


MAGISTRATES' COURT PRACTICE

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Slide numbering lost in reducing size

- Slides read top row from left to right
- Then middle row from left to right
- Then bottom row from left to right
- If any slides seem incomplete, please contact us at ebattorneys@barnards.co.za

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MAGISTRATES' COURT PRACTICE³

- INTRODUCTION
- PARTIES
- APPLICATIONS
- APPEALS
- EXECUTION
- PRE-LITIGATION
- ACTIONS
- INTERPLEADERS

- EXCEPTIONS
- OTHER
- PROCESS &
- ASPECTS
- NCA Debt Relief

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ETHICS: Dual Relationship

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

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ETHICS: Dual Relationship

- IN BOTH RELATIONSHIPS
 - BE HONEST
 - OBJECTIVE
 - PROFESSIONAL



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PROFESSIONAL CONDUCT is to (be)

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

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EFFECTIVE CONSULTING

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

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7

CONSULTATION & ADMIN (AS A PROFESSIONAL)

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

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CONSULTATION & ADMIN (AS A PROFESSIONAL)

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

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CONSULTATION & ADMIN (AS A PROFESSIONAL)

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

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CONSULTATION & ADMIN (AS A PROFESSIONAL)

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

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PAPER MANAGEMENT

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

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CITATION OF PARTIES

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

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CITATION OF PARTIES

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

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CITATION OF PARTIES

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

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CITATION OF PARTIES

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

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CITATION OF PARTIES

- MINORS 4 Scenarios:
 - 1 GUARDIAN (IN REPRESENTATIVE CAPACITY)
 - 2 MINOR (DULY ASSISTED BY GUARDIAN)
 - 3 CURATOR AD LITEM APPOINTED
 - SECTION 33 APPLICATION
 - Only if guardian is incapable of managing minor's estate
 - Ex Parte Opper & anor 2002(5)SA125(C)
 - 4 WITH COURTS CONSENT
 - Ex Parte Goldman 1960 (1)SA 89 D

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CITATION OF PARTIES

- MENTAL DISABILITY or
- PRODIGALS
 - For both also Apply ito s33
- NB Independent person in interests of the minor etc.
 - Martin NOvRAF2000(2)SA1023(W)
 - Attorney appointed must not also handle the legal proceedings

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CITATION OF PARTIES

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

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CITATION OF PARTIES

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

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CITATION OF PARTIES

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

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CITATION OF PARTIES

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

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CITATION OF PARTIES

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

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CITATIONS OF GOVERNMENT + STATE OFFICIALS

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

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CITATION OF PARTIES

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

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CORPORATE REPRESENTATION IN COURT

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

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High Court

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

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APPLICATIONS

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DRAFTING PLEADINGS

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

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MANDAMENT VAN SPOLIE

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

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GENERAL: 4 Forms of Notice

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

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Applications Rules 55/56

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

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Urgency Case Law (HC examples)

- Relaxation must correspond with urgency
 - Founding affidavit must
 - justify the extent of the departure,
 - show good cause why the time shorter
 - why hearing in due course will not suffice
- Luna Meubelvervaardigers v Makin anor* 1977 (4) SA 135 (W) at 137F

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Urgency Case Law (HC examples)

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

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MANDAMENT: NOTICE OF MOTION(1)

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

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MANDAMENT: NOTICE OF MOTION(2)

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

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MANDAMENT: NOTICE OF MOTION(3)

- RESPONDENT NOTIFIED TO DELIVER
 - Notice of Opp. in 5 days
 - Answering Affidavit in 10 days
- RESP NOT. TO GIVE SERVICE ADDRESS
 - (in 15 km)
- DATE IF NO INTENT. TO OPPOSE FILED
- ENDING
 - Date, Sign, Parties & Clerk/Registrar Addr.

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MANDAMENT: AFFIDAVIT (1)

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

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MANDAMENT: AFFIDAVIT (2)

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

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MANDAMENT: AFFIDAVIT (3)

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

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MANDAMENT: AFFIDAVIT (4)

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

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MANDAMENT (5): DRAFT COURT ORDER(LONG)

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

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MANDAMENT (5): DRAFT COURT ORDER(SHORT)

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

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MvS Procedure (6):

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

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Procedure Steps: Application on Notice

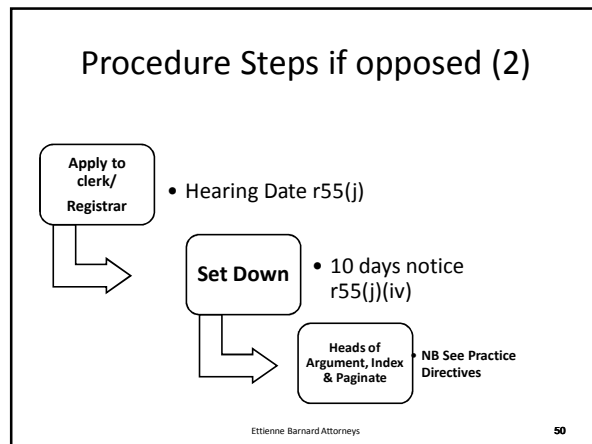
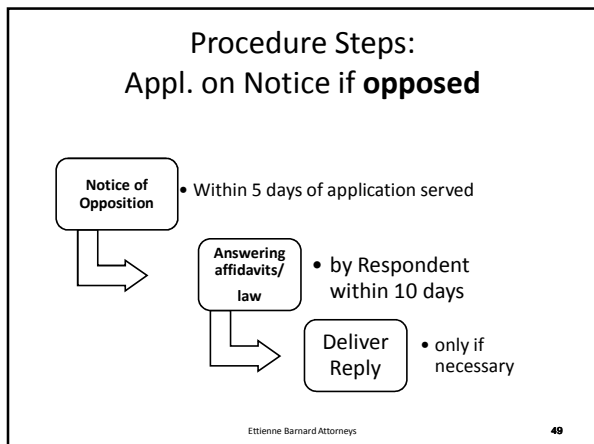
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Procedure Steps if unopposed

