIAL IN CERTAIN CASES

- 1 To Place a debtor *in mora*.
- 2 To claim interest from an earlier date.
- 3 When creditor wants to cancel contract
- 4 To complete a cause of action

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### 1 TO PLACE A DEBTOR IN MORA

- This is necessary where no time for performance has been agreed
- Once the demand period expires:
  - 1 THE DEBT BECOMES DUE
  - 2 INTEREST BEGINS TO RUN (and continues at the rate then applicable to the Prescribed Rate of Interest Act)

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### 2 SO THAT INTEREST CAN BE CLAIMED FROM EARLIER DATE

- ITO the Prescribed Rate of Interest Amendment Act (11 April 1997):
  - Interest can be claimed on UNLIQUIDATED DEBTS from demand OR summons (Whichever is earlier)
- THUS SEND DEMAND IN DELICTUAL CLAIMS AS EARLY AS POSSIBLE

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### 3 WHEN CREDITOR INTENDS TO CANCEL

- When the parties have not agreed on a right of immediate cancellation.
- DEMAND MUST REQUEST
  - Performance
  - Within reasonable time and
  - Warn that non-performance will lead to cancellation.

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### 3 WHEN CREDITOR INTENDS TO CANCEL

- ON NON COMPLIANCE - The agreement must be cancelled in a further letter or summons.

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#### 4 TO COMPLETE A CAUSE OF ACTION

- A Promissory Note/AOD due on Demand
- B National Credit Act 2005 Notice ito Sec129 as read with section 130 Before enforcing a debt
- B Cancellation ito Agreement
- D Before acceleration of payments ito Alienation of Land Act transaction
- E Before action against State, Provincial or Local Authority

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#### DELICTUAL CLAIMS AGAINST GOVERNMENT AUTHORITIES

- Cf prescription/time periods list
- Beware of Constitutional developments:
  - Sec 113(1) Defence Act 44 of 1957 invalid
    - MOHLOMI V MINISTER OF DEF. 1997 (1) SA 124
  - SOUTH AFRICAN POLICE SERVICES ACT?
    - MOHLOMI (Cf JUDGE DIDCOTT COMMENT)
    - SAPS ACT HAS SINCE THEN BEEN APPLIED IN OTHER CASES THE HIGH COURT.
- Know who to address the letter to.

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#### DELICTUAL CLAIMS AGAINST GOVERNMENT AUTHORITIES

- NB Beware of calculation method eg "CALENDAR MONTHS" etc.
- Clearly identify the CAUSE OF ACTION in the letter of demand
- REMEMBER SOME ACTS:
  - Differ on when the time begins to run
  - Give the courts power to condone non-compliance.

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#### DELICTUAL CLAIMS AGAINST GOVERNMENT AUTHORITIES

- INSTITUTION OF LEGAL PROCEEDINGS AGAINST CERTAIN ORGANS OF STATE ACT 40 OF 2002
- REPEALED EXPIRY PERIODS OF 14 ACTS
  - s 113 Defence Act 44 of 1957
  - s57 SAPS Act 68 of 1995
  - s39 Public Services Act Proclamation 103/1994
  - Whole of Limitation of Legal Proceedings (Provincial and Local Authrties) Act 94/1970 etc.

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#### INSTIT of LEGALPROCEEDINGS AGAINST CERTAIN ORGANS OF STATE ACT 40 OF 2002

- Applies if debt due before or after commencement ie. 28 November 2002
- Does not apply if
  - debt prescribed before that, or
  - if legal proceedings already instituted before commencement (In this case the proceedings continue as if this act had not been passed)

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#### INSTIT of LEGALPROCEEDINGS AGAINST CERTAIN ORGANS OF STATE ACT 40 OF 2002

- Organ of state includes any
  - national or provincial department
  - municipality
  - institution authorized by SA Constitution
  - institution authorized by a provincial constist
  - SA Maritime Safety Authority
  - SA Roads National Agency Limited, and any
  - person whose debt the state is liable for

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### INSTIT of LEGALPROCEEDINGS AGAINST CERTAIN ORGANS OF STATE ACT 40 OF 2002

- Debt is widely defined (“delictual, contractual or any other liability...”) section 1(1)(iii)
- section 2(1) makes chapter III of the Prescription Act 68 of 1969 applicable
- Thus normal rules of prescription apply to debts of the state
- (There are certain transitional provisions)

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### INSTIT of LEGALPROCEEDINGS AGAINST CERTAIN ORGANS OF STATE ACT 40 OF 2002

- Section 3(1): Notice in writing must be given
- Thus no proceedings **unless** the organ of state has consented in writing to institution of proceedings without notice
- Section 3(2) requires that the notice:
  - be served on the applicable organ of state
  - within 6 months of debt becoming due
  - must set out the facts giving rise to the debt
  - must set out the particulars of debt known to the creditor.

