



WELCOME EASTERN CAPE
ATTORNEYS

CAPE LAW SOCIETY
Magistrates' Court Committee



2011/05/17



**MAGISTRATES' COURT
NEW RULES**

AN INTRODUCTION

CAPE LAW SOCIETY
Magistrates' Court Committee



2011/05/17



Slides by
**Ettienne Barnard, Sonja
Labuschagne**
of
Ettienne Barnard Attorneys
and
Elzanne Jonker
of
Minde Schapiro & Smith

**MAGISTRATES' COURT
NEW RULES**


2011/05/17



www.barnards.co.za

<http://newmcrules.blogspot.com>

2011/05/17



OTHER RESOURCES

- JUTA Statures Editors, The Supreme Court Act & the Magistrates' Court Act and Rules, 2010 Edition
- <http://www.northernlaw.co.za/>
- <http://www.lawsoc.co.za/>
- <http://www.justice.gov.za/legislation/rules/rules.htm>
- Michael de Broglio's Legal Blog at <http://www.lawblog.co.za/blog/item/?itemID=499>
- <http://webtechlaw.com/posts/big-changes-for-magistrates-courts-in-south-africa.html>

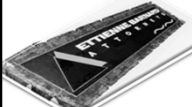
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Rules to facilitate court &
not other way around

INTRODUCTORY REMARKS

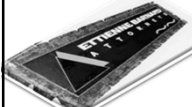
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Useful Transitional Rules

- RULES PROMOTE ADMINISTRATION OF JUSTICE
 - 1(1)-(3)
 - Also see *Ncoweni v Bezuidenhout* 1927 CPD 130
 - Purpose is “administering justice & not hampering it”
 - *Brown Bros Ltd v Doise* 1955(1) SA 75 (W)
 - “practical justice”
- PRESCRIBED FORMS INDULGENCE
 - 1(4)(a) Many forms may be adapted as circumstances require
 - 69(b) 12 Month use of old forms

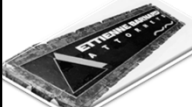
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Useful Transitional Rules

- For Serious challenges: Apply into r55(4)(b) for
 - Authority to Institute Proceedings
 - DIRECTIONS AS TO PROCEDURE
 - Directions as to Service of Documents


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APPLICATION OF RULES

- Adv Danie Van Loggerenberg opinion:
 - Based on Sec 12(2) of the Interpretation Act 33 of 1957
 - If **first document issued** before 15 of October 2010, **old rules apply** until the matter is finalised.

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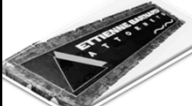


APPLICATION OF RULES INTERPRETATION ACT

Sections 12(2)(c) and (e):

- “(2) **Where a law repeals any other law, then unless the contrary intention appears, the repeal shall not –**
- (c) **affect any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed; or**
- (e) **affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, forfeiture or punishment as in this subsection mentioned,**
- **and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing law had not been passed.”**


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CASE LAW

- TRANSNET LTD v NGCEZULA 1995 (3) SA 538 (A)
- *Curtis v Johannesburg Municipality* 1906 TS 308
- “**Every law regulating legal procedure** must, in the absence of express provision to the contrary, necessarily govern, so far as it is applicable, **the procedure in every suit which comes to trial after the date of its promulgation**”.


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APPLICATION OF RULES

- “....but it is a convenient way of stating the fact that **every alteration in procedure applies to every case subsequently tried**, no matter when such case began or when the cause of action arose.”
- So if rules are procedural and the legislator did not expressly provide to the contrary, then the **new rules apply to all matters from 15 October 2010.**


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APPLICATION OF RULES

- Rule 1(2): rules must be applied to
 - facilitate expeditious handling and
 - minimize costs.
- Rule 55(4)(b): Ask Court for directions on procedure.
- Rule 1(3): Court may dispense with rules and direct procedure (at a s54 conference.)
- These rules should be used to counteract any unfairness that may result in the application of the new rules

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NOTICE OF APPEAL

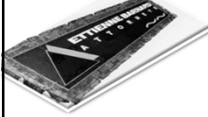
- In die Hof Verdaag, Judge Kees van Dijkhorst quotes the following grounds of appeal in a 1988 Californian case:

“Prosecuting attorney farted about 100 times during defence attorney’s argument”

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APPLICATIONS

General

On Notice of Motion & on Notice


Ex Parte

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GENERAL

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Applications taken away

- Rule 27(5) to dismiss action of plaintiff
- Rule 15(3) to dismiss action (no docs furnished as fp)
- Rule 60(2)&(3) to compel further particulars to plead

Applications added

- Edictal Citation
- Maintenance Pendente Lite...
- Irregular Proceedings

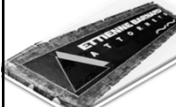
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Form of Notice (4 categories)

- 1 **Long Form** (Generally compulsory)
- 2 **Short Form** (Ex Parte)
- 3 **Specific Applications**
- 4 **Interlocutory Applications** (Hybrid form)

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Applications Rule 55/56

Out: Old Rule 55 (shorter, without affidavit, no specific time period for opposing papers & no separate set down)
 Old Rule 56 (Ex parte applications)
 Now see HC Rule 6 & 6(12) on urgency

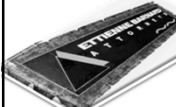
- Must
 - Be on **notice** of motion
 - Have supporting facts in an **affidavit** 55(1)(a)
- Ex Parte Applications only if 55(3)(a)
 - notice would **defeat purpose** of application; or
 - **urgency** justifies dispensing with notice.
- Dispensing rule 55(5)(5)
- Court may on good cause shorten notice period Rule 9(12) ^[old 9(14)]

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NOTICE OF MOTION HEADINGS

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Headings in DISTRICT court


IN THE MAGISTRATE'S COURT FOR THE DISTRICT OF **THE CAPE**
 HELD AT **CAPE TOWN**

CASE NO:

In the matter between:

Mr X	Applicant
and	
Mr Y	Respondent

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Headings in REGIONAL court

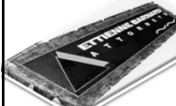
IN THE MAGISTRATE'S COURT FOR THE REGION OF THE **WESTERN CAPE**
 HELD AT **ATLANTIS**
 (or Cape Town/Somerset West/Bellville/Worcester/Wynberg)

CASE NO:

In the matter between:


Mr X	Applicant
and	
Mr Y	Respondent

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- Headings in the Forms in Annexure 1 differ from that set out in the Practice Directives
- But remember forms need just be similar

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The Long Form
ON NOTICE OF MOTION

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Long Form Applications examples

If they are Non-Urgent

- Application to Appoint Curator ad Litem [section 33]
- PIE & ESTA type
- Debt Review
- Liquidation of CC
- Spoliation Application
- Interdict


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Content of Notice

<p>OLD</p> <ul style="list-style-type: none"> • Applicant chose court date (some courts set aside certain days for applications) 	<p>NEW LONG FORM</p> <ul style="list-style-type: none"> • Applicant only chooses if unopposed (ie no notice of opposition) • Notice of appointed attorney & address • Respondent told to deliver Notice of Opp. in 5 days • Respondent told to deliver answering affidavit in 10 days • Respondent told to provide service address (in 15 km)
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Procedure Steps: Application on Notice

```

    graph TD
      A[Long Form] --> B[Issue & Service]
      B --> C[Wait 5 Days]
      C --> D["(Court days after Service)"]
  
```

- Provides for unopposed and opposed steps by Respondent (5 & 10 days)
- Service by Sheriff if not interlocutory

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Procedure Steps if unopposed

```

    graph TD
      A[Set Down] --> B[Appear]
      B --> C[Obtain Court Order]
  
```

- 5 Days before Hearing Date r55(1)(f)
- Draft r55(8)(a) minute of order for service

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Procedure Steps: Application on Notice

```

    graph TD
      A[Long Form] --> B[Issue & Service]
      B --> C[Wait 5 Days]
      C --> D["(Court days after Service)"]
  
```

- Provides for unopposed and opposed steps by Respondent (5 & 10 days)
- Service by Sheriff if not interlocutory

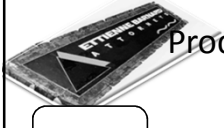
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Procedure Steps if opposed

- Notice of Opposition
 - Within 5 days of application served
- Answering affidavits/law
 - by Respondent within 10 days
- Deliver Reply
 - only if necessary


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Procedure Steps if opposed ()

- Apply to clerk/Registrar
 - Hearing Date r55(j)
- Set Down
 - 10 days notice r55(j)(iv)
- Heads of Argument, Index & Paginate
 - NB See Practice Directives & r63

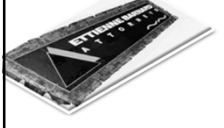
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Application on Notice: Time Period Checklist

• 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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Residential Eviction

ON NOTICE OF MOTION

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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);

NOW SEE:
Cf HC Rule 6

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


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Cape Killarney

- [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
 - Attempt to evict via a rule nisi ex parte order
 - & 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 for HC rules.

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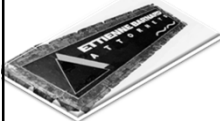
Cape Killarney Impact toned down:

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.

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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."

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Safe 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

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PIE Procedure Steps

- Leave enough time [22 COURT DAYS] for
 - Ex Parte Application [about 3 days]
 - Service of it by Sheriff[about 5 days]
 - 14 days ito PIE Act to pass[14 days]
- Service by Sheriff
- Wait 5 Days

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PIE Procedure Steps if unopposed

- to serve s4(2) & Directions for service
- Service by Sheriff...
- Seek Relief

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PIE Procedure Steps

- Leave enough time [22 COURT DAYS] for
 - Ex Parte Application [about 3 days]
 - Service of it by Sheriff[about 5 days]
 - 14 days ito PIE Act to pass[14 days]
- Service by Sheriff
- Wait 5 Days

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PIE Procedure Steps if opposed


- Notice to Oppose & Answering affidavits by Respondent
- Replying Affidavit only if necessary
- Date

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PIE Procedure Steps if opposed (2)

- to serve s4(2) & Directions for service
- Service by Sheriff...
- Seek Relief

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PIE Notice (1)

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

In the matter between: CASE NO:


MRS PASSIVE INCOME Applicant

and

STICKY TENANT Respondent

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

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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.

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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.

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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 Ettienn Barnard Attorneys, Ebrose Chambers, 5 Audas Street, Somerset West at which applicant will accept notice and service of all process in these proceedings.

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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 25th 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 14th of December 2010 at 09:00.

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PIE Notice (6)

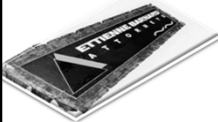
DATED at Somerset West this 18th day of November 2010
(signed) E Barnard.....
Attorneys for the Applicant
BARNARD LABUSCHAGNE INC
t/a Ettienn Barnard Attorneys
Ebrose Chambers, 5 Audas Street, Audas Estate, Somerset West, Tel: 021 – 852 7780;
Fax: 021 – 852 4194; Ref: EB/kb/X21

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)


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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).
- “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”
- If this has taken place or if no opposition filed, do the application into s 4(2)

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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

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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 4th of February 2011 at 09:00

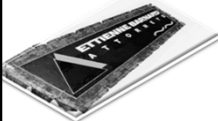
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PIE Ex Parte Notice (3)

3. That the Respondent be notified that the Applicant will on that date apply for an order:
 1. **Evicting** the Respondent and any person occupying through the Respondent, from 3 North Street, Bellville (“the property”);
 2. Determining a **just and equitable date** on which the Respondent must vacate the property;
 3. Determining a **date on which the Sheriff** may evict the Respondent if he and all persons under him have not vacated the property;
 4. Directing the Respondent to pay the **costs** of the Applicant (on an attorney and client scale)
 5. Further and/or Alternative Relief.


