

DRAFT GUIDELINES FOR CLERKS OF THE SMALL CLAIMS COURT

Kindly submit comments/inputs to:

Adv Pieter A du Rand

Chief Director: Court Services

Department of Justice and Constitutional Development Street Address: West Tower, Room 8.03, Momentum City Walk, 329 Pretorius Street, Pretoria, RSA

Postal Address: P/Bag X 81, Pretoria, 0001, RSA

Tel: 012-315 1219 Fax: 012-315 1888

Email: pdurand@justice.gov.za

Closing date for comments: 1 November 2016

| Table of contents | Page |
|--|-------------|
| Historical background | 3 |
| Small Claims Court Terms and Definitions | 5 |
| Chapter 1: The form and nature of the Small Claims Court | 8 |
| Chapter 2: Jurisprudence | 14 |
| Chapter 3: Duties of the Clerk of the Court | 25 |
| Chapter 4: Instituting a claim | 31 |
| Chapter 5: Defending a claim | 38 |
| Chapter 6: Counterclaims | 40 |
| Chapter 7: Applications | 42 |
| Chapter 8: Preparation for Trial | 46 |
| Chapter 9: Judgments and orders | 47 |
| Chapter 10: Steps following judgment | 50 |
| Chapter 11: Review | 52 |
| Chapter 13: Miscellaneous | 54 |
| Code of Conduct | 55 |
| Case law synopsis | 59 |
| Sources of reference | 65 |

HISTORICAL BACKGROUND

The initiative to establish Small Claims Courts began in the early 1980s.

The Hoexter Commission of Inquiry was appointed to inquire into the structure and functioning of the courts in South Africa. The Commission reported in 1982 that South Africa was in desperate need of a specific court designed to settle small civil claims in an informal and inexpensive manner.

The Commission envisaged the procedure in the Small Claims Courts to be similar to that of an arbitration - conducted in an informal atmosphere by a presiding officer, to be known as a Commissioner, who assumes and maintains an active inquisitorial role in the proceedings. It was proposed that the Commissioner should be vested with powers to adopt any procedure which he/she considers to be convenient and to afford a fair and equal opportunity for each party to present his/her case in an atmosphere where the rules of evidence would be relaxed. As a result of the findings, the Small Claims Courts Act, 1984 (Act 61 of 1984) was passed.

In 2003, the Department of Justice and Constitutional Development, together with the Cape Law Society and the Swiss Agency for Development and Co-operation, convened a conference in Cape Town to which key stakeholders were invited to review Small Claims Courts.

Although there was general consensus amongst conference delegates for Small Claims Courts to be retained, delegates felt that these courts were not functioning at optimal level.

They identified a number of shortcomings which were accordingly considered. The National Action Plan adopted at the 2003 conference identified the following 'key result areas' for transformation:

- The amendment of the Small Claims Court Act 61 of 1984 to align it with Constitution of the Republic of South Africa, 1996, and any other legislation that has effect on the operation of the Small Claims Courts.
- Proper training for Commissioners and court officials.
- The development of a manual/guide for training of commissioners and

court officials.

Draft

- The development of an all-inclusive public education and communication strategy.
- The introduction of a Student Internship Programme in Small Claims Courts for students who would like to volunteer their services in these courts.
- The decentralisation of Small Claims Courts to rural and peri-urban areas.
- The appointment of a National Steering Committee to co-ordinate, manage and facilitate the re-engineering of the Courts.

It is against this background that Guidelines for Commissioners and Clerks of Small Claims Courts were developed.

SMALL CLAIMS COURT TERMS AND DEFINITIONS

Unless the context indicates otherwise, the following terms as used in this guide have the meanings reflected below:

Abandonment- Where a party abandons a portion of their claim or counterclaim to bring the claim within the jurisdiction of the Small Claims Court. Where the portion is abandoned, the amount cannot be claimed again.

Act – The Small Claims Courts Act, 1984 (Act 61 of 1984)

Advisory Board – A body, consisting of appointed members of the public and officials of the Department, established in terms of section 25(1)(d) of the Act to advise the Minister on the functioning of the Small Claims Court.

Affidavit – A written statement made under oath or upon affirmation before a commissioner of oaths.