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### INSTIT of LEGALPROCEEDINGS AGAINST CERTAIN ORGANS OF STATE ACT 40 OF 2002

- s 3(3): Debt due only when creditor knows:
  - the identity of the organ of state
  - the facts giving rise to the debt
- Creditor deemed to have knowledge as soon as he/she/it could have required it by exercising reasonable care, unless the organ of state wilfully prevented him/her/it from knowing

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### INSTIT of LEGALPROCEEDINGS AGAINST CERTAIN ORGANS OF STATE ACT 40 OF 2002

- Condonation by court is possible if
  - debt has not been extinguished by prescription,
  - good cause for failure of the creditor, and
  - organ of state not unreasonably prejudiced by failure.
- S4 sets out procedure:
  - deliver by hand, certified mail, e-mail or fax
  - delivery must be to the various functionaries mentioned

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### INSTIT of LEGALPROCEEDINGS AGAINST CERTAIN ORGANS OF STATE ACT 40 OF 2002-CONDONATION

- IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG APPEAL CASE NO : A5044/09 DATE: 18/08/2010 HENRY GEORGE DAVID COCHRANE Appellant (Respondent a quo) v THE CITY OF JOHANNESBURG Respondent (Applicant a quo) [see update notes] condonation only necessary where state does not take the point.

18/08/2011

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## JURISDICTION

NB NB NB  
THE MAGISTRATES' COURT IS A  
CREATURE OF STATUTE

18/08/2011

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## JURISDICTION

- It is the **POWER** and **COMPETENCE** of a court to **HEAR** and **JUDGE** issues between the parties
- **THE ATTORNEY FOR THE**
  - PLAINTIFF must ensure that the proceeding is before a competent court.
  - DEFENDANT must always check this and advise the defendant on options.

18/08/2011

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## Western Cape Seats of the Civil Regional Courts

- **Atlantis** (Atlantis, Clanwilliam, Hopefield, Malmesbury, Moorreesburg, Piketberg (Piquetberg) Van Rhynsdorp, Vredenburg and Vredendal. )
- **Bellville** (Bellville, Bluedowns and Kuils River.)
- **Cape Town** (Cape and Goodwood.)
- **George** (George, Heidelberg, Knysna, Mossel Bay, Riversdale, Thembaletu and Uniondale. )
- **Mitchells Plain** (Mitchells Plain and Khayelitsha.)

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## Western Cape Seats of the Civil Regional Courts

- **Oudtshoorn** (Oudtshoorn, Beaufort West, Calitzdorp, Ladismith, Murraysburg and Prince Albert.)
- **Somerset West** (Somerset West, Bredasdorp, Caledon, Grabouw, Hermanus, Paarl, Stellenbosch, Strand, Tulbagh, Wellington and Wolseley.)
- **Worcester** (Worcester, Bonnievale, Ceres, Laingsburg, Montagu , Robertson and Swellendam. )
- **Wynberg** (Wynberg, Athlone, Phillipi and Simon's Town.)

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## JURISDICTION IN RESPECT OF PERSONS (S28) P44 of notes

### Any person who

- Resides
- Carried on Business
- Is employed

Within the district or **Regional Division**

### Any Partnership with

- Business Premises OR
- Member residing

Within the District or **Regional Division**

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## JURISDICTION IN RESPECT OF PERSONS (S28) P44 of notes

- Any Person in **Proceedings Incidental** to any other proceeding instituted in that court by that person
- Any Person where the **Cause of Action** arose wholly within that district or **regional division**
- **NB New RULE 5(6)(a) must aver and set put facts to support the averment**

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## JURISDICTION IN RESPECT OF PERSONS (S28) P44 of notes

### Any Party to an **interpleader** if:

- Execution Creditor and Every Claimant
  - Reside
  - carry on business or
  - is employed
- within the district or regional division or

### Subject matter attached by process of that court

- Sect 69(2) **Third Party** within the District or region

**All parties** consent to the jurisdiction

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## JURISDICTION IN RESPECT OF PERSONS (S28)

P44 of notes

- Any Defendant (in convention or re convention) who appears and make **no objection** to jurisdiction
  - Any Person who owns **immovable property** within the district or **regional division**
  - In Actions in respect of:
    - Such property or
    - Mortgage Bonds thereon
- NB to aver that property in juris

SEE RULE 5(6)(b)]

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## JURISDICTION IN RESPECT OF CAUSES OF ACTION (S29)

page 46

- **Delivery / Transfer** of Property of value 100 000 or Less – Regional Above 100 000-300 000
- **Eject** where Right of Occupation of Value 100 000 or less – Regional Above 100 000-300 000
- Actions for Determination of **Right of Way**