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Procedure Steps: Application on Notice

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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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- ### Application on Notice: Time Period Checklist
- | | | |
|--------------------|----------------------------------|------------------------|
| • Founding docs | • When Complete | • Rule 55 (1) |
| • Notice of Opp. | • Within 5 Days | • 55(1)(e)(iii)+(g)(i) |
| • No Opposition | • 10 Days after Fdoc | • 55(1)(e)(iii) |
| • Set-Down | • 5 Days notice to R | • 55(1)(f) |
| • Answ. Affidavit | • Within 10 Days | • 55(1)(g)(ii) |
| • Reply. Affidavit | • Within 10 Days | • 55(1)(h) |
| • Set-Down | • No answ aff -w5d | • 55(1)(j)(i) |
| | • Answ aff-w5d from reply/expiry | • 55(1)(j)(ii) |
| | • Resp if Appl did not | • 55(1)(j)(iii) |
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- ### SPOILIATION (7) DEFENCES:
- FACTS-DID NOT TAKE THE ITEMS
 - TOOK BUT HAD CONSENT
 - NOT IN POSSESSION
(eg. Employee not in possession)
 - ACTED IN CONTRA SPOILIATON
 - PROCEDURAL DEFENCES (eg. Jurisdiction; Non joinder)
 - NO CAUSE OF ACTION disclosed
 - COURTS DISCRETION
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- ### MANDAMENT (8): WHAT CAN RESPONDENT DO?
- ANTICIPATION
 - R55(3)(d)-no less than **24hrs** notice (r56(5)-**12** hrs notice but only re arrest suspectus de fuga)
 - OPPOSING AFFIDAVIT
 - NB GOOD FAITH
 - DON'T LEAVE ALLEGATIONS OPEN
 - COSTS?
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OPPOSING AN APPLICATION: THE OPPOSING AFFIDAVIT(9)

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

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55

OPPOSING AN APPLICATION: THE OPPOSING AFFIDAVIT(9)

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

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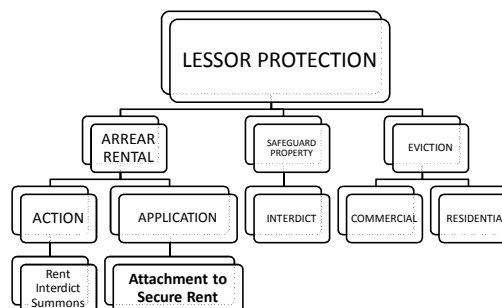
56

MANDAMENT

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

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57



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58

ATTACHMENT TO SECURE PAYMENT OF RENTAL

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

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AFFIDAVIT TO ATTACH IN SECURITY:RENTAL ARREARS1

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

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60

AFFIDAVIT TO ATTACH IN SECURITY:RENTAL ARREARS2

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

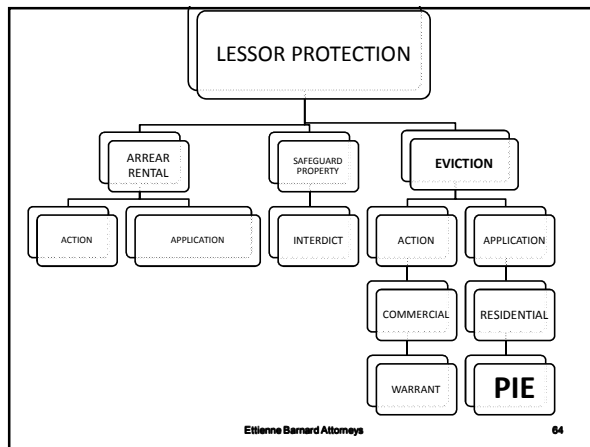
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AFFIDAVIT TO ATTACH IN SECURITY:RENTAL ARREARS3

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

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RESIDENTIAL EVICTION: PIE

- Relationship between 2 Acts (MCA & PIE)
- Out:** Old form of application(Where applicant chose the court date)
- Theart and Another v Minnaar NO, Senekal v Winkor 174 (Pty) Ltd** 2010 (3) SA 327 (SCA);
- Cf HC Rule 6
- Cape Killarney Property Investments (Pty) Ltd v Mahamba** 2001(4)SA1222 (SCA)

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Cape 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 Killarney (2)

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

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Cape Killarney Impact toned down:

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

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

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68

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.

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70

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 purpose, cannot be considered in... abstract"
Facts (what respondent knew) relevant.

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71

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.