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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;


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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 ??????????

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PIE Ex Parte Notice (6)


DATED at Somerset West this 18th day of November 2010
 (signed) E Barnard.....
 Attorneys for the Applicant
 BARNARD LABUSCHAGNE INC
 t/a Ettienne 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)

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Debt Review ON NOTICE OF MOTION


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All Creditors to be notified

- McLAREN v BADENHORST ANORS 2011 (1) SA 214 (ECG)
 - Debtor as consumer/1st Respondent cannot consent to jurisdiction alone
 - All Creditors should be notified

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Debt Review: Notice of Motion (1)


IN THE MAGISTRATES COURT FOR THE DISTRICT OF MITCHELL'S PLAIN
 HELD AT MITCHELL'S PLAIN Case no.:

In the matter between:

ALMAL UITHHELP N.O. Reg. no. NCRDC55532555 and JOSEPH NEEDABREAK (Identity no : 8????? 50?? 087)	Debt Counsellor/Applicant
ABSA BANK LIMITED	Consumer/1 st Respondent
STANDARD BANK LIMITED	Credit Provider/2 nd Respondent
NEDBANK LIMITED	Credit Provider/3 rd Respondent
	Credit Provider/4 th Respondent

Application in terms of s86(7)(c) & 86(8)(b) read with s87 of the
 National Credit Act 34, 2005 and rule 55, rule 9 and rule 33 of the Magistrates Court
 Act 32 OF 1944
 (as amended)

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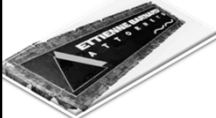


Debt Review: Notice of Motion (2)

KINDLY TAKE NOTICE THAT Almal Uithelp N.O. (hereinafter called the Applicant) intends to make application to this court for an order :

1. That the state of the First Respondent/Consumer be declared **over-indebted**;
2. Granting a **Debt Re-Arrangement Order** in accordance with Annexure "I" or such other Debt Re-Arrangement Order as the court deems fit under Section 86(7)(c)(ii) and 87(1) of the National Credit Act 2005; alternatively
2. An order in terms of Section 86(11) of the National Credit Act that any **Respondents** who have given notice to terminate the debt review process, be **ordered to resume the debt review** in accordance with Section 86(11).
3. That any Respondent who opposes this application pays the **costs** arising from such opposition;
4. Further and/or alternative relief.

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Debt Review: Notice of Motion (3)


TAKE FURTHER NOTICE that the accompanying affidavit of the Applicant attached hereto will be used in support of this application

TAKE NOTICE FURTHER that the Applicant has appointed Yusria Cornelius Inc. Attorneys 43 Hugo Street, Goodwood, 7460, Re/HH0379, Tel : 021 592 4912, Fax : 021 592 4910, Fax to email : 086 614 9871, Email: yusria@corneliusattorneys.co.za **c/o [Correspondent address]** at which Applicant will accept notice and service of all process in these proceedings.

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

To notify the Applicant or Applicant's Attorney, in writing on or before **01 NOVEMBER 2010.**

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Debt Review: Notice of Motion (4)

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 **24 NOVEMBER 2010**

DATED AT GOODWOOD ON THIS 15TH DAY OF OCTOBER 2010.

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Debt Review: Notice of Motion (5)


Yusria Cornelius Inc. Attorneys
Attorneys for Applicants
43 Hugo Street, Goodwood, 7460, Re/HH0379, Tel : 021 592 4912, Fax : 021 592 4910, Fax to email : 086 614 9871, Email: yusria@corneliusattorneys.co.za **c/o [Correspondent address]**

To: The Clerk of the Civil Court, Magistrates Court,
MITCHELL'S PLAIN

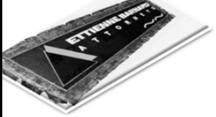
And to:

ABSA...	service per email as agreed to between the parties
STANDARD...	service per email as agreed to between the parties
NEDBANK...	service per email as agreed to between the parties

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The Short(er) Form **URGENCY & EX PARTE**


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Short Form Application examples

- Edictal Citation/Substituted service
- Giving notice will defeat the purposes of the application eg. The Respondent might
 - Remove/destroy the goods
 - Disappear with the minor child
- Urgent matters if the degree of urgency allows


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Documents in Urgent Matters:

- Notice of motion requesting
 - Annexure 1 Form 1
- Affidavit
- Draft “Court Order”(If Ex Parte use Rule Nisi)
 - R55(8) minute for service

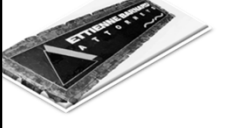
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Degree of Urgency

- Republikeinse Publikasies v Afrikaanse Pers 1972(1)SA773(A)
 - Applicant creates own rules but must justify in evidence
 - May even include going to court without issuing
- Luna Meubel Vervaardigers v Makin...1977 (4) 135 (W)
 - There should be a correlation between urgency & relaxing of rules
- Bandle Investments v Registrar of Deeds 2001(2) SA 203 (E)
 - Commercial interests may justify urgency


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Liquidation of CC

URGENT BUT NOT EX PARTE


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Liquidation of Close Corpora

- Rynders v Bankorp Ltd 1995 (2) SA 494 (W)
 - Mag Court Liquidation cannot be ex parte
- Adonis v Add.Magistrate, Bellville Anors 2007(2)SA 147 (C) approved the Rynders Case.
- Naidoo v Absa Bank Ltd 2010 (4) SA 597 (SCA)
 - No notice ito s129 NCA required
- (OLD) Rule 55 (1) (10 days notice to CC) compulsory
 - [Rule 9(14) now r9(12) was not applied
 - - shorter notice on good cause]
 - R55(5)(a)

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Close Corporation Notice (1)

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


CASE NO:

In the matter between
JOHN GELDSKIET Applicant
and
KRYSWAAR CC Respondent

NOTICE OF MOTION

BE PLEASED TO TAKE NOTICE that the above-named Applicant intends to make application to the above Honourable Court on MONDAY the 23RD day of NOVEMBER 2010 AT 09:00 or as soon thereafter as the matter may be heard for an Order in the following terms:


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Close Corporation Notice (2)

- 1 **Dispensing with** the forms and service provided for in the **Rules** of the above Honourable Court and entertaining this matter as one of urgency in terms of Rule 55(5)(a) as read with rule 9(12).
- 2 That the Respondent be placed under a **provisional order of liquidation** in the hands of the Master of the above Honourable Court.
- 3 That a **rule nisi** be issued calling upon Respondent and all persons interested to show cause, if any, on MONDAY 17th JANUARY 2011, by the above Honourable Court, why Respondent should not be finally liquidated;

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Close Corporation Notice (3)

4 That **service** of this Order be effected as the court directs and by the Sheriff:

4.1 At the registered office of the **Respondent**.

4.2 On all registered **trade unions** representing the employees of the Respondent


4.4 On the **employees** of the respondent

4.5 the **South African Revenue Services** as prescribed in the Close Corporations Act (s66) as read with the Companies Act (s346A)

5 That the costs of this application be costs in the liquidation.

6 Such further and/or alternative relief as the Honourable Court may deem fit.

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Close Corporation Notice (4)

TAKE FURTHER NOTICE that the attached affidavit of JOHN GELDSKIET will be used to support this application.

KINDLY PLACE THE MATTER ON THE ROLL ACCORDINGLY.

DATED AT CAPE TOWN this 18TH day of NOVEMBER 2010.

Applicant's attorneys
Per: (& Address)

TO: THE CLERK OF THE COURT, GOODWOOD
Registered Office at


AND TO RESPONDENT: THE MASTER, HIGH COURT, CAPE TOWN

AND TO : THE EMPLOYEES OF THE RESPONDENT

AND TO : ALL REGISTERED TRADE UNIONS OF THE THE EMPLOYEES OF THE RESPONDENT

AND TO : THE SOUTH AFRICAN REVENUE SERVICES

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Close Corporation Notice (5)

The rules may be compromised in relation to the degree of urgency:


– Less Urgent matters
(Alternative)]

TAKE NOTICE FURTHER that the applicant has appointed Etienne Barnard Attorneys [address] at which applicant will accept notice and service of all process in these proceedings.

TAKE NOTICE FURTHER that if you intend opposing this application you are required (a) to notify applicant or applicant's attorney in writing on or before the 30th 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 10th DECEMBER 2010 at 09:00

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Rule 56 references to Arrests Tamquam Suspectus de Fuga

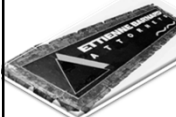
- MALACHI v CAPE DANCE ACADEMY INTERNATIONAL (PTY) LTD AND OTHERS 2010 (6) SA 1 (CC)
- "...The order of constitutional invalidity made by the Western Cape High Court, Cape Town, is confirmed to the following extent:
 - (i) The words 'arrest *tanquam suspectus de fuga*' as contained in A s 30(1) of the Magistrates' Courts Act 32 of 1944 are declared **unconstitutional and invalid**.
 - (ii) The whole of s 30(3) of the Magistrates' Courts Act 32 of 1944 is declared to be inconsistent with the Constitution and invalid..."

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SPECIFIC APPLICATIONS

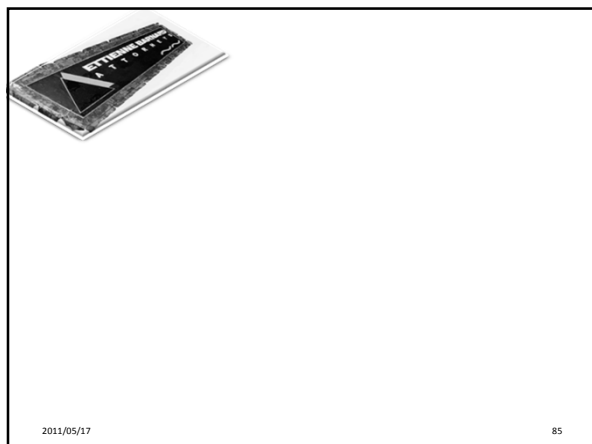
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APPLICATIONS IN THE FORMS TO THE RULES

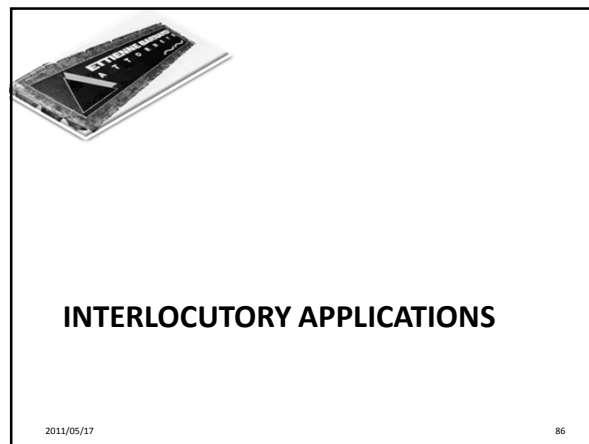
- Summary Judgment [form 7]
- Application for Trial With Assessors [form 21]
- Administration Order [form 44]
- Maintenance *pendente lite* , contribution towards costs, interim custody and access to children [form 42]

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INTERLOCUTORY APPLICATIONS

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Notice of Motion v Notice

Rule 55(1)(a)

- Every appl. shall be brought on
- Notice of Motion
- Supported by affidavit as to facts
- Rule 55(1)(f)&(j)(iv) requires separate notice of set down
- Formalities:
 - Appointing attorneys
 - Giving service addresses

Rule 55(4)(a)

- Interloc & incidental appl. must be brought
- Notice
- Affidavit **only if** facts need to be placed before court
- Rule 55(4)(a) “and set down with appropriate notice”
- **No Formalities** such as
 - Appointing attorneys
 - Giving service addresses

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Yorkshire Insurance Co Ltd v Reuben 1967 (2) SA 263 (E) [1]

“a substantial difference between an application being brought on notice...and...on notice of motion.