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## JURISDICTION IN RESPECT OF CAUSES OF ACTION (S29)

page 46

- Actions re **Liquid Doc**, Mortgage Bond Claim of Value 100 000 OR LESS – REGIONAL ABOVE 100 000 -300 000
- CC Act and Liquidation Applications

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## JURISDICTION IN RESPECT OF CAUSES OF ACTION (S29)

page 46

- Matrimonial Property Act (Section 16(1)) Where value of Property 100 000 or less - Regional Above 100 000 – 300 00
- Actions not mentioned where the value of the disputed matter is 100 000 or Less - Regional Above 100 000-R300 000
- S29(2): Action Includes Claim in reconvention

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## Matrimonial Matters

- Sec 29(1B)(a)
  - Nullity of a Marriage / Civil Union / Customary Marriage
  - Divorce
  - Questions arising therefrom
  - Any matter with regard to the Recognition of Customary Marriages Act
- Sec 29(1B)(b)
  - Same jurisdiction as High Court

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## Jurisdiction in NCA Debt Recovery

Page 48

- S29 (1)(e)
- District courts have unlimited jurisdiction
  - (No provision for Minister to determine)
  - Absa Bank Ltd v Myburgh 2009 (3) SA 340 (T)
  - “[40] ...especially decreed to be instituted in the lower court, regardless of any jurisdictional limitation regarding the sum C involved.”
- S29(1A)
  - The Minister may determine different amounts contemplated in subsection ... (e) districts and courts for regional divisions.
  - Minister has determined Regional courts at R300 000.
- ???Anomaly: District courts higher jurisdiction than Regional courts???

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## Jurisdiction in NCA Debt Recovery

Page 48

- It has been held that the debtor as Consumer or First Respondent cannot consent to jurisdiction alone. The consent of all the creditors is needed.
- McLaren v Badenhorst and Others 2011 (1) SA 214 (ECG)

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## Jurisdiction

- Sec 45 consent to jurisdiction
- Rule 33(5)(c) - If amount lower than regional Court jurisdiction then costs must be the same as district court regardless if sued out of regional court

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## Jurisdiction

- Sec 35
  - Transfer from one court to another
    - Consent
    - Application by either party
  - Undue expense
  - Inconvenience to such party
- S50 only available for defendant
  - Oosthuizen v Road Accident Fund (258/10) [2011] ZASCA 118(06 July 2011)

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## LAWYERS JOURNAL QUOTES FROM COURT

- “WERE YOU PRESENT WHEN THEY TOOK YOUR PICTURE?”
- “DID HE KILL YOU?”
- “HOW MANY TIMES HAVE YOU COMMITTED SUICIDE?”
- “WERE YOU ALONE OR BY YOURSELF?”

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## LAWYERS JOURNAL QUOTES FROM COURT

- “How far apart were the vehicles at the time of the collision?”
- “You were there until the time you left, is that true?”
- Q: “How was your first marriage terminated?”  
A: “By death”  
Q: “By whose death was it terminated?”

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## CITATIONS OF GOVERNMENT + STATE OFFICIALS

- SEE RELEVANT STATUTE
- CITE OFFICIAL CAPACITY & NOT BY NAME
  - S34 (Genl Law Amendment Act62/1955)
- Cite the Minister of relevant Dept
- Also applies provincially ie Cite the Member of Executive Council of a province
- May also use the name of the State
  - Regering van RSA v Santam 1964(1) SA 546 (W)

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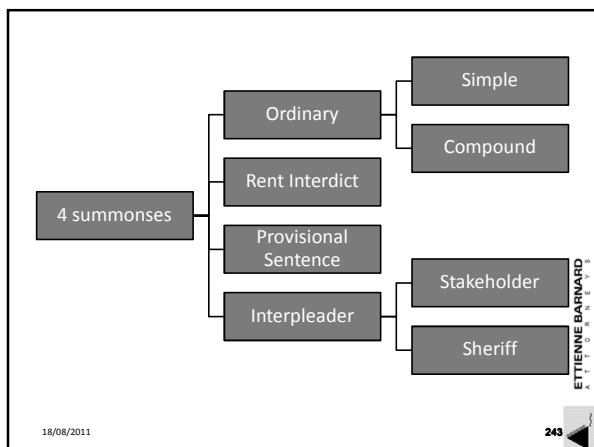
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## 7 PHASES OF ACTIONS

1. Before Summons
2. Summons
3. Exchange of Pleadings
4. Preparation for Trial
5. Trial
6. Execution
7. Appeals & Reviews (Remain unchanged)



## ORDINARY SUMMONS

(Rule 5)

SIMPLE SUMMONS	COMBINED SUMMONS
<ul style="list-style-type: none"> <li>• Debt / “liquidated demand”</li> <li>• Form 2</li> </ul> <p>Rule 5(2)(b) - “may”, party has choice to use Simple or Compound Summons</p>	<ul style="list-style-type: none"> <li>• All others</li> <li>• Form 2B but printed form <b>must be amplified</b> to comply with rules</li> </ul>