Cause of action – A set of facts that, if proven by the party claiming, would entitle that party to be awarded a remedy by a court of law.

Claim – The amount of compensation that the plaintiff is seeking from the defendant.

Clerk – means a clerk of the court appointed under section 11 of the Act (and includes an assistant clerk of the court so appointed) to attend to the administration of the Small Claims Court;

Commissioner – A Presiding Officer in a Small Claims Court.

Computation of days - When any particular number of days is prescribed for the doing of any act, or for any other purpose, the same shall be reckoned exclusively of the first and inclusively of the last day, unless the last day happens to fall on a Sunday or on any public holiday, in which case the time shall be reckoned exclusively of the first day and exclusively also of every such Sunday or public holiday.

Contempt of court – When a person wilfully insults a commissioner during the session of his court, or a clerk or messenger or other officer present at that session, or wilfully interrupts the proceedings of a court or otherwise misbehaves himself in the place where the session of a court is held.

Counterclaim – A claim the defendant has against the plaintiff in reaction to the main claim.

Damages – Monetary loss suffered by either party.

Debtor – A person who owes another person or entity money.

Default judgment – A binding judgment made by the court in favour of either party based on some failure to take action by the other party.

Defendant – The person against whom a claim is made.

Ejectment/Eviction – The legal process of removing someone from immovable property.

Execution – The enforcement of a judgment.

Incidental jurisdiction- In terms of section 17 of the Act the following indirect matters do not influence the court's jurisdiction to hear actions:

- (a) If a claim is instituted for the balance of an account which falls within the court's jurisdiction (i.e. less than R15 000), the court will still have jurisdiction even though the account relates to items and transactions which in total, exceed the jurisdiction of the court (i.e. more than R15 000). The amount claimed must, however, be R15 000 or less.
- (b) Where the claim does not exceed the R15 000 jurisdiction limit the court is not deprived of its power to try the case merely because it is necessary for the court to, in order to reach a decision, give a finding over a matter which falls outside its jurisdiction.
- (c) In order to determine whether a claim falls within the jurisdiction of a court the claim for interest on the capital amount claimed will not be taken into consideration.

Judgment/Order – A binding decision made by a Commissioner.

Judgment creditor – A person in whose favour a judgment is granted.

Judgment debtor – A person against whom a judgment is granted.

Jurisdiction – The authority of the court to hear and decide claims.

Jurisdictional limit – The maximum amount that can be awarded by a Small Claims

Court in respect of a claim (currently R15 000).

Juristic Person – means a duly registered company or close cooperation.

Letter of Demand – a formal letter, delivered by hand or registered mail giving notice of intention to institute proceedings against the defendant should the claim not be met.

Parties – The plaintiff and the defendant involved in the lawsuit.

Plaintiff – The person who institute the claim.

Proof of service – A document filed with the court proving that a party has been properly presented with copies of the court papers, ie return of service by sheriff or an affidavit by a plaintiff.

Record – Means to take down information presented in court by the parties in writing, shorthand or electronically limited to the writing of appearances and the judgement/order of court by the commissioner.

Service – Presenting a document to another person in accordance with the rules of the court by the sheriff or a party.

Settlement – An agreement between the parties themselves with or without the involvement of a Commissioner which partially or fully brings the dispute to an end.

Sheriff (including the Deputy Sheriff) – A person appointed by the Minister tasked to deliver court documentation processes and to execute court orders.

Summons – A notice informing the defendant to appear in court to answer claims instituted against him/her.

Unliquidated claim – A claim where the amount in dispute is not fixed under an agreement and requires an assessment by the court.

Witness – A person who is called to court to testify on behalf of either party.