...never...intended, when parties are engaged in litigation and have complied with such formalities as appointing attorneys and giving addresses for the service of documents in the proceedings, that, in further applications incidental to such proceedings, the parties would be required to go through all the same formalities again with all the concomitant and unnecessary expense.”

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Yorkshire Insurance Co Ltd v Reuben 1967 (2) SA 263 (E) [2]

“...the use of the word 'notice' in sub-rule (11) as opposed to the 'notice of motion' in the other sub-rules to Rule 6 indicates clearly that interlocutory and other applications incidental to pending proceedings were not intended to be brought by...formal notice of motion in the same way as applications initiating proceedings. [It]...was not enacted solely for the purpose of prescribing a different procedure as regards set down as has been suggested ...”

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Yorkshire Insurance Co Ltd v Reuben 1967 (2) SA 263 (E) [3]

“...all that is required ...is a notice advising the other party that an application will be brought on a date assigned by the Registrar.


*It follows, therefore, that **the applicant unnecessarily adopted the procedure applicable to notices of motion** when initiating the application to compel particulars and its costs must be limited to the costs of a simple notice to respondent's attorneys as is given in other matters connected with litigation, e.g. the notice to deliver particulars”*

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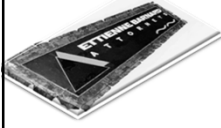
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Notice of Motion v Notice

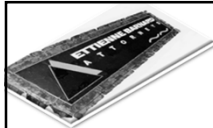
<p>SUBSTANTIVE</p> <ul style="list-style-type: none"> • NO HEARING DATE IN NOTICE FOR OPPOSED MOTIONS • RESPONDENT: <ul style="list-style-type: none"> – NOTICE OF OPP. 5 DAYS – OPPOSING AFFIDAVIT 10 DAYS • DATE INSERTED ONLY APPLIES TO UNNOPOSED • FURTHER NOTICE OF SET DOWN REQUIRED 	<p>INTERLOCUTORY OR INCIDENTAL</p> <ul style="list-style-type: none"> • HEARING DATE INSERTED IN NOTICE FOR OPPOSED MOTIONS • RESPONDENT: <ul style="list-style-type: none"> – NO NOTICE OF OPPOSITION – OPPOSING AFFIDAVIT ANY TIME BEFORE – MUST GET REASONABLE TIME • DATE INSERTED APPLIES TO UNNOPOSED & OPPOSED • NO FURTHER SET DOWN REQUIRED
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ACTION PROCEEDINGS

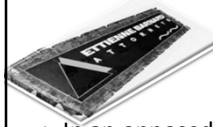
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Service address of the State Attorney (1)

- Formerly Rule 9(g) provided for service on the State Attorney ("SA") via the local Clerk of the Magistrates' Court
- New Rules: service on the SA at the Clerk of the Court has fallen away
- If it is a document that the Sheriff must serve, it is to be done on
 - The Office of the SA in Pretoria
 - Or a branch office of the SA serving the area of jurisdiction of the court [new rule9(g)]

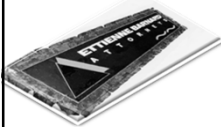
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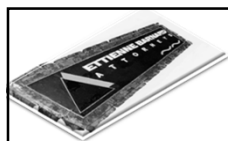
Service address of the State Attorney (2)

- In an opposed matter, the SA must appoint a local service address within 15km of the court, see
 - rule 5(3)(a)(i) if SA is the Plaintiff
 - rule 13(3)(a) if SA is the Defendant
 - rule 55(1)(e)(i) if SA is the Applicant
 - rule 55(1)(g)(i) if SA is the Defendant

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•THANK YOU!

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ACTIONS AND THE AMENDED RULES

A BRIEF OVERVIEW

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Letters of Demand

- Rule 4(1)(a): The LoD referred to in SS 57 & 58 **shall** contain particulars of the nature and the amount of the claim
- Rule 4(1)(b): where the original cause of action is a credit agreement under the NCA, the LoD referred to in S58 must deal with the relevant provisions of SS 129 & 130, and allege that each one has been complied with

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SUMMONS

(Rule 5)

SIMPLE SUMMONS

- Debt / liquidated amount
- Form 2

Rule 5(2)(b) - "may", party can choose to use Simple Summons

Uniform Rules - "shall"

COMBINED SUMMONS

- All others
- Form 2B

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MATERIAL CHANGES

- **15 km** service address
- Rule 5(3)(b) to (d) provides for service by **facsimile** or mail under certain conditions.
- If defended – written request by Plaintiff whether consent to fax/e-mail – if no response – Application for such consent (just and appropriate)
- Rule 5(9) and 6(12) – Plaintiff = Cessionary – details
→ Name, address, description of cedent, date
- Rule 5(10) - actions where an order is sought to declare immovable property which is the home of a defendant, executable (and also probably in actions where an eviction of a lessee is sought), defendant's attention must be drawn to section 26 of the Constitution which accords everyone the right to access to adequate housing

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- Rule 5(6)(a) - compulsory when relying on jurisdiction in terms of S 28(1)(d) of the Magistrates' Courts Act 32 of 1944, to aver that the whole cause of action arose within the district or region, **and** to set out the particulars in support of such averment.
- In the past, only necessary to make the averment that the whole cause of action arose within the Courts district.
- Rule 5(6)(b) – when relying on jurisdiction ito S28(1)(g), summons must contain averment that property situates within the district or region.

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- Simple Summons

Rule 5(7) – a claim regulated by legislation, may contain a bare allegation of compliance with the legislation, but a declaration (and a combined summons) must allege full particulars of such compliance.

If RDJ filed, evidence of compliance with the provisions of the legislation must be filed to the satisfaction of the court(Rule 12(6A)).

- Cause of action within NCA? – compliance with Section 129 & 130 needs to be pleaded – Combined summons suggested

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NB: Non compliance with Rule 5

Rule 5(11)

↓

deemed to be an
IRREGULAR STEP
RULE 60A

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- Rule 5(5) :
 - Consent to judgment
 - Appearance to defend
 - S109
 - S57, 58, 65A
- Form 2B oversight - recommendation

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SIMPLE SUMMONS

IN THE MAGISTRATE'S COURT FOR THE DISTRICT OF SOMERSET WEST

HELD AT SOMERSET WEST CASE NUMBER: 3/11

In the matter between:

A N ATTORNEY (PTY) LTD Plaintiff

and

D DEBTOR Defendant

SUMMONS

TO: The Sheriff or his/her Deputy:
SOMERSET WEST

INFORM: **D DEBTOR**, an adult male teacher whose full and further particulars are to the Plaintiff unknown residing at **18 Seminar Road, Somerset West**, which address is the Defendant's chosen domicile of residence; (hereinafter called "the Defendant")

THAT: **A N ATTORNEY (PTY) LTD**, a Company with limited liability, duly registered in accordance with the Company laws of the Republic of South Africa, of **Shop 5, Tygervalley Centre, Bellville** (hereinafter called "the Plaintiff")

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

- Payment of the sum of R 135.00 (THREE THOUSAND ONE HUNDRED AND THIRTY FIVE RANDS), being the amount which is due, owing and payable by the Defendant to the Plaintiff for Goods sold and delivered by Plaintiff to Defendant at the latter's special instance and request in and during June 2010, which amount despite demand defendant fails and/or neglects to pay and which said sum, despite demand, remains unpaid;
- Interest thereon at the rate of 15.50% from a tempore morae;
- Costs of suit;
- further and/or alternative relief.

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INFORM the Defendant that if it disputes the claim and wish to defend the action, it shall:

(i) within **10 (ten)** days of the service upon them of this Summons file with the Registrar or Clerk of the Court at Somerset West, 31 Caledon Street, Somerset West, notice of its intention to defend and serve a copy thereof on the Plaintiff's Attorney, which said notice shall give an address (not being a post office box or a post restate) referred to in Rule 13(1) for the service upon the Defendant of all notices and documents in the action;

(ii) thereafter, and within **20 (twenty)** days after filing and serving notice of intention to defend as aforesaid, file with the Registrar or Clerk of the Court and serve upon the Plaintiff a plea, exception, notice to strike out, with or without a counterclaim.

INFORM the Defendant further that if it fails to file and serve notice as aforesaid, judgment as claimed may be given against Defendant without further notice to, or if having filed and served such notice, they fail to plead, except, make application to strike out or counterclaim, judgment may be given against them. And immediately serve on the Defendant a copy of this Summons and return the same to the Registrar or Clerk of the Court with whatever you have done thereupon.

Dated at **BELLVILLE** this **28th** day of **OCTOBER 2010**.

Registrar / Clerk of the Court

ATTORNEYS INC
5 ADDRESS STREET
CAPE TOWN
TEL: _____
FAX: _____
E-MAIL: _____
Service Address: SOMERSET WEST LAW FIRM
ADDRESS: _____
SOMERSET WEST, 7130

(2) **CONSENT TO JUDGMENT**
I admit that I am liable to the plaintiff as claimed in this summons for in the amount of R..... and costs to date) and consent to judgment accordingly.
Dated at this day of 20.....

Defendant: _____

*(3) **NOTICE OF INTENTION TO DEFEND**
To the Registrar/Clerk of the Court:
I hereby give notice that the defendant hereby notifies his or her intention to defend this action.
Dated at this day of 20.....

Defendant/Defendant's attorney

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Address: _____
Postal address: _____
Facsimile (fax) number (where available): _____
Electronic mail (e-mail) address (where available): _____
(Give full address for acceptance of service of process or documents within 15 kilometers from the Court-house and also the postal address.)