### “Liquidated demand” r5(2)(a)

- Fatti’s Engineering v Vendick Spares 1962 (1) SA 736 @ 739
  - LD=> **A claim for reasonable payment for services**
  - Usually easy to determine quick
  - Unless something prevented court from doing so
- Neves Builders & Decorators v De la Cour 1985 (1) SA 540 (C)
  - If the exercise becomes too intricate or time consuming, it might not be regarded as an LD

### “Liquidated demand” r5(2)(a)

- Pick ’n Pay Retailers v Dednam 1984 (4) SOUTH AFRICA 673 (0)
  - Claim for **damages** due to Breach of Contract was held to be liquidated **because it amounted to the purchase price** into the agreement.

## CAUSE OF ACTION IN A SIMPLE SUMMONS

- Content may be brief
  - SA Permanent Building Soc. V Gomitzka 1939 TPD 285
    - Court refused to set aside summons which did not aver “due & payable” and held
    - “Particularization of the claim ....is a matter for the declaration”
  - Also not a pleading therefor not exipiable
    - Susan v Kikillus 1955 (2) SA 137 (W)

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## CAUSE OF ACTION IN A SIMPLE SUMMONS

- Brief content could however prevent summary judgment
  - Eg. leaving out the “due & payable” averment
    - Landman Implimente v Leliehoek Motors 1975 (3) SA 347 (O)
  - However it might be implied
    - Globe Engineering Works v De Orneleas Fishing 1983 (2) SA 95 (C)

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## ACTION PROCEEDINGS

- ITO RULE 5 ACTIONS ARE STARTED:
  - BY SUMMONS
  - GIVING DEFENDANT 10 DAYS TO DEFEND [r13(1)]
  - 16 December to 15 January = DIES NON
    - I.E. Not counted in the time to defend

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## 3 PROVISIONAL SENTENCE SUMMONS

- Rule 14A
- Similar rule to r8 in Uniform Rules of Court
- Process to obtain **judgment before trial**
  - “a provisional or interlocutory order”
  - “Final judgment still to be considered in the principal case”
- Rule 14A Not ultra vires the MCA
  - Ndamase v Functions 4 All 2004 (5) SA 602 (SCA)

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## 3 PROVISIONAL SENTENCE SUMMONS (2)

- Twee Jonge Gezellen (Pty) Ltd & anor v Land And Agricultural Development Bank Of South Africa t/a The Land Bank & anor Case CCT 68/10[2011] ZACC 2 held
  - Provisional Sentence limits s34 of Bill of Rights
  - Accordingly the court ordered that:

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## 3 PROVISIONAL SENTENCE SUMMONS (3)

- The common law developed to give courts a discretion to refuse provisional sentence only where the defendant shows:
  - 1He/she/(it?) cannot satisfy the debt;
  - 2Even balance of prospects of success in the main case on the papers; &
  - 3Reasonable prospect that oral evidence may tip such balance in his/her favour.

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### 3 PROVISIONAL SENTENCE SUMMONS (4)

- Form 2A
- Copies of all liquid documents must be annexed to summons [r14A(3)]
- Practical example (20 marks)
- Similar question in February 2011 admission exam (for 7 marks)

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### 3 PROVISIONAL SENTENCE SUMMONS (5)(Q2.1.1)

- No later than 3 days before hearing(1)
- File Defendant's affidavit (1)
- Setting out his defence (1)
  - (If defendant can't pay & has good defence, remember **Twee Jonge Gezellen Case**)
- Attending Hearing (1)
- Argue Defendant's case (1)
- In practice some magistrates' require a notice of intention to defend.

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### 3 PROVISIONAL SENTENCE SUMMONS (6)(Q2.1.2)

- I would grant provisional sentence (1)
- Legal position
  - Defendant must show (1)
    - On balance of probabilities (1)
    - That plaintiff is not entitled to Provisional Sentence (1)
- Applied to the facts
  - Affidavits do not indicate any probability(1)
  - So defendant has failed to establish a defence(1)

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### 3 PROVISIONAL SENTENCE SUMMONS (7)(Q2.1.3)

- I would call on Plaintiff for security (1)
- For restitution (1)
- Of judgment debt to defendant (1)
- If security is provided, Defendant must pay claim plus costs (1)
- If Plaintiff does not provide security (1)
  - OR
  - Once Defendant has paid(1)
  - Deliver Notice of Intention to Defend (1)
  - Within 10 days after that, Plea(1) and
  - Counterclaim (1)

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### 1The Ordinary Summons

- Must include the
  - (1)Standard endorsements
    - consent to judgement
    - Form of appearance to defend
    - section 109 warning (in bold type)
    - sections 57, 58, 65A and 65D
  - (2)Signed by/obo plaintiff
    - Plaintiff service address (within 15km of court)
    - Plaintiff postal address, and where available
    - Fax & e-mail address