CHAPTER 1

1. THE FORM AND NATURE OF SMALL CLAIMS COURTS

- *Nature of the Court:* The Small Claims Court is a court where claims are resolved speedily, inexpensively and informally. Litigants conduct their own cases without legal representation.
- *The procedure is informal:* The process in the Small Claims Court is meant to be an easier and less expensive way to resolve disputes. The procedure and rules are simplified to enable the litigant to understand and conduct the proceedings with ease.
- *Small Claims Court not a court of record:* The proceedings in the Small Claims Court are not recorded. The Commissioner is only obliged to record the court order made (or cause it to be recorded), and to sign the order. The information will be recorded in the relevant register kept by the clerk of the court.
- *Who may institute a claim?* In terms of section 7 of the Act only a **natural person** may institute an action as **plaintiff** and both a natural or juristic person may become a party to an action as a defendant.
- *The nature of claims in the Small Claims Court:* A person can file a claim within the current jurisdictional limit which is determined from time to time by the Minister of Justice and Constitutional Development. Currently the limit is R15 000.

2. Role-players in the Small Claims Courts

2.1 Advisory Boards

The Rules provide that the Minister may establish an advisory board for a district or area. A member of an advisory Board holds office at the discretion of the Minister.¹

The advisory boards consist of members who are experts nominated from the local community and who are appointed by the Minister. The Minister also appoints the chairperson and vice-chairperson of the said board. If the chairperson and vice-chairperson are not available, a chairperson is to be appointed from the members present.²

In practice the Minister will act on the advice of the advisory board. The Minister may dissolve the board at any time.

Where an Advisory Board is inactive, the magistrate of the district or any interested party may approach the Department with regard to the revival of that Advisory Board.

Functions of the Advisory Board

- It is the task of the advisory board to launch the court at local level and to administer it. The advisory board may also advise the Minister regarding the various aspects contained in rule 2(3) of the Rules and is, *inter alia*, responsible for the following arrangements.
- It is the duty of the advisory board to determine at every centre the needs of the community, the availability of commissioners, court and administrative officials to identify members for the advisory board and make recommendations in this regard to the Minister and to regulate court sessions and recess thereof.
- The advisory board must identify a building for the holding of court, must investigate the accessibility and the suitability of the building and determine whether the facilities suffice in the needs of the court. If for

¹ Rule 2(1)

² Rule 2(1)(c)

example it appears that one court is insufficient to accommodate the number of cases, the possibility of instituting an additional court must be investigated.

- The chairman of the advisory board must, before the initial functioning of the court, obtain the names and particulars of the clerk(s) of the court as well as the legal assistant(s) and make arrangements with the magistrate of the district where the court is situated for the appointment of such officials in terms of section 11 of the Act.
- The advisory board must work closely with the clerk of the court. The clerk is the main pivot on which the functioning of the court depends. The clerk must, with the assistance of the advisory board, resolve any problems which arise.
- The advisory board is responsible for a training programme for commissioners and other court officials. It is also the duty of the advisory board to nominate competent persons as commissioners and to submit the nominations, in the case of an attorney to the president of the society of which the attorney is a member and, in the case of an advocate to the chairman of the council of the bar for the division of the High Court of South Africa where the advocate is practising, for approval where after the Minister must be advised in this regard.
- The advisory board must meet regularly and submit a copy of the minutes of the meetings to the Director-General for his information. The Director-General must be notified in writing of any resignation, death or change in respect of members of the board.
- The advisory board must identify suitable members for the advisory board and make recommendations in this regard to the Minister and to regulate court sessions and recesses.

2.2 Commissioners

Presiding Officers in the Small Claims Court are called Commissioners.³ The Minister or the Deputy Minister appoints a Commissioner for the Small Claims Court.⁴ A magistrate, if authorised thereto, may also appoint commissioners.

The qualifications for appointment as commissioner are set out in section 9(1) and (2) of the Act.

If a commissioner is unable due to his absence or incapacity to finalise a hearing, the case must be heard *de novo* before another commissioner. Commissioners should not preside over cases of persons who are personally known to them (friends, relatives, clients etc.) or cases where the possibility of prejudice on the part of the commissioner exists.

The clerk of the court must where it comes to his/her notice that a plaintiff or defendant is personally known to the commissioner ensure that the matter is placed on the roll of another commissioner.

Functions of the Commissioners

- Commissioners are authorised to make a finding regarding a dispute.
- They can grant judgment for the plaintiff, the defendant or order absolution from the instance, in so far as either party has proved his/her case or failed to do so.⁵

2.3 Clerk of the Court

The clerk of the court is the **co-ordinator** around which the courts function. The advisory board has an important role to play, but the clerk of the court has the most important task in the day to day functioning of the court. Co-operation between the advisory board and the clerk of the court is of the utmost importance.