*The original notice must be filed with the Registrar or Clerk of the Court and a copy thereof served on the plaintiff or plaintiff's attorney.
Costs if the action is undefended will be as follows:-

Costs :	Amount	VAT
Attorney's Charges:		
Summons	R485.00	R67.90
Attending Court	(Item 7 of Part II of Table A)	
Judgment fees	(Item 3 of Part II of Table A)	
	R408.00	R57.12

Court Fees
Sheriff's Fees
Re-issue
Sheriff's Fees on re-issue of summons

TOTAL R R

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Defendant must take notice that:

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

Notice:

- Any person against whom a court has, in a civil case, given judgment or made any order who has not, within 10 days, satisfied in full such judgment or order may be called upon by notice in terms of section 65A(1) of the Act to appear on a specified date before the court in chambers to enable the court to inquire into the financial position of the judgment debtor and to make such order as the court may deem just and equitable.
- If the court is satisfied that:
 - the judgment debtor or, if the judgment debtor is a juristic person, a director or officer of the juristic person has knowledge of the abovementioned notice and that he or she has failed to appear before the court on the date and at the time specified in the notice; or
 - the judgment debtor, director or officer, where the proceedings were postponed in his or her presence to a date and time determined by the court, has failed to appear before the court on that date and at that time; or
 - the judgment debtor, director or officer has failed to remain in attendance at the proceedings or at the proceedings so postponed, the court may, at the request of the judgment creditor or his or her attorney, authorize the issue of a warrant directing a sheriff to arrest the said judgment debtor, director or officer and to bring him or her before a competent court to enable that court to conduct a financial enquiry. [Section 65A(6) of the Act]
- Any person who:
 - is called upon to appear before a court under a notice in terms of section 65A(1) or 65A(8)(b) of the Act (where the sheriff, in lieu of arresting a person, hands to that person a notice to appear in court) and who willfully fails to appear before the court on the date and at the time specified in the notice; or
 - where the proceedings were postponed in his or her presence to a date and time determined by the court, willfully fails to appear before the court on that date and at that time; or
 - willfully fails to remain in attendance at the relevant proceedings or at the proceedings so postponed, shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding three months. [Section 65A(9) of the Act]
- On appearing before the court on the date determined in the notice in terms of section 65A(1) or 8(b) of the Act in pursuance of the arrest of the judgment debtor, director or officer under a warrant referred to in section 65A(6) of the Act or on any date to which the proceedings have been postponed, such judgment debtor, director or officer shall be called upon to give evidence on his or her financial position or that of the juristic person and his or her ability to pay the judgment debt. [Section 65D of the Act]
- Any person against whom a court has, in a civil case, given any judgment or made any order who has not satisfied in full such judgment or order and paid all costs for which he or she is liable in connection therewith shall, if he or she has changed his or her place of residence, business or employment, within 14 days from the date of every such change notify the clerk or registrar of the court who gave such judgment or made such order and the judgment creditor or his or her attorney full and correctly in writing of his or her new place of residence, business or employment, and by his or her failure to do so or to fail to do so within the said period, shall be liable to a fine or imprisonment for a period not exceeding three months. [Section 109 of the Act]

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IN THE MAGISTRATE'S COURT FOR THE DISTRICT OF SOMERSET WEST

HELD AT SOMERSET WEST

IN the matter between:

A N ATTORNEY (PTY) LTD Plaintiff

and

D DEBTOR Defendant

COMBINED SUMMONS

TO: The Sheriff or his/her Deputy: **SOMERSET WEST**

INFORM: **D DEBTOR**, an adult male teacher whose full and further particulars are to the Plaintiff unknown residing at 18 Seminar Road, Somerset West, which address is the Defendant's chosen *domicilium citandi et executandi* (hereinafter called "the Defendant")

THAT: **A N ATTORNEY (PTY) LTD**, a Company with limited liability, duly registered in accordance with the Companies laws of the Republic of South Africa, of **Shop 5, Tygervalley Centre, Bellville** (hereinafter called "the Plaintiff") hereby institutes action against them in which action the Plaintiff claims the relief and on the grounds set forth in the Particulars of Claim annexed hereto marked Annexure "A".

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INFORM the Defendant that if it disputes the claim and wish to defend the action, it shall:

- within **10 (ten)** days of the service upon them of this Summons file with the Registrar or Clerk of the Court at Somerset West, 33 Caladon Street, Somerset West, notice of its intention to defend and serve a copy thereof on the Plaintiff's Attorneys, which said notice shall give an address (not being a post office box or a post restant) referred to in Rule 13(3) for the service upon the Defendant of all notices and documents in the action;
- thereafter, and within **20 (twenty)** days after filing and serving notice of intention to defend as aforesaid, file with the Registrar or Clerk of the Court and serve upon the Plaintiff a plea, exception, notice to strike out, with or without a counterclaim.

INFORM the Defendant further that if it fails to file and serve notice as aforesaid, judgment as claimed may be given against Defendant without further notice to, or if, having filed and served such notice, they fail to plead, except, make application to strike out or counterclaim, judgment may be given against them. And immediately serve on the Defendants a copy of this Summons and return the same to the Registrar or Clerk of the Court with whatsoever you have done thereupon.

Dated at **BELVILLE** this **28th** day of **OCTOBER 2010**.

Registrar / Clerk of the Court

MINDE SCHAPIRO & SMITH
 TYGERVALLEY OFFICE PARK II
 CNR OLD OAK & WILLIE VAN SCHOOR
 BELLVILLE, 7530; PO BOX 4040, TYGERVALLEY 7536
 Tel No. - **021-918 9000**; Fax No.: **021-918 9000**
 Service Address: **LEON FRANK & PARTNERS**
 UNIT B6, THE BEACHHEAD OFFICE PARK
 10 NIBLUCK WAY, SOMERSET WEST, 7130

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(2) **CONSENT TO JUDGMENT**
 I, undersigned, am indebted to the plaintiff as claimed in this summons (or in the amount of R. _____ and costs to date) and I consent to judgment accordingly.
 Dated at _____ this _____ day of _____ 20__

Defendant

(3) **NOTICE OF INTENTION TO DEFEND**
 To the Registrar/Clerk of the Court:
 I, undersigned, hereby notify you of my intention to defend this action.
 Dated at _____ this _____ day of _____ 20__

Defendant/Defendant's attorney

Address: _____
 Postal address: _____
 Facsimile (fax) number (where available): _____
 Electronic mail (e-mail) address (where available): _____
 (Give full address for acceptance of service of process or documents within 15 kilometers from the Court house and also the postal address.)
 *The original notice must be filed with the Registrar or Clerk of the Court and a copy thereof served on the plaintiff or plaintiff's attorney.

Costs if the action is undefended will be as follows:-

Costs:	Amount:	VAT:
Attorney's Charges:	R 57,50	
Summons:	R 65,00	
Attending Court:	(Item 7 of Part B of Table A)	
Judgment fees:	(Item 3 of Part B of Table A)	R 57,12
Court Fees:		
Sheriff's Fees:		
Re-issue:		
Sheriff's Fees on re-issue of summons:		
TOTAL:	R	R

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Defendant must take notice that:

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

Notice:

- Any person against whom a court has, in a civil case, given judgment or made any order who has not, within 10 days, satisfied in full such judgment or order may be called upon by notice in terms of section 65A(1) of the Act to appear on a specified date before the court in chambers to enable the court to inquire into the financial position of the judgment debtor and to make such order as the court may deem just and equitable.
- If the court is satisfied that:
 - the judgment debtor or, if the judgment debtor is a juristic person, a director or officer of the juristic person has knowledge of the abovementioned notice and that he or she has failed to appear before the court on the date and at the time specified in the notice; or
 - the judgment debtor, director or officer, where the proceedings were postponed in his or her presence to a date and time determined by the court, has failed to appear before the court on that date and at that time; or
 - the judgment debtor, director or officer has failed to remain in attendance at the proceedings or at the proceedings so postponed, the court may, at the request of the judgment creditor or his or her attorney, authorize the issue of a warrant directing a sheriff to arrest the said judgment debtor, director or officer and to bring him or her before a competent court to enable that court to conduct a financial enquiry. [Section 65A(6) of the Act]
- Any person who:
 - is called upon to appear before a court under a notice in terms of section 65A(1) or 65A(8)(b) of the Act (where the sheriff, in lieu of arresting a person, hands to that person a notice to appear in court) and who willfully fails to appear before the court on the date and at the time specified in the notice; or
 - where the proceedings were postponed in his or her presence to a date and time determined by the court, willfully fails to appear before the court on that date and at that time; or
 - willfully fails to remain in attendance at the relevant proceedings or at the proceedings so postponed, shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding three months. [Section 65A(9) of the Act]
- On appearing before the court on the date determined in the notice in terms of section 65A(1) or 8(b) of the Act in pursuance of the arrest of the judgment debtor, director or officer under a warrant referred to in section 65A(6) of the Act or on any date to which the proceedings have been postponed, such judgment debtor, director or officer shall be called upon to give evidence on his or her financial position or that of the juristic person and his or her ability to pay the judgment debt. [Section 65D of the Act]
- Any person against whom a court has, in a civil case, given any judgment or made any order who has not satisfied in full such judgment or order and paid all costs for which he or she is liable in connection therewith shall, if he or she has changed his or her place of residence, business or employment, within 14 days from the date of every such change notify the clerk or registrar of the court who gave such judgment or made such order and the judgment creditor or his or her attorney full and correctly in writing of his or her new place of residence, business or employment, and by his or her failure to do so or to fail to do so within the said period, shall be liable to a fine or imprisonment for a period not exceeding three months. [Section 109 of the Act]

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PLEADING IN GENERAL (RULE6)

- 6(4): pleadings shall contain a clear and concise statement of the material facts and answers with sufficient particularity
- 6(5): when denying allegation – not evasively – answer the point of substance
- 6(6): reliance on contract – details
- 6(8): forfeiture of benefits – grounds upon which claim is based
- 6(9): Damages – details
- 6(11): Agreement governed by legislation – nature and extent of compliance
- 6(13): Failure to comply ➡ R60A

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JUDGMENT BY CONSENT (RULE 11)

- 2 Witnesses
- Full names
- Addresses
- Telephone numbers

(all must be recorded)

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SS 57 & 58

- Rule 4(1)(a): particulars of nature of claim and amount MUST be in the demand
- Rule 4(2): Affidavit containing evidence;
- Rule 4(3): 2 witnesses, full names, tel. numbers
- Rule 4(4): Rule 12 (6) (original)
Rule 12(6A) (evidence re compliance)
Rule 12(7) (powers of CoC/ Registrar to refer to Court)
Applies to S57 and S58

African Bank Ltd v Myambo 2010 (6) SA 298 (GNP)

- ❖ fair and effective collection procedures promoted the purpose of the NCA
- ❖ Provided that the provisions of s 58 and those of the NCA were applied properly and with due regard to the parties' rights, it was in the interests of credit providers, consumers and of justice that the effective debt-collection procedure afforded by s 58 was utilised.
- ❖ The magistrate's finding that s 58 was contrary to the purposes of the NCA could not be upheld.

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DEFAULT JUDGMENT (RULE 12)

- Rule 6A: If claim is founded on any cause of action arising out of or regulated by legislation, then the Plaintiff **SHALL** together with RDJ file evidence confirming compliance with the provisions of such legislation to the satisfaction of the court.
- Example: NCA – compliance: In as far as the registered slip was not annexed to PoC, this will be filed with RDJ.