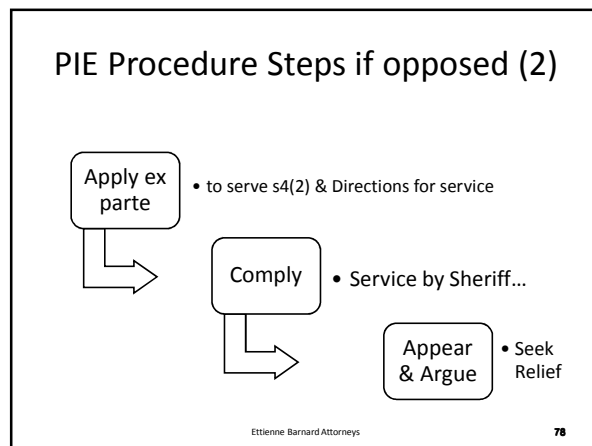
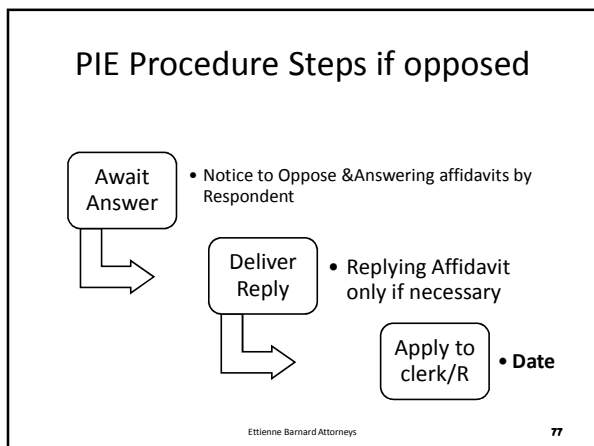
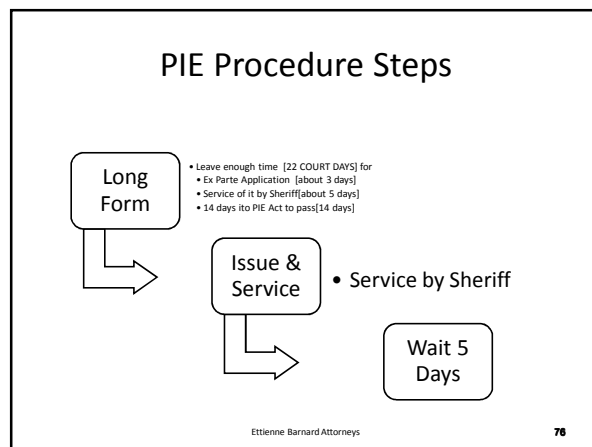
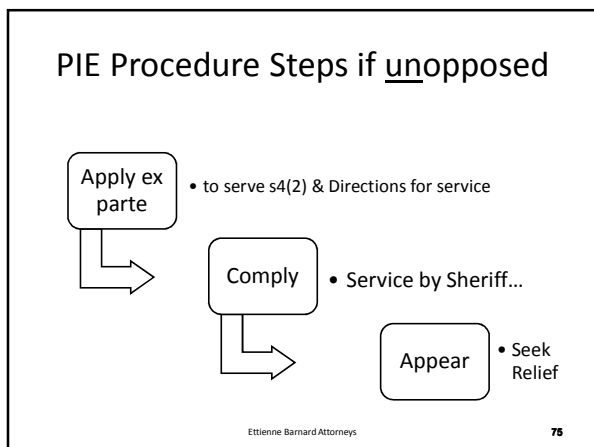
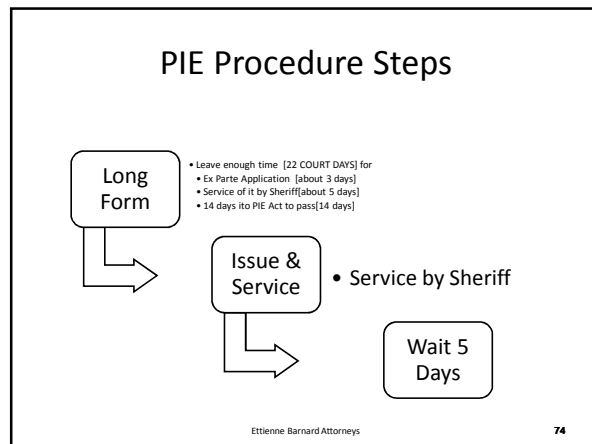
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72

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 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 Ettienne 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 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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Cape Killarney says:

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

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85

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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86

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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87

PIE Ex Parte Notice (3)

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

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88

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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89

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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90

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 Etienne Barnard Attorneys
 Ebrose Chambers, 5 Audas Street, Audas Estate, Somerset West, Tel: 021
 – 852 7780; Fax: 021 – 852 4194; Ref: EB/kb/X21

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

And to: STICKY TENANT
 (full physical address)

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

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PIE NB AFFIDAVIT CONTENT

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

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RESCISSION & VARIATION of JUDGMENTS

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

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RESCISSION & VARIATION of JUDGMENTS

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

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RESCISSION & VARIATION of JUDGMENTS

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

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**RESCISSION & VARIATION
SCENARIO 1**

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

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**RESCISSION & VARIATION
SCENARIO 2**

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

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**RESCISSION & VARIATION
SCENARIO 3**

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

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**RESCISSION & VARIATION
SCENARIO 3**

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

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APPEALS (CIVIL MATTERS) TIMELINE CHECKLIST (1)

- NB 2 ACTS AND SETS OF RULES APPLY +
- WC Consolidated Practice Notes
- REQUEST WRITTEN JUDGMENT
WITHIN 10 DAYS AFTER JUDGMENT
- MAGISTRATE gives WRITTEN JUDGMENT
WITHIN 15 DAYS AFTER REQUEST

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APPEALS (CIVIL MATTERS) TIMELINE CHECKLIST (2)

- NOTICE OF APPEAL
 - WITHIN 20 DAYS AFTER JUDGMENT OR
 - 20 DAYS AFTER WRITTEN JUDGMENT
MC RULE 51(3)&(7)
- APPELLANT GIVES SECURITY
 - with Notice of Appeal
MC RULE 51(4)

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NOTICE OF APPEAL

- IS ONLY COMPLETE WHEN ALL RULE 51 REQUIREMENTS ARE MET:
 - 51(3) APPEAL IS NOTED
 - 51(4) DELIVERY OF NOTICE
 - 51(7) MUST STATE
 - WHOLE OR ONLY PART OF JUDGEMENT
 - GROUNDS OF **FACT** AND **LAW**

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105

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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106

APPEALS (CIVIL MATTERS) TIMELINE CHECKLIST (3)

- NOTICE OF CROSS APPEAL
IN 10 DAYS OF DELIVERY OF NOTICE OF APPEAL
MC RULE 51(6)
- MAGISTRATE SUPPLIES REASONS FOR JUDGMENT
IN 15 DAYS AFTER NOTICE OF APPEAL
MC RULE 51(8)

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107

APPEALS (CIVIL MATTERS) TIMELINE CHECKLIST (4)