³ Section 8.

⁴ Sections 9(1)(a) and (1A).

⁵ Section 34(a)-(b).

The duties of the clerk of the court are set out in rule 3 of the Rules.

Functions of the clerk of the court

- Advise the public in connection with any enquiries in regard to the procedures for instituting a claim, the jurisdiction of the court, rescissions, trial dates and other general enquiries (written enquiries or letters must be answered in writing);
- Refer persons to legal assistants for advice if necessary;
- Receive and process documents used in cases;
- Issue summons and documents of process;
- Fix trial dates;
- Arrange court rolls;
- Arrange the duty roster for commissioners with the co-operation of the advisory board, and inform the said commissioners regarding the arrangements;
- Inform the Director-General in writing if a commissioner resigns, moves out of the jurisdiction of the court or dies;
- Ensure that the daily roll is attended to in court;
- Make provision for the filing and storage of court documents;
- Issue warrants authorised by the commissioner and process same;
- Transfer matters to the relevant Magistrates Court for execution purposes;
- Provide the plaintiffs and defendants with copies of documents of process, if so requested, and
- Provide the court file to the commissioner and ensure that it is received back.

2.4 Other court officers

In terms of section 11 of the Act, the magistrate of the district in which the seat of a Small Claims Court is situated, may appoint as many clerks of the Small Claims Court, interpreters and legal assistants for that court as may be necessary.

The legal assistant is there to advise any person in regard to any action which falls within the jurisdiction of the court. The legal assistant may also assist with the drafting of the process of court.⁶

⁶ Rule 5

2.5 Sheriffs

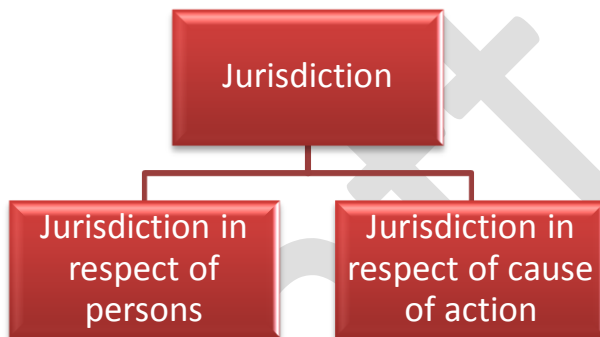
The sheriff is the official responsible for the service and execution of the process of the court referred to in rule 4(1). In terms of section 11(2) of the Act, the sheriff appointed for the magistrate's court of a district, must act as sheriff of the small claims court in that part of the district falling within the area of jurisdiction of that court.

Draft

CHAPTER 2

1. JURISDICTION

Jurisdiction refers to the authority of the court to hear and decide cases. Any reference in this guide to the jurisdiction of the Small Claims Court includes the power of the court to hear and adjudicate legal disputes between parties.



- Jurisdictional limits are an important feature of Small Claims Courts and must be adhered to by both litigants and Commissioners.
- Lack of jurisdiction is a ground for review.
- The institution of an action in a court, which is not vested with the necessary jurisdiction, will lead to the dismissal of an action and the prospective litigant who wishes to proceed with the case would have to institute the claim from the beginning in a competent court.
- Therefore, the clerk of the Small Claims Court must assist prospective litigants in order to determine which court has jurisdiction in respect of the action that is to be instituted.

1.1 Jurisdiction in respect of persons

Only a **natural person** may institute an action as plaintiff, but both a **natural or juristic person** may become a party to an action as a defendant. Therefore, a juristic person is not allowed to institute a claim in a Small Claims Court as a plaintiff but may file a counterclaim as a defendant.⁷

The Small Claims Court Act lists the circumstances under which the Small Claims Court of a specific area will have jurisdiction in respect of persons (section 14):

- The plaintiff may sue the defendant where the defendant **resides, works or carries on business.**
- The plaintiff may sue a partnership where **its business premises** are situated or where **one of the partners resides within the jurisdiction of the court.**
- The plaintiff may sue a company or a close corporation where it has its **registered head office or principal place of business.**
- In the case of a syndicate, unincorporated company or church at the **local office or place of business** of such body.