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NOTICE OF INTENTION TO DEFEND (RULE 13)

- Rule 13(1): Dies non; 16 December -15 January, both dates inclusive.
- Rule 13(3)(a): - The physical address provided within 15 kilometers of the Court.
- where available fax/e-mail
- indicate preferred address of service
- Eg:
"KINDLY TAKE NOTICE THAT Defendant is prepared to accept service or prefers service of all subsequent documents and notices in the suit by way of e-mail/fax at the address reflected hereunder."
- Service by facsimile or electronic mail under certain conditions:
- 13(3)(b): Defendant shall indicate
- 13(3)(c): Plaintiff may deliver written consent
- 13(3)(c): Plaintiff refuses/fails, Application
- If No Notice received = DJ

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SECURITY FOR COSTS (RULE 62)

- Rule 62(1): Notice setting forth grounds upon which claimed & amount.

Computer Brilliance CC v Swanepoel 2005 (4) SA 433 (T) – *«Respondent has no absolute right to security»*.

- Rule 62(2): If amount contested – Registrar/Clerk of the Court.
- Rule 62(3): If liability is contested or party fails to deliver, then Application to Court and proceedings stayed.
- Rule 62(5): Shall be given in the form, amount and manner directed by Registrar/Clerk unless Court directs otherwise/parties agree otherwise

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SUMMARY JUDGMENT (RULE 14)

- Amended to correspond with Rule 32 of the Uniform Rules of Court.
- Plaintiff has 15 days from date of delivery of notice of intention to defend to deliver application for summary judgment.
- If based on liquid document same must be annexed to the Affidavit.
- **FIRSTRAND BANK LTD v BEYER 2011 (1) SA 196 (GNP)**:
 1. Requirement that deponent able to swear positively to facts
 2. Habit of corporate institutions to have employee depose to deficient pro forma verifying affidavit deleted;
 3. Deponents on behalf of companies and other legal persons to state unequivocally that facts within their personal knowledge, and how they acquired such knowledge, to enable court to assess evidence before it.
- Defendant's answering affidavit has to be delivered before noon on the day but one preceding the day on which the application is to be heard.
- The option a defendant had of paying into Court, previously rule 14(3)(a), has been deleted. – NOW Rule 14(3)(a): Security to satisfaction of Registrar/Clerk of the Court
- **SPECIAL COST AWARDS:**
 - Rule 14(10)(a) – Plaintiff had knowledge of defence – costs (taxable immediately and may order attorney/client)
 - Rule 14(10)(b) – where SJ was refused and Court after judgment finds defence unreasonable and that SJ should have been granted – attorney and client costs

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NB:

The raising of a bona fide counterclaim is no longer a ground for refusing summary judgment.
Rule 14(3) requires a defendant to satisfy the Court that it has a bona fide defence to the action.

SOIL FUMIGATION SERVICES LOWVELD CC v CHEMFIT TECHNICAL PRODUCTS (PTY) LTD 2004 (6) SA 29 (SCA)

- ❖ Such can in principle constitute 'bona fide defence' to corresponding C part of claim in convention
- ❖ In order to succeed with defence defendant to comply with provisions of Rule 32(3)(b) requiring full disclosure of nature and grounds of counterclaim as well as material facts upon which it relies
- ❖ *"I can see no reason why a court considering an application for summary judgment should not, in the exercise of its overriding discretion under rule 32(5), have regard to the different considerations that arise when the defence put forward is by way of a counterclaim as opposed to a plea."*

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PROVISIONAL SENTENCE (RULE 14A)

- No change ... HOWEVER RECENT CASE LAW
- **TWEE JONGEN GEZELLEN (PTY) LTD AND ANOTHER v THE LAND AND AGRICULTURAL DEVELOPMENT BANK OF SA t/a THE LAND BANK AND ANOTHER - CCT 68/10 judgment handed down on 22/02/11**
- The procedure for provisional sentence to a certain extent unjustifiably limited the right of access to courts granted in the Constitution.
- It was therefore declared inconsistent **to the extent** that it does not give a court the power to refuse provisional sentence where the defence raised requires oral evidence and where the defendant is unable to pay the judgment debt to enter into the main case.
- The **common law was thus developed** to provide courts with a discretion to refuse provisional sentence in the following circumstances:
 - (i) an inability to satisfy the judgment debt;
 - (ii) an even balance of success in the main case on the papers; and
 - (iii) a reasonable prospect that oral evidence may tip the balance of success in the defendant's favour.

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- The previous rule 15, request for documents or accounts upon which plaintiff's action is based, has been deleted.
- Rule 23(15), the equivalent of Uniform Rule 35(14), provides for discovery for purposes of pleading.
- What if FP filed before amended Rules?
- In light of R1(3) old Rule would apply and right has occurred prior to amendment.
- Rule 55(4)(a) = Interlocutory/Other applications incidental to pending proceedings
- Rule 55(4)(b) = Applications to Court for directions as to procedure or service of documents may be made ex parte where giving of notice is not necessary.

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DECLARATION (RULE 15)

- 15 days after Notice of Intention to Defend when simple summons has been used.
- Set forth: Nature of claim
Conclusion of Law
Prayers
- Rule 15(4) and (5) Notice of bar and a subsequent default judgment by the defendant.
- High Court: at least 5 days' notice to plaintiff of application for default judgment,
- Rule 15(5): at least 10 days notice of set down

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FURTHER PARTICULARS (RULE 16)

- Old rule deleted
- Pleadings should contain sufficient detail
- If not → Exception / Rule 60A
- After close of pleadings, not less than 20 days before trial
- Compliance 10 days after receipt thereof
- Non-compliance: Compel/Dismissal/Striking out of defence

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PLEA (RULE 17)

- 20 days to deliver
- Admit, deny, confess and avoid (Rule 60A)
- If not denied / admitted – deemed to be admitted (17(3)(a))
- Rules 17(5)(a) to (c) relates to tenders being pleaded - Tender as part of amount claimed, plea shall specify items to which tender relates – same as old rule
- Payment if amount tendered to be secured to satisfaction of Plaintiff, no longer payment into court

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OFFER TO SETTLE (RULE 18)

- Drastically amended
- In essence a copy of the HC Rule 34.
- Tender = writing
- Unconditional/without prejudice
- No payment into court
- Tender by 3rd parties too
- Notice of tender – to all parties
- Acceptance within 15 days, thereafter by way of written consent/order of court
- Failure to pay/perform, 5 days notice, then apply for judgment
- Rule 18(13): Any party who discloses an offer/tender to Magistrate/Court shall be liable for costs given against him even if successful in the action.

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INTERIM PAYMENTS (RULE 18A)

- New Rule
- Identical to HC 34A
- Actions for damages claims for personal injuries/death
- Medical costs/Loss of income
- If granted/refused, further Applications upon good cause shown

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EXCEPTIONS/ STRIKE OUT (RULE 19)

- Identical to HC Rule 23
- 2 Grounds:
 - ① Vague and embarrassing
 - ② lacks averments necessary to sustain a cause of action/defence
- In ① - Notice to remove cause of complaint in 15 days
- In ② - Exception

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CLAIMS IN RECONVENTION (RULE 20)

- Drastically amended
- In essence a copy of the HC Rules
- Exception: Rule 20(5) An action may be stayed in the where the claim in reconvencion exceeds the jurisdiction of the Magistrates' Court.
- Non-compliance with Rule \Rightarrow Rule 60A

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REPLICATION AND PLEA IN RECONVENTION (RULE 21)

- All periods have been amended to comply with High Court.
- 15 days after receipt of plea/claim in reconvention
- Rule 21(5): Introduces the concept of further pleadings following a plaintiff's replication in the Magistrates' Court.

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CLOSE OF PLEADINGS (RULE 21A)

- (a): parties have joined issue
- (b): last day for filing replication/subsequent pleading has lapsed or not been filed
- (c): parties agree in writing
- (d): parties unable to agree, court on application declares pleading closed

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SET DOWN (RULE 22)

- Rules 22(4) - (6) have been added.
- Rule 22(4): Registrar / Clerk of the Court shall draw file, take to Magistrate, who then decides whether pre-trial in terms of S54 is necessary – enabling subrule – does not compel Magistrate.
- Tendency in our Western cape Courts: Application for a trial date in the form of a Rule 37 minute.
- Trial date shall be allocated within **10 days!**
- R22(5) and (6): Divorce matters – Registrar, at written request by Plaintiff set matter down on a date to be fixed by the Registrar.

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DISCOVERY (RULE 23)

- Drastically amended
- Copy of the HC Rules
- HC Rule 35 makes mention of documents and tape recordings, whilst Rule 23 mentions documents and tape, electronic, digital or other forms of recordings.
- Discovery requires a request from the opposite party - No automatic discovery in Magistrates' Courts.
- R23(1) Notice to Discover
- R23(3) Notice for additional documents
 - Which party believes is in other's possession but not discovered;
 - Make available for inspection
 - If not in possession – under oath and state whereabouts
- R23(4) party failing to discover after receiving notice may not use document.
- R23(5) RAF, state, cessionary – discovery against driver/owner/cedent – Form 14
- Rule 23(6) – Notice to produce for inspection (Request = Form 15)
- Rule 23(7) – (Response = Form 15A)
- Rule 23(9) – Notice to specify particulars of dates/parties to any document/tape
- Rule 23(10) – Notice to admit
 - That document/tape or recording properly executed and what it purports to be
 - If no objection – admitted without proof
 - If not admitted – to be proved but party could be ordered to pay the costs of proof
- Rule 23(11) – Notice to produce at trial – original – no witness necessary
- Rule 23(12) – Court may order to produce

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- Rule 23(13(a)): Any party may deliver notice (Form 15B) to any party whose pleadings/affidavits make reference to any document/tape for inspection and making of a copy.
- Non compliance to notice – may not use document.
- Rule 23(15): After NID, any party may, for purpose of pleading, require other party to make available for inspection, within 5 days, a **clearly specified** document/tape/electronic/digital in his or her possession which is relevant to a reasonable anticipated issue and allow a copy thereof.
- Test: Essential and not useful (Cullinan Holdings Ltd v Stadsraad 1992(1) SA654 (T) at 647 F)
- R23(8) - Non compliance = compliance/dismissal of claim/striking of defence.
- Rule 23(14) = applicable to Applications in so far as Court directs

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NO. 15B NOTICE – RULE 23(13)

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

CASE NUMBER: 12345/10

In the matter between:

A ATTORNEY	Plaintiff
And	
D DEBTOR	Defendant

NOTICE IN TERMS OF RULE 23(13)(A)

TAKE NOTICE THAT the Plaintiff requires Defendant to produce for Plaintiff's inspection the following documents or recordings referred to in Defendant's plea:

1. Agreement referred to in paragraph 3 thereof;
2. Invoice referred to in paragraph 6 thereof.

Dated at BELLVILLE on this 18th day of NOVEMBER 2010

E JONKER
Plaintiff's attorneys
Address

TO: Defendant's attorneys

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Medical examinations and experts (Rule 24)

- Only amendment:
- Rule 24(5A): If any party claims damages resulting from death of another person, he or she shall undergo a medical examination as prescribed in this Rule if it is requested and it is alleged that his or her own state of health is relevant in determining damages.