- APPLY FOR A HEARING DATE
TO THE REGISTRAR OF THE HIGH COURT
WITHIN 40 DAYS AFTER NOTING APPEAL
HC RULE 50(4)(a)
- IF APPELLANT DOES NOT APPLY RESPONDENT APPLIES
IN FOLLOWING 20 DAYS
HC RULE 50(4)(b)

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108

APPEALS (CIVIL MATTERS) TIMELINE CHECKLIST (5)

- POWER OF ATTORNEY TO PROSECUTE APPEAL & APPOINT ATTORNEY/ADV.
 - DONE WITH APPLICATION FOR DATE
HC r50(7)(2)&(3)
- LODGE RECORD WITH REGISTRAR
 - [HC RULE 50(7)(a)]
 - DONE WITH APPLICATION FOR DATE

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109

APPEALS (CIVIL MATTERS) TIMELINE CHECKLIST (6)

- NB APPEAL LAPSES IF NOT PROPERLY PROSECUTED WITHIN 60 DAYS OF NOTING IT
HC RULE 50(1)
- CROSS APPEAL LAPSES 20 DAYS LATER
HC RULE 50(3)

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APPEALS (CIVIL MATTERS) TIMELINE CHECKLIST (7)

- REGISTRAR SUPPLIES HEARING DATE
 - [HC RULE 50(5)]
 - At least 40 days after receipt of applicat.
- 2 COPIES OF RECORD TO RESPOND.
- APPELANT DELIVERS HEADS OF ARGUMENT
 - HC RULE 50(9)+ WCons. Practice Note 46
 - Not less than 15days before before hearing

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111

APPEALS (CIVIL MATTERS) TIMELINE CHECKLIST (8)

- Heads must comply with WC Consolidated Practice Note 49(2) & Uniform r50(9)
 - CONCISE & SUCCINCT STATEMENT OF MAIN POINTS (WITHOUT ELABORATION)
 - succinct=clear, precise & short
 - CONTAIN A LIST OF AUTHORITY REFERRED TO r50(9)
 - USUALLY LISTED ALPHABETICALLY
 - Original + 3 additional copies r50(9)

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APPEALS (CIVIL MATTERS) TIMELINE CHECKLIST (9)

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

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113

APPEALS (CIVIL MATTERS) TIMELINE CHECKLIST (10)

- RESPONDENT DELIVER HEADS OF ARGUMENT
 - [HC RULE 50(9)]
 - Not less than 10days before before hearing
- FINAL PREPARATION
 - ARGUMENTS FOR AND AGAINST
 - CHECK COURT FILE

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APPEALS (CIVIL MATTERS) TIMELINE CHECKLIST (11)

- APPEAR AT HEARING
 - ARRANGE WITH OPPONENT FOR INTRODUCTION TO PRESIDING JUDGES (SENIOR INTRODUCES) BEFORE HEARING
- IF YOU INTEND USING COUNSEL OR ATTORNEY TO APPEAR,
 - BRIEF HIM OR HER WELL IN ADVANCE
 - WITH A COPY OF THE COMPLETE RECORD (FINALLY NUMBERED AND PAGINATED)

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116

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117

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118

REVIEW PROCEEDINGS

- As an inferior court, Magistrates' Court proceedings may be reviewed by the High Court with area jurisdiction
- Supreme Court Act 59 of 1959 applies:
 - sections 19(1)(ii) confirms HC review jurisdiction
 - section 24 sets out the grounds
 - Uniform Rule 53 sets out the procedure

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119

GROUND FOR REVIEW section 24(1)

- a Inferior court had **no jurisdiction**;
- b Magistrate had **bias, malice, interest in the cause** or was **corrupt**
- c **Gross irregularity** in the proceedings
- d **Admitted** inadmissible/incompetent **evidence**
or
- e **Rejected** admissible/competent **evidence**

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120

REVIEW PROCEDURE

Uniform Rule of Court 53(1)

- By Application on notice of motion to the Magistrate calling him/her
 - to show cause why such decision or proceeding should not be reviewed and corrected or set aside
 - to dispatch to the registrar within 15 days
 - the record of the applicable proceedings
 - his reasons
 - to notify the applicants that he has done so

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121

REVIEW PROCEDURE

Uniform Rule of Court 53(2)

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

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122

REVIEW PROCEDURE

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

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123

REVIEW PROCEDURE

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

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124

REVIEW PROCEDURE

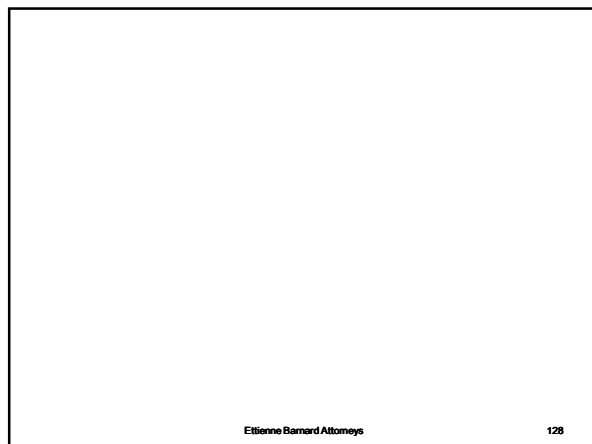
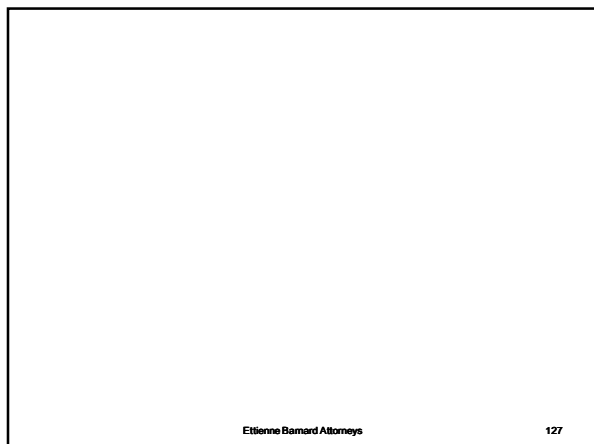
- Remember to
 - prepare, paginate, index and number record
 - prepare for hearing
 - brief practitioner who will appear
 - tidy court file
 - attend hearing