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## 1The Ordinary Summons

- (3) Description:
  - Defendant
  - Plaintiff
  - Cedent
  - If plaintiff sues in representative capacity, state the capacity
  - if action based on instrument, requiring presentment, state fact & date of presentment
  - jurisdiction if: whole cause –allege & set out facts
  - OR property concerned in district- aver property in **district or region**

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## 1The Ordinary Summons

- (4) Rule 5(10) warning re right to housing where immediately executable order will be sought:
  - “The defendant’s attention is drawn to section 26(1) of the Constitution of the Republic of South Africa which accords to everyone the right to have access to adequate housing. Should the defendant claim that the order for eviction will infringe that right it is incumbent on the defendant to place information supporting that claim before the Court”.

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## 1The Ordinary Summons

- (5) Must comply with Rule 6 in setting out the material terms
  - Particulars of claim must:
    - Be divided into paragraphs
      - 1 distinct averment = 1 paragraph
    - Clear & concise statement of material facts relied on  
(so that opponent can reply)

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**Contract**

- Written
- Oral
- When
- Where
- By
- Copy
- Whole
- Or Part
- Compliance with legislation governing contract

**Matrimonial**

- Grounds for
- Division
- Transfer
- Forfeiture
- Iro MOCOP

**Damages**

- Quantum reasonably assessable
- If PIC
- Birthdate
- Injury
- Extent &
- Nature
- & disability
- Nature
- Effects
- Duration
- Medical, Hospital & similar costs
- Amount
- Calculation
- Pain & Suffering
- Temporary or permanent
- & which injury caused it
- Disability iro
- Earning of Income
- How amount lost to date is made up
- Estimated future loss
- Nature of work Plaintiff can in future do
- Disability iro
- Enjoyment of amenities of life
- & whether permanent or temporary
- Disfigurement full description
- & whether permanent or temporary
- Damages due to Death of another
- Deceased birthdate
- Dependant’s birthdate

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## 1The Ordinary Summons

- Nature of claim (cf causes of action & Amlers)
- Amount of claim
- Interest rate
- Amount of costs if undefended

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NB: Non compliance with Rule 5 or 6

Rule 5(11) & 6(13)

deemed to be an  
IRREGULAR STEP  
RULE 60A

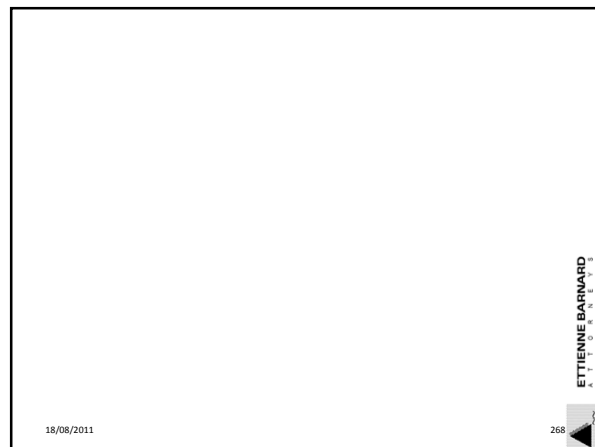
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## 1The Ordinary Summons

- Rule 7 Deals with amendment
  - before service: initialed by clerk of court to be of effect
  - after service: use rule 55A procedure
- Rule 9 Deals with service of a summons
  - by the sheriff in one of the ways set out