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PRE-TRIAL (RULE 25)

- Rule 1(3):
 - In order to **promote access to courts** or in the **interest of justice**, a court may, at a S54 conference dispense with any provisions of the Rules and give directions as to the procedure to be followed so as to **dispose of the action** in the most **expeditious** and **least costly** manner.
 - Mediation especially in Divorce matters

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WITHDRAWAL, DISMISSAL AND SETTLEMENT (RULE 27)

- Rule 27(5) – Application to dismiss where Plaintiff fails to set down matter timeously has been deleted
- Substituted with positive obligation to inform registrar/Clerk of the Court/other parties of settlement, agreement to postpone or withdrawal by way of Notice
- Rule 27 (6) and (7): When making settlement agreement an Order of Court, other party must be present or written waiver (in agreement)
- Rule 27(9): breach = judgment
- Application in terms of R27(9) has to be on notice to all parties. It is no longer possible to waive Notice of this Application.

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INTERVENTION, JOINDER AND CONSOLIDATION OF ACTIONS (RULE 28)

- R28(3): Plaintiff may join several causes of action
- R28(4): Application that separate trials be held
- R28(5): Consolidation of actions
 - Upon Application (long form)
 - On Notice
 - Convenient to do so
 - Proceed as one action
 - directions as to further procedure
 - May give one judgment

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THIRD PARTY PROCEDURE (RULE 28A)

- Equivalent to HC Rule 13
- Extra Rule 28A(10): Where Court makes decision regarding liability of Defendant/Third party and either Defendant discharges the obligation to the Plaintiff or pays more than his fair share, then Defendant who discharged the obligation may execute for that amount which Defendant is liable.
- Third Party Notice = Form 43 – remember not a summons, no default judgment possible. If third party does not defend, no further documents and notices needs to be served.
 - ➊ Seek contribution/indemnification from 3rd party
 - ➋ Substantially same question/issue
 - ➌ Nature and grounds of claim and relief set out
 - ➍ Copies of all pleadings to 3rd party only, Notice to other
 - ➎ After close of pleadings – with leave from the Court
- Third party:
 - ➊ NID
 - ➋ Plea/Exception
 - ➌ Counterclaim against party issuing notice
 - ➍ Counterclaim against other party – with leave of Court (Rule 20)
 - ➎ May apply for separation of trials / Separate hearing of any issue

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NON APPEARANCE OF PARTY – WITHDRAWAL & DISMISSAL (RULE 32)

- Rule 32(2): If a Defendant/Respondent does not appear, a judgment (not exceeding the relief claimed) may be given against him or her with costs, **AFTER** consideration of such evidence, either oral or by Affidavit, as the Court deems necessary.
- Preparation will therefore be necessary.

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IRREGULAR PROCEEDINGS (RULE 60A)

- Rule 60A(1) – irregular step (contravention of the Rules), party may apply to have same set aside
 - Rule 60A(2) – On notice, specifying particulars of the irregularity/impropriety alleged:
- Only if:**
- Applicant has **not** taken further step in the case with knowledge of irregularity
 - Applicant has, within 10 days of becoming aware, by written notice afforded his opponent an opportunity of removing the case or complaint within 10 days and
 - Application is delivered within 15 days after expiry of the second period in (b)
- Rule 60A(3) – If Court is of opinion that step is irregular/improper, it may **set aside** in whole or in part, **grant leave to amend** or **make order as it deems fit**.
 - Rule 60A(4) – If party does not comply, he cannot take a further step save for applying for an extension of time.
- EXAMPLES:**
- Pleadings do not comply with Rules
 - Non compliance with Form
 - Irrevocable property sought to be declared executable – no attention to Section 26 of Constitution
 - Pleading not signed by attorney
 - Same demand in plea and non-compliance with Rule 17
- DASS AND OTHERS NNO v LOWWEST TRAINING (PTY) LTD 2011 (1) SA 48 (KZD)**
- Plaintiff filing notice of bar after having filed application for summary judgment
 - Notice of bar an irregular step which could be set aside on application of defendant;
 - Where, however, defendant chooses to file plea in compliance with notice of bar, irregular filing of notice of bar cured thereby
- NEW DOCUMENTS INTRODUCED BY NEW RULE:**
- Notice to remove complaint
 - Short form Notice
 - Affidavit (not necessary)
 - Draft Court order

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IN THE MAGISTRATE'S COURT FOR THE DISTRICT OF BELLVILLE

HELD AT BELLVILLE

Case Number: 44/10

In the matter between:

A ATTORNEY

Plaintiff

and

E EXCEPTIO

Defendant

NOTICE IN TERMS OF RULE 60A

KINDLY TAKE NOTICE THAT Plaintiff is of the intention to apply that the defendant's Plea be set aside as an irregular step in terms of Rule 60(A) on the following grounds:

- Defendant's Plea delivered on 1 November 2010 fails to comply with Rule 6(1) in that same was not signed by an attorney or Defendant himself.

PLEASE TAKE FURTHER NOTICE THAT should the aforesaid irregularity and complaint not be removed within 10 days of service of this notice, application shall be made for setting aside the Plea as an irregular step in terms of Rule 60(A).

DATED AT BELLVILLE THIS 18th DAY OF NOVEMBER 2010.

TO: THE CLERK OF THE COURT
MAGISTRATE'S COURT
BELLVILLE

AND TO: DEFENDANT'S ATTORNEYS

2011/05/17

MINDE SCHAPIO & SMITH
PER: E JONNER
Attorneys for Plaintiff
Tyger Valley Office Park II
Cor Old Dak Wille van Schoor, BELLVILLE
(Ref: E JONNER)

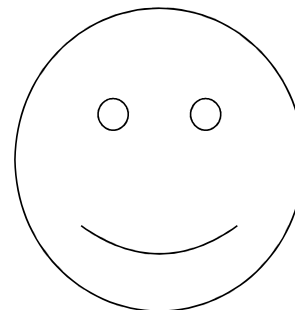
144

FILING, PREPARATION AND INSPECTION OF DOCUMENTS (RULE 63)

- Plaintiff / Applicant shall no later than 10 days prior to the hearing collate and number consecutively, and suitable secure all pages and shall prepare and deliver complete index;
- Every Affidavit filed, if party is represented, shall bear name and address of attorney filing it on first page.
- Rule 63(5): Registrar/Clerk may reject document that does not comply
- Rule 63(6): Any person, with leave of Registrar/Clerk, and **on good cause shown**, may examine and make copies of all documents in court file

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THE END

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JURISDICTION

- Regional Civil Courts in the Eastern Cape
- National Credit act Matters
- Matrimonial

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Eastern Cape Seats of the Civil Regional Courts

- East London East London, Komgha, Mdantsane
- Grahamstown Albany, Adelaide, Alexandria, Bathurst, Bedford, Somerset East
- Graaff-Reinet Graaff-Reinet, Aberdeen, Cradock, Hofmeyr, Jansenville, Middelburg, Pearston, Willowmore
- King William's Town King William's Town, Cathcart, Fort Beaufort, Keiskammahoek, Middledrift, Peddie, Stutterheim, Victoria East, Zwelitsha

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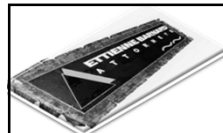


Eastern Cape Seats of the Civil Regional Courts

- Mthatha Umtata, Bizana, Butterworths, Elliot, Elliotdale, Engcobo, Flagstaff, Idatywa, Kentani, Lidobe, Lusikiski, Maclear, Matatiele, Mount Ayliff, Mount Fletcher, Mount Frere, Mqanduli, Nqamakwe, Ngqeleni, Port St Johns, Qumba, Tabankulu, Tsolo, Tsomo, Willowvale.
- Port Elizabeth Port Elizabeth, Kirkwood, Motherwell, Uitenhage

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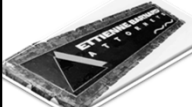


Eastern Cape Seats of the Civil Regional Courts

- Queenstown Queenstown, Albert, Aliwal North, Barkley East, Glen Grey, Lady Frere, Herschel, Hewu, Indwe, Lady Grey, Molteno, Mpofu, Ntabethemba, Sterkstroom, Steynsburg, St Marks, Tanka, Venterstad, Wodehouse, Xalanga
- Humansdorp Humansdorp, Hankey, Joubertina, Stetlerville

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Northern Cape Seats of the Civil Regional Courts

- De Aar De Aar, Britstown, Carnarvon, Colesberg, Hanover, Noupoot, Philipstown, Richmond, Victoria West
- Kimberly Kimberley, Barkley West, Harswater, Douglas, Hopetown, Jan Kempdorp, Warrenten
- Springbok Namaqualand, Calvinia, Fraserburg, Garies, Port Nolloth, Sutherland, Williston
- Upington Gordonia, Groblershoop, Hay, Kakamas, Kathu, Keimoes, Kenhardt, Kuruman, Olifantshoek, Pofadder, Postmasburg, Prieska

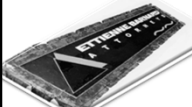
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Western Cape Seats of the Civil Regional Courts

- 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.)
- 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 NCA Debt Recovery

- 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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Divorces - Jurisdiction

- Jurisdiction of Regional Courts Amendment Act 31 of 2008 – came into operation on 9 August 2010
- Jurisdiction over either party who lived in jurisdiction of court for Divorces
Sec 28(1A)


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Divorces - Jurisdiction

- Regional Court has same jurisdiction as High Court with regard to Divorce matters
Sec 29(1B)(b)
- Transitional Provision – any proceedings instituted in Divorce Courts not concluded before commencement of regional courts – must proceed in Divorce Courts
Sec 9(1)

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Divorces - Summons

Out: All of Divorce Court Rules (since 15/10/10)

- Must be combined summons R 5(2)(b)
- Notice of defence now 10 days R 13(1)
- Summons must adhere to all requirements of Rules 5 and 6
- Claim for division, transfer or forfeiture must give details why entitled to in summons R 6(8)
- Must serve personally R 9(3)


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Divorces - undefended

- Can set down (request registrar in writing) if NOT:
 - Defended
 - Plead
 - Written notice that not defend R 22(5)
- No notice of setdown is necessary
- Practice note: 6 months after service, must give notice
- Defendant can not consent to judgement R 11 (1) or (4)
- Undefended divorce action postpone, may continue before another magistrate R22(6)


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Divorces Defended

- Follows the same path as any other defended matter
- Practice note: Require original marriage certificate, but certified copy will be accepted on good grounds

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Divorce Interim Relief

Out Rule 32 Divorce Court Rules
New Rule 58
High Court Rule 43

- The same as old Rule 32
- Form 42 – only difference is reference to R 55(1)(g)(i) – service address within 15 km for defendant - rule 58 silent on 15 km but HCR say 8 km
- Can apply again if material change in either party's circumstances R 58(6)

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Rule 58 – Flow Chart

a) Maintenance *pendente lite*
b) Contribution towards costs of a pending matrimonial action
c) Interim custody of any child
d) Interim access to child

↓

Rule 58(2)(a)
• Sworn statement setting out relief claimed
• Notice – Form 42

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R 58 – Flow Chart

Rule 58 (2)(b)
Served by the Sheriff


↓

Rule 58(3) Ten (10) court days

Respondent shall deliver sworn reply in the nature of a plea

If no sworn reply, then in default, and ipso facto barred

2011/05/17 161



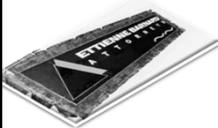
R 58 – Flow Chart

Rule 58 (4)
• Registrar shall bring the matter before court for summary hearing as soon as possible
• 10 days notice
• Unless respondent in default