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125

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126



EXECUTION: TYPES OF WARRANTS

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

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129

WHICH MOVABLES MAY BE ATTACHED

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

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WHICH MOVABLES MAY BE ATTACHED

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

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WHICH MOVABLES MAY BE ATTACHED

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

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132

WHICH MOVABLES MAY BE ATTACHED

- NOT DEBTS DUE TO THE DEBTOR
 - Garnishee Order
 - SEC 72 (EX PARTE)
 - The Act allows so should not be affected by New Rule 55
 - SEC 65 E(1)(b)

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MAGISTRATES' COURT PRACTICE

Slides compiled by



www.barnards.co.za

<http://newmcrules.blogspot.com>

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EXECUTION: TYPES OF WARRANTS

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

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135

PROCEDURE RE MOVABLE PROPERTY(1)

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

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136

PROCEDURE RE MOVABLE PROPERTY(2)

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

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137

PROCEDURE RE MOVABLE PROPERTY(3)

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

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138

PROCEDURE RE MOVABLE PROPERTY(4)

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

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139

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140

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

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

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THE CONSTITUTION & (sec66(1)(a))

- JAPHTA v SCHOEMAN & ANORS CCT 74/03
- **The failure in s66(1)(a) to provide judicial oversight** over imm prop execution sales was declared **unconstitutional & invalid**.
- S66(1)(a) to be read as though the words "a court, after consideration of all relevant circumstances, may order execution" appear before the words "against the immovable property of the party"

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THE CONSTITUTION & (sec66(1)(a))

- Rule 55 Application setting out all the relevant circumstances must be brought before execution against imm prop may proceed.
- What about where summons asks for property to be declared immediately executable?
- Magistrates' meeting majority opinion

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143

Developments since Jaftha(1)

- Standard Bank of SA Ltd v Saunderson & others 2006(2) SA 264 (SCA)
- Claims for arrear bond payments
- SCA found clerk/registrar may grant the warrant of execution for immovable goods without an application to court

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Developments since Jaftha(2)

- Must comply with the following
 - Prayer declaring the mortgaged properties executable in summons
 - Must inform defendants that the order to execute might infringe their right of access to adequate housing in summons

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Developments since Jaftha(3)

Suggested Paragraph

- 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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146

Developments since Jaftha(4)

- Reshat Schloss v Gordhan Taramathi & others (unreported judgment on 10/10/2005 under case number 2657/2005 by Cape High Court)
 - Jaftha applies retrospectively
 - If writ was invalid then sale of execution was void

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Developments since Jaftha(5)

- Menqa & another v Markom 2008(2) SOUTH AFRICA 120 SCA Confirms Reshat Schloss case
 - Property sold in May 2005 after default judgment was obtained.
 - Property was transferred to purchaser in November 2005

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Developments since Jaftha(6)

- Property then sold again
- Interdict to stop transfer of property to second buyer granted by Court
- Principal was confirmed on Appeal to SCA on 30 November 2007
- Warrant was declared invalid and therefore transfers are void
- However buyers must be compensated for unjust enrichment
- Rei vindicatio proceedings must be instituted

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149

Execution on Mortgage Bond Refused

- South Gauteng High Court
- Firststrand Bank Limited v Motingoe and
 - Case 638/2009
- Peoples Mortgage Ltd v Mofokeng & Zulu
 - Case 8830/2009
- Firststrand Bank Limited v Mudlaudzi
 - Case 8941/2009

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150

Execution - immovable

- Standard Bank v Saunderson 2006 (2) SA 264 (SCA)
- 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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ATTACHMENT PROCEDURE IMMOVABLES(1)

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

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152

ATTACHMENT PROCEDURE IMMOVABLES(2)

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

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153

ATTACHMENT PROCEDURE IMMOVABLES(3)

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

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154

ARRANGING SALE- IMMOVABLES(1)

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

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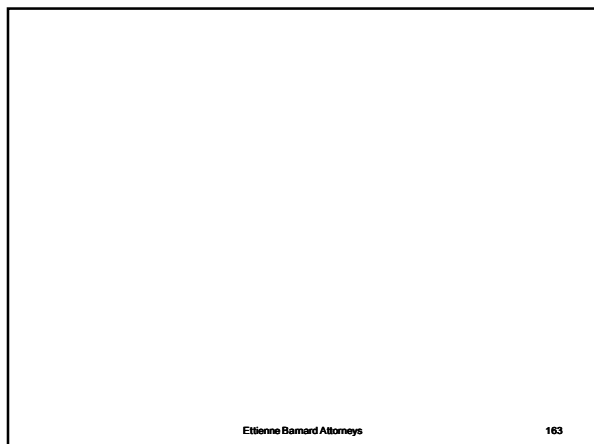
155

ARRANGING SALE- IMMOVABLES(2)

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

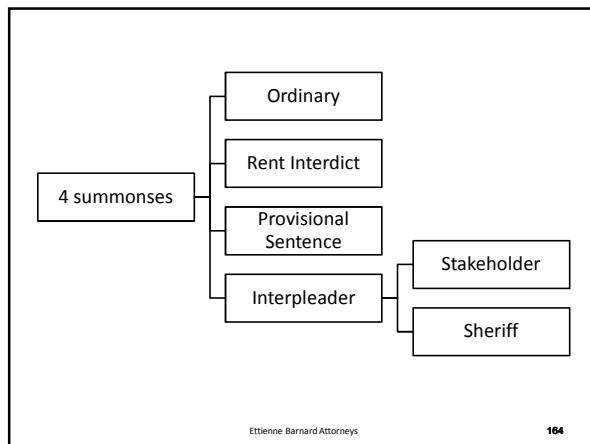
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156