### Defended Actions Flow Chart(1)

Summons  
• r5&6

NID  
• r13

Irregular Step?  
• r60A

Summary Judgment  
• r14

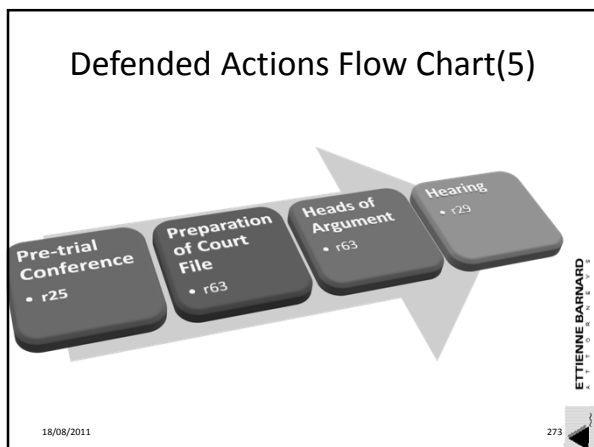
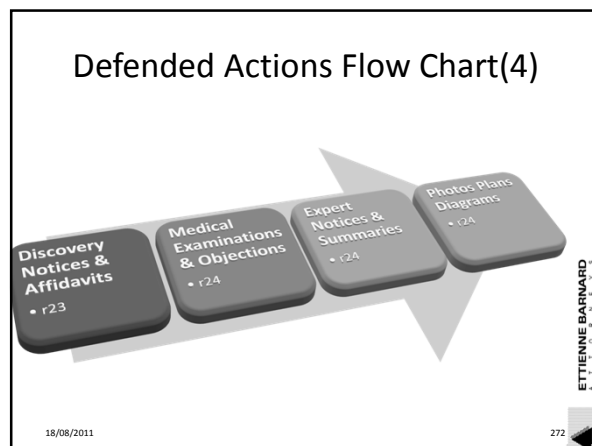
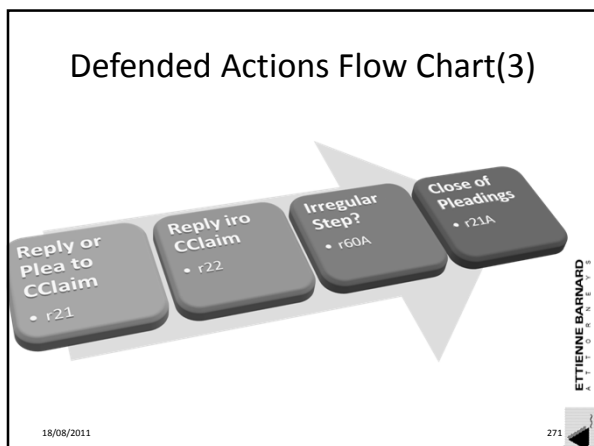
### Defended Actions Flow Chart(2)

Declaration  
(if Summons was simple)  
• r15

Documents needed to Plead  
• R23(15)

Plea/Exc/Strike/Tend/Offer/C Claim  
• R17/18/19/20

Irregular Step?  
• r60A



### DEFENDED ACTIONS

- ENTRY OF APPEARANCE TO DEFEND:
  - Defendant:
    - Not the state: Notice of intention to defend must be delivered within 10 Days
    - The state or state employees: 20 days (Rule 13)
  - If entry of appearance is defective Plaintiff: Notice in terms of Rule 12(2) granting defendant 5 Days to rectify

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### DEFENDED ACTIONS

- OTHER INITIAL DOCS BY DEFENDANT: AT LEAST WITHIN 10 DAYS
  - **RULE 62**: Request SECURITY (Where possible)
  - **RULE 19**: Note EXCEPTIONS (Where necessary)
  - **RULE 19**: Application to Strike Out (Where necessary)
  - **RULE 23(15)**: Early Discovery for purposes of pleading

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### DEFENDED ACTIONS

- PLAINTIFF has 10 days to **answer** the RULE 62 Request.
- PLAINTIFF has 5 days to **answer** the RULE 23 Request.
- In certain cases, PLAINTIFF may **APPLY FOR SUMMARY JUDGEMENT** within 10 days of notice of defence RULE 14 (NB TACTICAL ADVANTAGE)
- DEFENDANT must then act in terms of RULE 14

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### DEFENDED ACTIONS Rule 17

- DEFENDANT MUST SET OUT DEFENCE IN A PLEA WITHIN 20 DAYS AFTER:
  - NOTICE OF INTENTION TO DEFEND
  - RECEIVING DECLARATION
  - (DISMISSAL OF SUMMARY JUDGEM APPL.
  - COURT GRANTING LEAVE TO DEFEND
  - AFTER DISMISSAL OF EXCEPTION OR APPLICATION TO STRIKE OUT
  - AFTER AMENDMENT OF SUMMONS ALLOWED BY COURT AT THE HEARING OF SUCH EXCEPTION OR APPLICATION)

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### DEFENDED ACTIONS Rule 20 onwards

- SHOULD DEFENDANT WISH TO COUNTERCLAIM, THIS IS DONE BY CLAIM IN RECONVENTION DELIVERED TOGETHER WITH THE PLEA
- DO NOT USE INTRO:
  - “DEFENDANT IS PLAINTIFF IN RECONVENTION
  - PLAINTIFF IS DEFENDANT IN RECONVENTION
  - THE PARTIES ARE REFERRED TO AS IN CONVENTION” see r 24(1)

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### DEFENDED ACTIONS

- PLAINTIFF MAY EXCEPT TO PLEA(RULE19)
- OR APPLY TO STRIKE OUT
- PLAINTIFF MUST PLEAD TO COUNTERCLAIM
- COUNTER CLAIMS MAY BE CONDITIONAL

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### DEFENDED ACTIONS Compelling Compliance

- BOTH PLAINTIFF AND DEFENDANT CAN USE RULE 60(2) AND 60(3) TO COMPEL COMPLIANCE WITH THE RULES.
- BUT FOR:
  - RULE 62, USE RULE 62(3)