↓

• The court may hear evidence as is considered necessary
• May dismiss application
• Make order as deems fit to ensure just and expeditious decision

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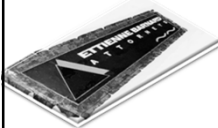
Form 42

No. 42 – Notice in terms of Rule 58(2)(a)
 IN THE REGIONAL COURT FOR THE REGIONAL DIVISION OF NORTHERN CAPE
 HELD AT UPINGTON CASE NO:123/11
 In the matter between
 MRS WANT A LOT Applicant
 and Respondent
 MR WILLIE GEENNIE

To the above-mentioned respondent:
 TAKE NOTICE that if you intend to defend this claim you must within 10 court days file a reply with the registrar of this court, giving an address for service referred to in Rule 55(1)(g)(i) and serve a copy thereof on the applicant or his or her legal practitioner. Should you not comply with the above, you will then be automatically barred from defending and judgment may be given against you as claimed. Your reply must indicate what allegations in the applicant's statement you admit or deny, and must concisely set out your defence.
 DATED at UPINGTON this 18 day of March 2011

GRAB A LOT ATTORNEYS
 Applicant/Applicant's legal practitioner
 Address for service:
 12 VOORTREKKER ROAD
 UPINGTON

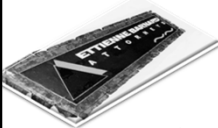
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Divorce - Costs

- Costs are scale C of Table A of Annexure 2
- Rule 58 costs:
 - Advocate max R 175-00 - undefended
 - Advocate max R 250-00 – defended
 - Attorney max – R 250-00 – undefended
 - Attorney max – R 375-00 – defended
 - Unless court directs otherwise

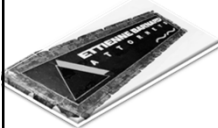
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Divorces

- Variation of care and contact orders
 - Old Divorce Court R 39
 - Rule 49 and Sec 36
 - Absence
 - Fraud or common mistake
 - Patent errors
 - Not one of these have common law right to vary as has same jurisdiction as High Court in Divorce matters
 Sec 29(1B)(b)

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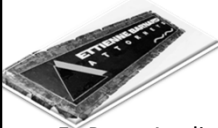


Edictal Citation/ Substituted Service

Out: Rule 10 (summons lapsed after 12 months)
 Cf HC Rule 5

- EC def/resp **outside** S A 10(1)(a)
- SS d/r **inside** S A **but** unknown **where** 10(1)(b)
- Documents not initiating proceedings 10(3)

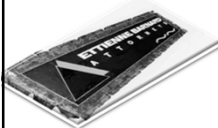
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EC/SS Procedure

- Ex Parte Application
- No respondent is cited
- Application for authority to institute proceedings or directions as to procedure or service of documents may be done ex parte where service is not appropriate or not necessary R55(4)(b)
- Application may be heard in chambers

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EC/SS Affidavit Content

Rule 10(2)(a)

- Nature and extent of claim
- Grounds of claim
- Grounds for jurisdiction in main claim
- Suggested manner of service
- Info on def/resp whereabouts if known
- If not known:
 - Last known whereabouts
 - Enquiries made to establish current whereabouts

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ES/SS COURT ORDER

R10(2)(b)

- Court may order as to manner of service as it deems fit
- Must also order the time within which notice of intention to defend is to be given
- Or any other step that is to be taken by the person to be served.


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ES/SS

- Where service by publication is ordered,
- it may be in a form similar to Form 4 of Annexure,
- approved and signed by the registrar or clerk of the court.

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Form 1- Short Notice (1)

No. 1 - Notice of Intention (Short Form)

IN THE REGIONAL COURT FOR THE REGIONAL DIVISION OF NORTHERN CAPE
 HELD AT SPRINGBOK CASE NO:
 101/2011
 In the matter of:
 MALULEKA POWEL Applicant

TAKE NOTICE that application will be made on behalf of the above-named applicant on the 18th day of November 2010

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Form 1- Short Notice (2)

at 9:00 or as soon thereafter as counsel may be heard for an order in the following terms:

(a) That leave be given to institute action against the Defendant by way of Edictal Citation claiming a decree of divorce

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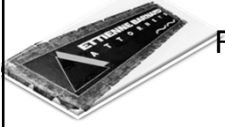


Form 1- Short Notice (3)

(b) That service of the Edictal Citation and/or necessary processes of this Honourable Court be affected by service upon the Defendant by notice (complying substantially with Form 4 of this court) in The Evening Standard Newspaper before 30 March 2011

(c) That the Defendant be given leave to defend the said action within one (1) month of date of this service.

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Form 1- Short Notice (4)

and that the affidavit of MALULEKA POWEL annexed hereto will be used in support thereof.

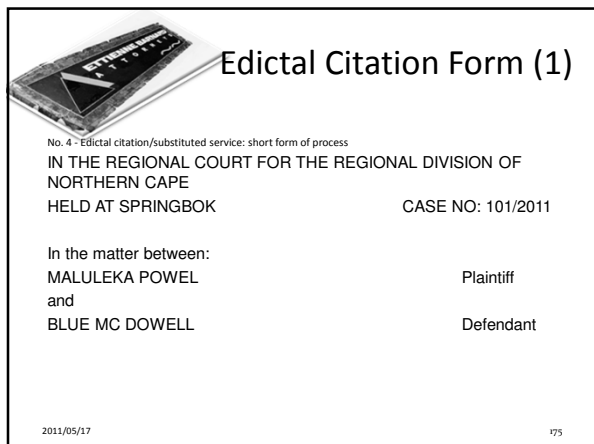
Kindly place the matter on the roll for hearing accordingly.

DATED at SOMERSET WEST on 15 November 2010

 Applicant/Applicant's Attorney

.....
 To the Registrar Court of the abovementioned

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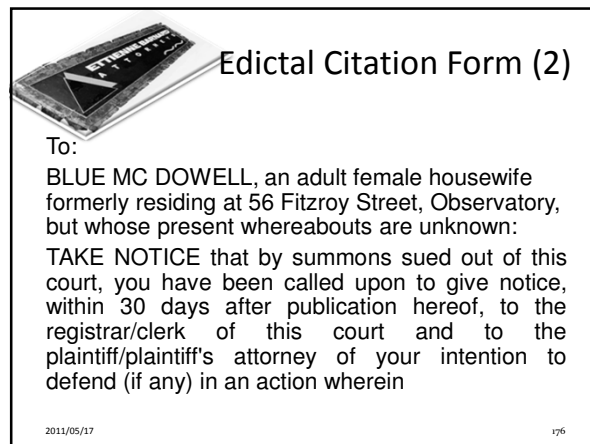


Edictal Citation Form (1)

No. 4 - Edictal citation/substituted service; short form of process
 IN THE REGIONAL COURT FOR THE REGIONAL DIVISION OF
 NORTHERN CAPE
 HELD AT SPRINGBOK CASE NO: 101/2011

In the matter between:
 MALULEKA POWEL Plaintiff
 and
 BLUE MC DOWELL Defendant

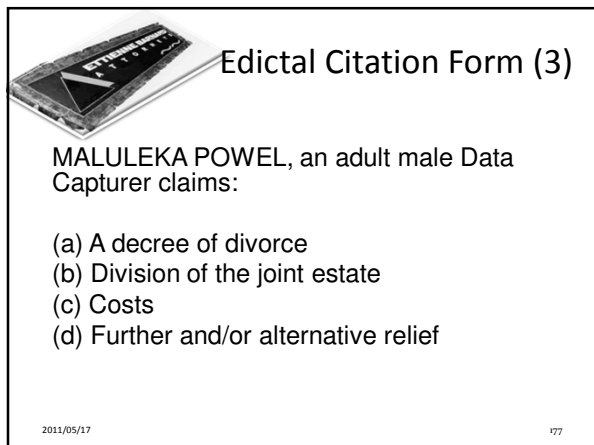
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Edictal Citation Form (2)

To:
 BLUE MC DOWELL, an adult female housewife
 formerly residing at 56 Fitzroy Street, Observatory,
 but whose present whereabouts are unknown:
 TAKE NOTICE that by summons sued out of this
 court, you have been called upon to give notice,
 within 30 days after publication hereof, to the
 registrar/clerk of this court and to the
 plaintiff/plaintiff's attorney of your intention to
 defend (if any) in an action wherein

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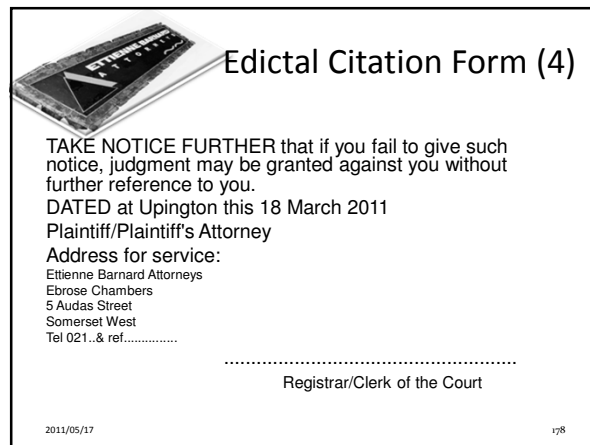


Edictal Citation Form (3)

MALULEKA POWEL, an adult male Data
 Capturer claims:

- (a) A decree of divorce
- (b) Division of the joint estate
- (c) Costs
- (d) Further and/or alternative relief

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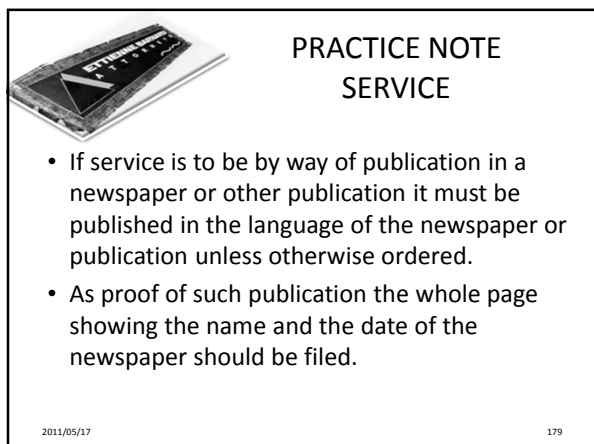


Edictal Citation Form (4)

TAKE NOTICE FURTHER that if you fail to give such
 notice, judgment may be granted against you without
 further reference to you.
 DATED at Upington this 18 March 2011
 Plaintiff/Plaintiff's Attorney
 Address for service:
 Etienne Barnard Attorneys
 Ebrose Chambers
 5 Audas Street
 Somerset West
 Tel 021.. & ref.....