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163



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164

INTERPLEADER CLAIMS

- Section 69 and Rule 44
- This is a procedure used by persons with **contradictory claims**
- Two situations are possible
 - **STAKEHOLDER**
 - **SHERIFF**

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165

INTERPLEADER CLAIMS 1 STAKEHOLDER

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

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166

INTERPLEADER CLAIMS 1 STAKEHOLDER

- Applicant must
 - by affidavit state that
 - CLAIMS NO INTEREST EXCEPT FOR COSTS
 - NOT COLLUDING WITH THE CLAIMANT
 - IN CASE OF PROPERTY OTHER THAN MONEY, APPLICANT WILL DEAL WITH IT AS THE COURT DIRECTS
 - in case of money, PAY IT INTO COURT

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167

INTERPLEADER CLAIMS 1 STAKEHOLDER

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

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INTERPLEADER CLAIMS 2 SHERIFF

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

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Interpleader claims – R 44

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

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ACTION PROCEEDINGS

DEMAND

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7 PHASES OF ACTIONS

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

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PRE-SUMMONS STEPS

DEMAND

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175

DEMAND

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

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176

DEMAND: CONTENTS

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

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177

To be used for s57 &58 Demand must state

- The nature of the claim &
- The amount of the claim [s4(1)(a)]
- In NCA matters
 - Each of the requirements of
 - s129 &
 - S130
 - That each of the requirements have been met [s4(1)(b)]

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178

DEMAND: PRACTICAL

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

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179

DEMAND

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

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DEMAND IS ESSENTIAL IN CERTAIN CASES

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

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1 TO PLACE A DEBTOR IN MORA

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

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2 SO THAT INTEREST CAN BE CLAIMED FROM EARLIER DATE

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

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3 WHEN CREDITOR INTENDS TO CANCEL

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

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3 WHEN CREDITOR INTENDS TO CANCEL

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

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4 TO COMPLETE A CAUSE OF ACTION

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

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DELICTUAL CLAIMS AGAINST GOVERNMENT AUTHORITIES

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

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DELICTUAL CLAIMS AGAINST GOVERNMENT AUTHORITIES

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

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DELICTUAL CLAIMS AGAINST GOVERNMENT AUTHORITIES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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ACTION PROCEEDINGS

Jurisdiction

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JURISDICTION

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

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JURISDICTION

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

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JURISDICTION IN RESPECT OF PERSONS (S28)

a ANY PERSON WHO

- RESIDES
- CARRIES ON BUSINESS
- IS EMPLOYED

WITHIN THE DISTRICT OR REGIONAL DIVISION

b ANY PARTNERSHIP WITH

- BUSINESS PREMISES IN THE DISTRICT OR
- MEMBER RESIDING WITHIN DISTRICT OR REGIONAL DIVISION

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JURISDICTION IN RESPECT OF PERSONS (S28)

c ANY PERSON IN PROCEEDINGS INCIDENTAL TO ANY OTHER PROCEEDING INSTITUTED IN THAT COURT BY THAT PERSON

d ANY PERSON WHERE THE CAUSE OF ACTION AROSE WHOLLY WITHIN THAT DISTRICT OR REGIONAL DIVISION

NB APPLY NEW RULE 5(6)(a) AVER AND SET OUT FACTS TO SUPPORT AVERMENT

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JURISDICTION IN RESPECT OF PERSONS (S28)

e ANY PARTY TO INTERPLEADER, IF:

- EXEC. CREDITOR & EVERY CLAIMANT RESIDE, CARRY ON BUSINESS OR EMPLOYED WITHIN DISTRICT **OR REGIONAL DIVISION**
- or
- SUBJECT MATTER ATTACHED BY PROCESS OF THAT COURT
- SECT 69(2) THIRD PARTY WITHIN THE DISTRICT
- ALL PARTIES CONSENT TO JURISDICTION

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JURISDICTION IN RESPECT OF PERSONS (S28)

- (f) ANY DEFENDANT (IN CONVENTION OR RECONVENTION) WHO APPEARS & TAKES NO OBJECTION TO JURISD
- (g) ANY PERSON WHO OWNS IMMOVABLE PROPERTY WITHIN THE DISTRICT **OR REGIONAL DIVISION**
- IN ACTIONS IN RESPECT OF:
 - SUCH PROPERTY OR
 - MORTGAGE BONDS THEREON

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JURISDICTION IN RESPECT OF CAUSES OF ACTION (S29)

- DELIVERY/TRANSFER OF PROPERTY OF VALUE R100 000 OR LESS (REGIONAL 100 000-R300 000)
- EJECTMENT WHERE RIGHT OF OCCUPATION OF VALUE R100 000 OR LESS (REGIONAL 100 000-R300 000)
- ACTIONS FOR DETERMINATION OF RIGHT OF WAY
- ACTIONS RE LIQUID DOC, MORTGAGE

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JURISDICTION IN RESPECT OF CAUSES OF ACTION (S29)

- NATIONAL CREDIT ACT (DISTRICT UNLIMITED JURISDICTION) (REGIONAL 100 000-R300 000)
- MATRIMONIAL PROPERTY ACT (SECTION 16(1)) WHERE VALUE OF PROPERTY R100 000 OR LESS (REGIONAL SAME AS HIGH COURT [s29(1B)(b)])
- CC ACT ACTIONS & LIQUIDATION APPLICATION

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- NCA
- FIRSTRAND BANK LTD v MALEKE AND THREE SIMILAR CASES 2010 (1) SA 143 (GSJ)
- ABSA BANK LTD v MYBURGH 2009 (3) SA 340 (T)

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CITATIONS OF GOVERNMENT + STATE OFFICIALS

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

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DEMAND IS ESSENTIAL IN CERTAIN CASES