⁷ Section 7(1).

- The court has jurisdiction in respect of the defendant if ***the cause of action*** arose entirely within the jurisdiction of the court. (It is irrelevant whether or not the defendant resides, works or carries on business within the area of jurisdiction of the court.)⁸
- The court further has jurisdiction in respect of a defendant who ***appears and knowingly does not object*** to the court's jurisdiction. In doing so, the defendant knowingly subjects himself or herself to the jurisdiction of the court, which would otherwise not have had jurisdiction.⁹ The commissioner should however inform the parties of their right to object to the jurisdiction of the court.
- In actions regarding immovable property (such as a house, stand or sectional title) or a bond on such property, the court in whose jurisdiction ***the immovable property is situated*** has jurisdiction in respect of the owner of the property.¹⁰
- A party to the action may also, with the consent of all the parties, or upon the application of one of the parties who satisfies the court that the hearing of the action in that court may result in undue expense or inconvenience to him or her, be ***transferred by the court to any other court***.¹¹
- The court also has jurisdiction on grounds of ***incidental proceedings***, meaning that if an action is instituted in a specific court, the court may hear matters related to the case.

1.2 Jurisdiction in respect of causes of action

⁸ Section 14(1)(d).

⁹ Section 14(1)(e).

¹⁰ Section 14(1)(f).

¹¹ Section 13

The Small Claims Court has jurisdiction in respect of the following causes of action:

- Actions for the delivery or transfer of any property, movable or immovable;
- Actions for ejectment actions for ejectment against the occupier of any premises or land within the area of jurisdiction of the court;
- Actions based on or arising out of a liquid document or a mortgage bond;
- Actions based on or arising out of a credit agreement as defined in section 1 of the National Credit Act, 2005, and
- Actions for counterclaims in respect of any cause of action mentioned above.

Actions for delivery or transfer of movable or immovable property

These are actions instituted where a claim is instituted for the delivery or transfer of movable or immovable property not exceeding the current monetary jurisdiction. If the clerk finds that the property has been lost or destroyed, clerk must advise the party to put in a claim for damages.

Actions for ejectment

The Small Claims Court has jurisdiction in actions for ejectment against the occupier of land or premises which is unlawfully occupied and used for commercial - ***and not residential*** - purposes which is situated within the court's area of jurisdiction.

If in such an action the right to occupation is also in dispute, the court has jurisdiction if the clear value of that right to the occupier does not exceed the current monetary jurisdiction.

- ***Ejectment claims limited to land/premises occupied for business purposes***

In the Small Claims Court ejectment claims are limited to property occupied for business purposes only.

For example, a plaintiff may eject a defendant who failed to pay rent in breach of a lease agreement in respect of land or premises

occupied by the defendant ***for commercial purposes***.

A plaintiff may, however, not eject a defendant who failed to pay rent in breach of a lease agreement in respect of land or premises occupied by the defendant ***for residential purposes***. Therefore the Small Claims Court cannot be used to eject a defendant from premises in which he or she resides.

- ***The meaning of “unlawful occupier” in terms of PIE Act***

The reason the Small Claims Court does not have jurisdiction to hear an action for the ejectment of a residential tenant is because eviction by a court from land or premises unlawfully occupied is regulated in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

The concept “*unlawful occupier*” in the PIE Act includes only those persons who occupy premises unlawfully for ***residential purposes*** and excludes those who occupy premises or land unlawfully for business purposes. The Small Claims Court has jurisdiction in actions for ejectment from premises occupied for business purposes as ejectment from such premises is excluded from the application of the PIE Act.

- ***The Small Claims Court is not a court for the purposes of the PIE Act***

The definition of the term “court” in the PIE Act refers to the High Court or the Magistrate’s Court and excludes the Small Claims Court. Only the Magistrate’s Court and the High Court may be approached to institute proceedings in terms of the PIE Act.