.....
 Registrar/Clerk of the Court

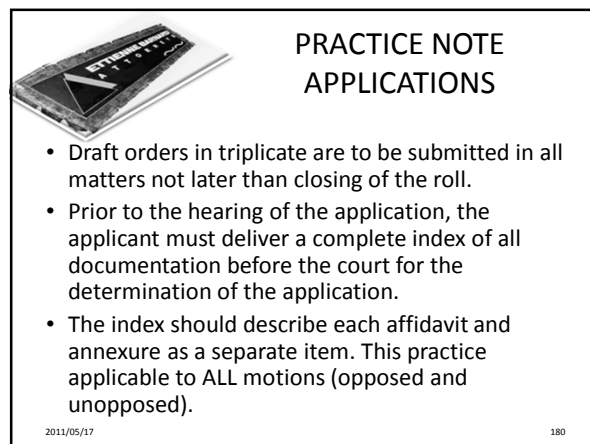
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**PRACTICE NOTE
 SERVICE**

- If service is to be by way of publication in a newspaper or other publication it must be published in the language of the newspaper or publication unless otherwise ordered.
- As proof of such publication the whole page showing the name and the date of the newspaper should be filed.

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**PRACTICE NOTE
 APPLICATIONS**

- Draft orders in triplicate are to be submitted in all matters not later than closing of the roll.
- Prior to the hearing of the application, the applicant must deliver a complete index of all documentation before the court for the determination of the application.
- The index should describe each affidavit and annexure as a separate item. This practice applicable to ALL motions (opposed and unopposed).

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PRACTICE NOTE APPLICATIONS

- Binding of Documents: Documents shall be bound in such a way that allows easy and unhindered turning of pages and each bundle shall not consist of more than 100 pages each.
- All handwritten documents are to be copied and typed versions prepared and inserted immediately thereafter in the record as far as practically possible. Exceptions may be considered for indigent litigants.

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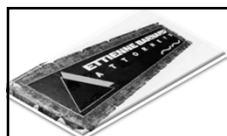


PRACTICE NOTE APPLICATION

- All the documents should be properly paginated. Applicant must ensure that all the documents including the Notice of motion, founding affidavit and annexures and any replying affidavit are properly paginated before service on the Respondent.
- The respondent must also ensure that the answering affidavit and annexures are properly paginated prior to serving on the applicant.

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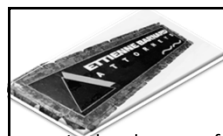


PRACTICE NOTE APPLICATIONS

- The legal representative for each party in a motion which appears on the opposed roll, is to file a practice note with the registrar, on closing of the roll
- The practice note shall set out -
 - the name of the parties, the case number and its number on the roll;
 - the names and telephone numbers of all legal representatives in the motion;
 - the nature of the motion;
 - an indication of the issues to be determined in the application;
 - the relief sought at the hearing by the party on whose behalf the legal representative is completing the practice note;
 - an estimate of the probable duration of the motion;
 - if the matter is urgent, and if so, motivate the urgency;
 - whether or not the papers need to be read and, if so, which portions thereof.

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PRACTICE NOTE APPLICATIONS

- In the absence of a practice note from the applicant, a motion appearing on the opposed roll will be removed from the roll, unless the presiding officer directs differently.
- A practice note must be filed as set out above on each occasion the motion appears on the opposed roll.
- Concise heads of argument are to be attached to the practice note at the time of filing thereof.
- In the event that the day on which the practice note and concise heads are to be filed falls on a public holiday, such documents shall be filed on the preceding court day.

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PRACTICE NOTE

- **Settlement Agreements And Draft Orders**
- Where the parties to a civil trial have entered into a settlement agreement, a presiding officer will make a settlement agreement an order of court only if –
 - The legal representatives of all the parties to the trial are present in court and confirm the signatures of their respective clients to the settlement agreement and that their clients want the settlement agreement made an order of court, or
 - Proof to the satisfaction of the presiding officer is provided as to the identity of the person who signed the settlement agreement and that the parties thereto want the settlement made an order of court.

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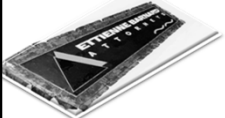


PRACTICE NOTE CIVIL TRIALS

- Civil trials
 - Only trials ready for hearing will be allocated;
 - Allocation register to be kept
 - RC President/representative will allocate
 - due regard to be given to justifiable claims for precedence
 - At time of allocation - joint expert minute required
 - After allocation – no joint minute – compliance with practice required will not proceed with trial.

2011/05/17

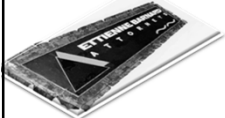
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PRACTICE NOTES CIVIL TRIALS

- Bundles of Documents
 - Collated, numbered and suitably bound
 - Indexed
 - Joint bundle by parties
 - If not, the parties must decide which party's bundle is dominant / subservient
 - Subservient bundles must not contain documents of dominant bundles
 - Documents not bound in volumes of more than 100 pages, unless in lever arch file
 - Bound in manner not necessary to be held open but stays open

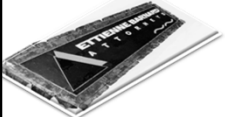
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PRACTICE NOTES CIVIL TRIALS

- Parties must agree prior to trial of evidential status of documents
 - This agreement must be contained in a pre-trial minute
 - Agreement must also state which document will be part of the record, should the matter proceed to appeal.
- Unnecessary documents – punitive cost order
- Expert witnesses
 - Where practically possible – joint minute (agreements and disagreements and signed minute by experts)
 - If not, may result in removal from roll

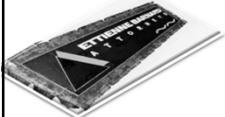
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PRACTICE NOTE CIVIL TRIALS

- Withdrawal of attorneys
 - at least 14 days prior to the trial
 - unless good cause shown if late, may be ordered to pay wasted costs de boniis propriis;
 - in writing what steps to advise client and that client is aware of consequences

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Service of documents

Old: Rule 9
New: Rule 9
Cf HC Rule 4

- Small changes through out rule
- Service by fax or email if not a process of court
R9(9)(a)

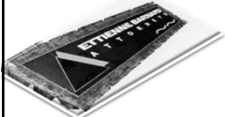
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Service

- Old Rule 9(6) – if not able to serve documents on
 - Residence or employment;
 - Domicilium citandi; or
 - Body Corporate.
- Then can affix process to outer or principle door or leave copy at domicilium
- No Rule 9(6) in new rules
- But


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Service

- R 9(3)(c) – can serve on somebody else at place of employment
- R9(3)(d) – can leave copy at domicilium
- R9(3)(e) – company - copy at main door
- So only problem is with service on person at residence
- If person keeps residence or place of business closed and prevents sheriff from serving process then may affix to door
R9(5)


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Service of documents

- Domicilium Citandi service R 9(3)(d)
- But proviso that court may, if there is reason to doubt whether process served has come to the actual knowledge of person served, treat such service as invalid.
- Court not satisfied as to effectiveness of service, might order such further steps as it deems fit R 9(20)
- R 9(14)-(18) deals with service of docs outside RSA
- R 9(21)-(25) deal with service in SA of foreign process


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Costs

- Still R 33
- Costs that have been reasonably incurred and in respect of which there is no specific provision for in the rules, the court may on request award but court must give direction as to how this must be taxed R33(8)(d)
- Costs in convention and reconvention – clerk of the court will award successful parties a proportionate amount of their costs in accordance with the award given by court R33(13)


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Costs

- When party makes a written offer for costs to be taxed and such offer refused, then party refusing offer shall not be allowed any costs of taxation if the bill is taxed in an amount smaller than the offer R33(17)

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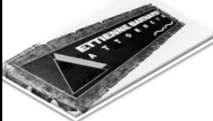


Costs

- Magistrate Court

– Undefended 15/10/10	28/1/11
• R0 - R 7 000	R0 - R 12 000
• R 7 001 - R 50 000	R 12 001 - R 50 000
• Over R 50 000	Over R 50 000
– Defended 15/10/10	28/1/11
• Scale A: R 0 – R 7 000	R 0 – R 12 000
• Scale B : R 7 001 – R 50 000	R 12 001 – R 50 000
• Scale C: over R 50 000	over R 50 000

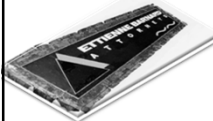
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Costs

- Regional Court
 - Scale C of Table A of Annexure 2
 - If amount lower than regional Court jurisdiction then costs must be the same as district court regardless if sued out of regional court

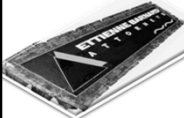
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Execution

- Rule 39 - Provisions are made for more than one sheriff in an area
- Rule 40 – the same
- Rule 41 – interpleader suspends period of 4 months for release of attachment, until final adjudication of the interpleader claim R41(7)(f)(iii)
- Goods exceed R 5000-00 must advertise – R 41(8)(c)
- Form 32 – warrant of execution still the same
- Rule 42 – the same

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Interpleader claims – R 44

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

↓ 15 days of claim

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

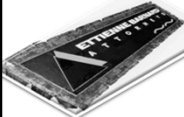
↓ Within 10 days

Execution creditor must inform sheriff if accepts claim

↙ ↘ Within 10 days

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

2011/05/17 200



Interpleader

- Form 36 still the same
- Sheriff shall inform other sheriff's in the area of date
- Rest of provisions are the same as the old rule

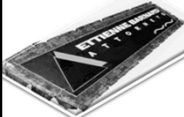
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Execution - immovable

- JAPHTA v SCHOEMAN & OTHERS 2005 (2) SA 140 (CC)
- Standard Bank v Saunderson 2006 (2) SA 264 (SCA)
- Elsie Gundwana v Steko Development CC and others [2011] SACC 14
- 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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Execution - immovable

- Rule 5(10) – a summons where plaintiff applies to declare executable immovable property which is the home of the defendant must contain the following notice
 - “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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Execution - immovable

- Rule 43 – still the same rule
- R43(6)(c) – newspaper registered with the Audit Bureau of Circulations of South Africa
- R 43(11) – sale be held at place deemed fit by the sheriff – old rule – in front of court house


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Section 65 enquiries

- Rule 45 minor changes with reference to Credit Act
- Form 40 – still the same
- Form 40A – warrant of arrest – still the same
- Form 40B – Notice to appear ito Sec 65A(8)(b) still the same

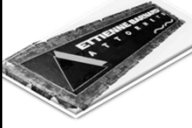
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Emolument Attachment

- R 46 – still the same
- Form 38 – changed
- **IMPORTANT NOTICE:**
- Service must be by sheriff. If not it is a criminal offence
- After deduction, if debtor does not have means to support himself or his dependants than court may amend the order

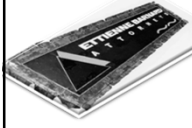
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Garnishee order

- R 47 – small changes re Credit Act
- Form 39 – still the same


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Administration

- R48 – the same
- R 600-00 to be kept for costs R48(4)
- Form 44 – the same
- Form 45 – the same

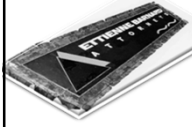
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Definitions

- Deliver – where ordered by court or agreed to between parties by fax or email (chapter III part 2 of Electronic Communications and Transactions Act, 2002 will apply)
- Transitional Provision R 69(b)
 - Forms can still be used for a period of 12 months after 15 October 2010 with necessary changes as is required

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•THANK YOU!

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