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

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7 PHASES OF ACTIONS

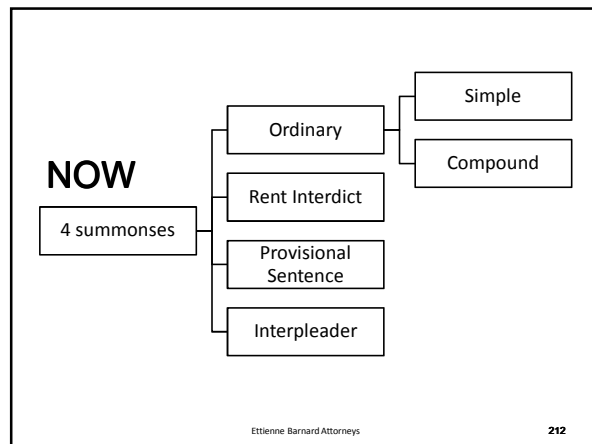
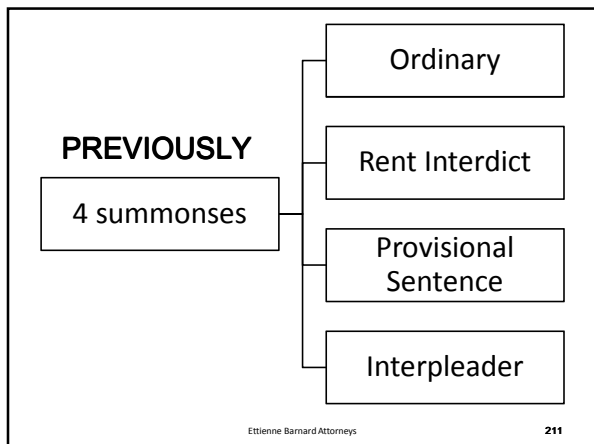
1. Before Summons
2. Summons
3. Exchange of Pleadings
4. Preparation for Trial
5. Trial
6. Execution
7. Appeals & Reviews (Remain unchanged)

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ACTION PROCEEDINGS

Summons

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ORDINARY SUMMONS
(Rule 5)

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

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"Liquidated demand"
r5(2)(a)

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

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"Liquidated demand"
r5(2)(a)

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

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CAUSE OF ACTION
IN A SIMPLE SUMMONS

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

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CAUSE OF ACTION IN A SIMPLE SUMMONS

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

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ACTION PROCEEDINGS

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

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3 PROVISIONAL SENTENCE SUMMONS

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

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3 PROVISIONAL SENTENCE SUMMONS (2)

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

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3 PROVISIONAL SENTENCE SUMMONS (3)

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

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3 PROVISIONAL SENTENCE SUMMONS (4)

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

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

- No later than 3 days before hearing(1)
- File Defendant's affidavit (1)
- Setting out his defence (1)
 - (If defendant can't pay & has good defence, remember **Twee Jonge Gezellen Case**)
- Attending Hearing (1)
- Argue Defendant's case (1)

- In practice some magistrates' require a notice of intention to defend.

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

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

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

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

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1The Ordinary Summons

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

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227

1The Ordinary Summons

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

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1The Ordinary Summons

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

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1The Ordinary Summons

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

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<p>Contract</p> <ul style="list-style-type: none"> • Written • Oral • When • Where • By • Copy • Whole • Or Part • Compliance with legislation governing contract 	<p>Matrimonial</p> <ul style="list-style-type: none"> • Grounds for • Division • Transfer • Forfeiture • iro MDCOP 	<p>Damages</p> <ul style="list-style-type: none"> • Quantum reasonably assessable • If PIC • Birthdate • Injury • Extent & • Nature • & disability • Nature • Effects • & Duration • Medical, Hospital & similar costs • Amount • Calculation • Pain & Suffering • Temporary or permanent • & which injury caused it • Disability iro • Earning of income • How amount lost to date is made up • Estimated future loss • Nature of work Plaintiff can in future do • Disability iro • Enjoyment of amenities of life • & whether permanent or temporary • Disfigurement full description • & whether permanent or temporary • Damages due to Death of another • Deceased birthdate • Dependant's birthdate
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1The Ordinary Summons

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

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1The Ordinary Summons

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NB: Non compliance with Rule 5 or 6

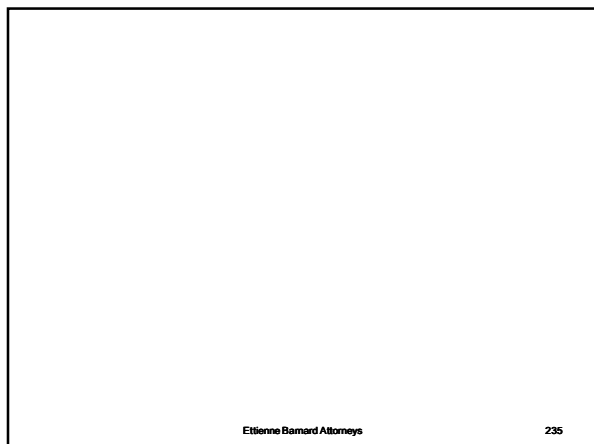
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Rule 5(11) & 6(13)