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### Summary - Non Compliance

Rule 60 Non Compliance	Own Rule	Rule 60A Irregular Step	Rule 19 Exception / Strike Out
R 23 (15) – further Particulars	R 62(4) – security R 18 – settle R 16(4) – F/P R23(8) – Discovery (incl 23(14))	Any Pleadings Summons Plea Counterclaim Plea in Reconvention	Any pleadings Affidavits

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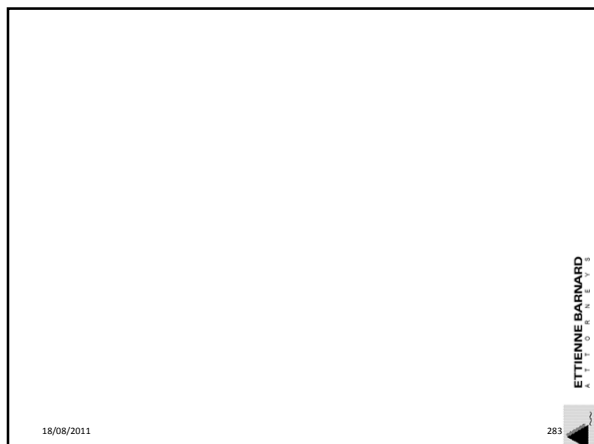
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### Rule 21A PLEADINGS CLOSE IF

- parties have joined issue without adding further pleading
- last day for replication/subsequent pleading has lapsed and it has not been filed
- parties agree in writing & file with Clerk/Registrar
- parties unable to agree, court on application declares pleading closed


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## PREPARATION AFTER CLOSE OF PLEADINGS


- THE PLEADINGS CLOSE ON DELIVERY OF REPLY OR ON EXPIRY OF TIME PERIOD TO REPLY [RULE 21(4)]
- NB DIARISE DATES
- USE PREPARATION CHECKLIST



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## PREPARATION AFTER CLOSE OF PLEADINGS




- GET TRIAL DATE
- SET DOWN NOTICE
- DISCOVERY NOTICE after close of pleadings but at least 15 days before trial [r 23(1)]
- DISCOV. AFFIDAVIT within 10 days from request [r23(1)]
- MEDICAL EXAMIN. examination request must be for a date after days [r24(2)(a)]
- MED. EXAM OBJECTIONS within 10 days from request [r24(3)(a)]
- REQUEST MEDICAL REPORTS to be furnished within 15 days from request [r24(4)]
- INSPECT PROPERTY at least 15 days before trial [r 24(6)]

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## PREPARATION AFTER CLOSE OF PLEADINGS



- EXPERT WITNESSES at least 15 days before trial [r 24(9(a))]
- EXPERT OPINIONS at least 10 days before trial [r 24(9(b))]
- PLANS, DIAGRAMS, PHOTOS request at least 10 days before trial [r 24(10(a))]
- PLANS etc admitting within 10 days [r24(10(b))]
- PRE-TRIAL CONFERENCE (FORMAL/ INFORMAL) request at least 10 days before conference [r25(3)]

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## THE HEARING

- PLAINTIFFS DUTY TO PREPARE THE COURT FILE:
  - INDEXES (VOLUNTARY)
  - ENSURE FILE CONTENT IS COMPLETE
  - ALL STEPS AGREED AT PRE-TRIAL HAVE BEEN COMPLIED WITH
- INTRODUCE YOURSELF TO OPPONENT AND MAGISTRATE BEFORE COURT

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## THE HEARING

- BLACK ROBE USUALLY FOR TRIALS
- DRESS NEATLY & ADVISE CLIENT AND WITNESSES TO DO SO
- STAND WHEN ADDRESSING COURT
- SIT WHEN OPPONENT ADDRESSES COURT (UNLESS YOU WANT TO OBJECT)
- DO **NOT** LEAVE COURT WHILE MATTER IS BEING HEARD WITHOUT THE LEAVE OF THE COURT

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## THE HEARING

- AT THE END OF YOUR APPEARANCE EXCUSE YOURSELF FORMALLY BY ASKING "MAY I BE EXCUSED"
- MAKE **PROPER USE OF MECHANICAL APPARATUS** (REMEMBER TYPED RECORD WILL FORM MAIN APPEAL MATERIAL)
- SPEAK AUDIBLY AND CLEARLY

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## THE HEARING

- PROCEDURE DURING TRIAL:
  - MAGISTRATE GOES ON RECORD
  - PLAINTIFF/LEGAL REPRESENTATIVE INTRODUCES HIM/HERSELF
  - DEFENDANT/LEGAL REPRESENTATIVE INTRODUCES HIM/HERSELF
  - PARTIES MAY ADDRESS THE COURT ON THE ISSUES AT THE START OF THE TRIAL

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## THE HEARING

- IF THERE ARE ANY POINTS IN LIMINE, THE PARTIES RAISE THEM
- PARTY WITH THE DUTY TO START BEGINS LEADING EVIDENCE IN CHIEF BY CALLING FIRST WITNESS
- THE WITNESS MAY THEN BE X-EXAMINED BY THE OPPONENT LEGAL REPRESENTATIVE
- THE COURT MAY ASK QUESTIONS TO CLARIFY BUT MAY NOT "DESCEND" INTO THE ARENA

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## THE HEARING

- AT THE CLOSE OF THE (PLAINTIFF) CASE THE DEFENDANT MAY ASK FOR ABSOLUTION OF THE INSTANCE
- IF NOT GRANTED, THE DEFENDANT PRESENTS CASE IS PRESENTED BY CALLING DEFENCE WITNESSES
- PLAINTIFF MAY X-EXAMINE EACH DEFENCE WITNESS

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## Cross Examination ("x")

1

- Remember that this is not as good a tool as **good evidence** presented during **Examination in Chief**
- It is your duty to **put your clients version** to the witness during X
- Regard whatever other advantages you get during X as a bonus
- Lead the witness (unlike examination in chief)

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## Cross Examination ("x")

2

- During X try to
  - Elicit evidence favourable to your client
  - Test or discredit reliability of Evidence in Chief
  - Destroy or Undermine credibility of
    - testifying witness or some other witness
  - Parade your case (to fix it in mind of the magistrate)
  - Change the chronology of the evidence in chief
  - Evaluate the expert evidence in light of your own experts

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## Good Cross Examination



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## THE HEARING

- ANY OF THE PARTIES MAY ASK FOR AN INSPECTION IN LOCO
  - PURPOSE IS OBSERVATION
  - NO WITNESS TESTIMONY IS TO BE LED AT THE SCENE
  - THE COURT SHOULD RECORD ITS OBSERVATIONS AND WHAT IS POINTED OUT BY THE LEGAL REPRESENTATIVES

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## THE HEARING

- ARGUMENT AFTER SECOND PARTIES HAVE CLOSED HER/HIS/ITS CASE
- REMEMBER COSTS
- DRAFT COURT ORDER HELPS COURT FOCUS ON THE RELIEF YOU WANT

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## DRAFTING CHECKLIST 1

- PARTIES
  - PLAINTIFF/APPLICANT r5 (name,sex,occup,address,...)
  - DEFENDANT/RESPONDENT (same if known)
- JURISDICTION
  - PERSON
    - RESIDES/WORKS/PLACE OF BUSINESS (EG.REGISTERED);
    - WHOLE CAUSE OF ACTION; or
    - PROPERTY IN AREA
  - AMOUNT
    - District:R100 000 (50 000 for Admin Orders & NCA unlimited)
    - Regional:R300 000 (Unlimited for Divorces)
    - AGREEMENT
    - ABANDON AMOUNT IN EXCESS

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## DRAFTING FOR LITIGATION

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### DRAFTING CHECKLIST 2

- LOCUS STANDI
  - WIDE SENSE (CAPACITY)
  - CORRECT PARTIES (LINK THEM)
  - ENOUGH PARTIES (eg Trust- ALL TRUSTEES JOINED)
- THE STORY (Evidence)
  - BACKGROUND
  - CAUSE OF ACTION (cf Amlers)
    - NB was demand necessary?
    - Legislation
      - GENERAL (Eg Prescription)
      - SPECIFIC (eg Estate Agents Fidelity Fund Certificate)

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### DRAFTING CHECKLIST 3

- LEGISLATION
- RELIEF
  - SUBSTANTIAL
  - INTEREST
  - COSTS
    - IF ATT/CLIENT GIVE REASONS
      - CONDUCT; AND/OR
      - AGREEMENT

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### THANK YOU

Ms Yusria Cornelius will present the session on NCA Debt Review after lunch



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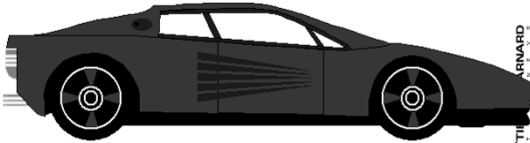
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### MAG COURT PRACTICE

- ENJOY THE EVENING
- SEE YOU NEXT WEEK



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ENJOY THE WEEKEND

- DRIVE SAFE



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The illustration shows a man in a shopping cart being launched on a roller coaster track. He has a shocked expression, and his cart is flying through the air. The track is a complex wooden structure with multiple loops and drops.

MAGISTRATES' COURT PRACTICE

- ETTIENNE BARNARD ATTORNEYS
- SOMERSET WEST

Slides compiled by



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The logo for Etienne Barnard Attorneys is a dark rectangle with the name 'ETTIENNE BARNARD' in white, with 'ATTORNEYS' written in smaller letters below it.