↓

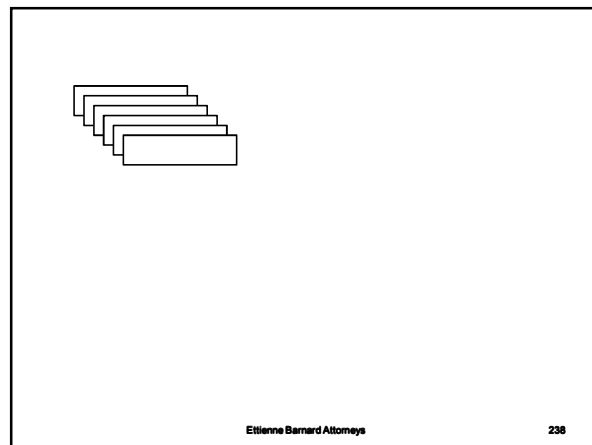
deemed to be an
IRREGULAR STEP
RULE 60A

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1The Ordinary Summons

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



DEFENDED ACTIONS

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

DEFENDED ACTIONS

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

DEFENDED ACTIONS

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

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DEFENDED ACTIONS

Rule 17

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

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DEFENDED ACTIONS

Rule 20

- SHOULD DEFENDANT WISH TO COUNTERCLAIM, THIS IS DONE BY CLAIM IN RECONVENTION DELIVERED TOGETHER WITH THE PLEA
- USUAL INTRO:
 - "DEFENDANT IS PLAINTIFF IN RECONVENTION
 - PLAINTIFF IS DEFENDANT IN RECONVENTION
 - THE PARTIES ARE REFERRED TO AS IN CONVENTION"

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DEFENDED ACTIONS

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

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DEFENDED ACTIONS

Compelling Compliance

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

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Rule 21A

PLEADINGS CLOSE IF


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

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PREPARATION AFTER CLOSE OF PLEADINGS


- NB DIARISE DATES
- USE PREPARATION CHECKLIST



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PREPARATION AFTER CLOSE OF PLEADINGS


- GET TRIAL DATE
- SET DOWN NOTICE (by Plaintiff or Defendant)
- DISCOVERY NOTICE after close of pleadings but at least 20 days before trial [r 23(1)]
- DISCOV. AFFIDAVIT within 20 days from request [r23(2)(a)]
- MEDICAL EXAMIN. examination request must be for a date after 15 days [r24(2)(a)]
- MED. EXAM OBJECTIONS within 10 days from request [r24(3)(a)]
- REQUEST MEDICAL REPORTS to be furnished within



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PREPARATION AFTER CLOSE OF PLEADINGS

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



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PREPARATION AFTER CLOSE OF PLEADINGS RULE 63

- PLAINTIFFS DUTY TO PREPARE THE COURT FILE:
 - ALL DOCS A4 ONE SIDE ONLY
 - If LARGER Than a4 => FOLD
 - If SMALLER Than a4 => PASTE ON A4
 - STATED CASES, AFFIDAVITS & GROUNDS OF APPEAL
 - IN Paragraphs
 - Consecutively Numbered
 - Collate, suitably secure & Index at least 10 days

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PREPARATION AFTER CLOSE OF PLEADINGS

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

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THE HEARING

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

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THE HEARING

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

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THE HEARING

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

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THE HEARING

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

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THE HEARING

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

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256

Cross Examination ("x")

1

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

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Cross Examination ("x")

2

- During X try to
 - Elicit evidence favourable to your client
 - Test or discredit reliability of Evidence in Chief
 - Destroy or Undermine credibility of
 - testifying witness or some other witness
 - Put your version for comment
 - Parade your case (to fix it in mind of the magistrate)

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258

THE HEARING

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

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THE HEARING

- ARGUMENT AFTER BOTH PARTIES HAVE CLOSED THEIR CASE
- REMEMBER COSTS

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DRAFTING FOR LITIGATION

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DRAFTING CHECKLIST 1

- PARTIES
 - PLAINTIFF/APPLICANT RULE 6 (name, sex, occup, address,...)
 - DEFENDANT/RESPONDENT
- JURISDICTION
 - PERSON
 - RESIDES/WORKS/REGISTERED
 - WHOLE CAUSE OF ACTION
 - AMOUNT
 - R100 000 (50 000 for Admin Orders)
 - AGREEMENT
 - ABANDON AMOUNT IN EXCESS

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DRAFTING CHECKLIST 2

- THE STORY (Evidence)
 - BACKGROUND
 - CAUSE OF ACTION (cf Amlers)
 - NB was demand necessary?
- LOCUS STANDI
 - WIDE SENSE (CAPACITY)
 - CORRECT PARTIES (LINK THEM)
 - ENOUGH PARTIES (eg Trust- ALL TRUSTEES JOINED)

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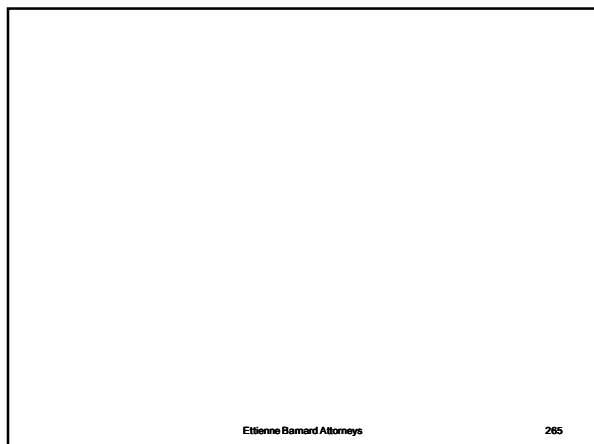
263

DRAFTING CHECKLIST 3

- LEGISLATION
 - GENERAL (Eg Prescription)
 - SPECIFIC (eg Estate Agents Fidelity Fund Certificate)
- RELIEF
 - SUBSTANTIAL
 - INTEREST
 - COSTS
 - IF ATT/CLIENT GIVE REASONS
 - CONDUCT; AND/OR
 - AGREEMENT

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264



NCA

- WHEN DOING DEMAND REMEMBER NCA s 129 & 130 (if the rental agreement is a credit agreement)
 - draw the default to the notice of the consumer in writing
 - and propose that the consumer refer the credit agreement to
 - a **debt counsellor**,
 - **alternative dispute resolution agent**,

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NCA

- consumer court or
- ombud with jurisdiction,
 - with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date; an
- The creditor, subject to section 130 (2), **may not commence any legal proceedings** to enforce the agreement **before** first providing the **notice** to the consumer

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MAGISTRATES' COURT PRACTICE

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