When the plaintiff needs to institute action for ejectment of a defendant who unlawfully occupies land or premises for residential purposes, he or she may only approach the Magistrate’s Court or the High Court. ***Therefore the Small Claims Court is not a court for the purposes of the PIE Act.***

Actions based on liquid documents and mortgage bonds

A liquid document is a document that in itself renders proof that a person unconditionally acknowledges, under his/her signature, that he/she owes a fixed amount of money.

The jurisdiction granted by section 15 (c) of the Act to a Small Claims Court in an action based on or resulting from a liquid document or a bond is limited to the current monetary jurisdiction.

The following are examples of liquid documents:

- promissory notes;
- bills of exchange and cheques;
- unconditional bonds and acknowledgment of debt.

Actions based on credit agreements

The Small Claims Court's jurisdiction in actions based on or resulting from a credit agreement¹² as defined in the National Credit Act, is limited to claims where the value of the goods in dispute is not more than the current monetary jurisdiction. The value referred to is the market value of the goods at the time of the institution of the claim.

¹² An agreement constitutes a credit agreement if it is a credit facility, a credit transaction, a credit guarantee or any combination of the aforementioned.

Claims excluded from the jurisdiction of the Small Claims Court -

- Claims exceeding the current monetary jurisdiction;
- Claims against the State, including municipalities;
- Claims based on the cession or the transfer of rights;
- Claims for damages in respect of defamation, malicious prosecution, wrongful imprisonment, wrongful arrest, seduction and breach of promise to marry;
- Claims for the dissolution of a marriage;
- Claims concerning the validity and interpretation of wills;
- Claims concerning the status of a person in respect of his or her mental capacity;
- Claims in which specific performance is sought without an alternative claim for damages;
- Perpetual silence;
- Validity of legislation.

Abandonment of portions of the claim

A party, whose claim exceeds the prescribed limit, is allowed to abandon a part of the claim that exceeds the limit in order to bring the claim within the jurisdiction of the court.¹³ A party may explicitly abandon a part of that claim or counterclaim in the summons or statement of defence, or at any time thereafter. A party must specifically express that he/she abandons that part of the claim in the summons or counter claim.

A party may also deduct an amount that he/she admits is owed to the other party from the claim in order to bring it within the jurisdiction of the court.¹⁴

Actions against the State

Small Claims Courts are prohibited from entertaining actions instituted against the

¹³ Section 18

¹⁴ Section 19

State.¹⁵ The term “State” includes national, provincial and municipal administrations.

Draft

¹⁵ Section 14(2).

2. LIMITATIONS

Parties

Only a natural person may institute an action in the Small Claims Court.¹⁶ However, a juristic person may institute a counterclaim as a defendant.

A natural person is distinct from a juristic person who is a legal entity such as a company, a corporation or statutory body.

Splitting of claims is not permissible

A claim – based on one and the same cause of action and between the same parties - may not be divided into several smaller claims in order to recover the full amount that exceeds the Small Claims Court jurisdiction.

That is why it is important to examine the cause of action.

Labour matters

Labour matters are regulated by the Basic Conditions of Employment Act and the Labour Relations Act. Such claims are normally not part of the scope of the Small Claims Court.

The court has no jurisdiction under the Labour Relations Act and cannot hear unfair dismissal or unfair labour practice cases. Similarly the court has no jurisdiction in unfair discrimination cases or automatically unfair dismissal matters.

However, there may be circumstances where specific claims, although seemingly related to labour matters, may be of a different nature and could be heard in the Small Claims Court. So whilst the court should be slow to entertain labour related matters, its jurisdiction could include monetary claims **founded in contract**. As an example, a plaintiff may merely want to claim a small salary due in terms of a contract.

Limitations:

- ✓ Is the person instituting the action a natural person?
- ✓ Make sure the claim is not a split claim.
- ✓ Make sure the claim does not exceed the monetary limit of R15 000.
- ✓ If a labour matter, excise caution.
- ✓ Check jurisdiction.
- ✓ Check that no legal representation is allowed.

¹⁶ Section 7(1).

Thus the facts of each case should be carefully scrutinize and where feasible should be considered for action in the Small Claims Courts. A court should also guard against “forum shopping” which essentially means that it should not entertain a contractual claim that has already served before the CCMA or another Statutory Bargaining Council.

The whole matter can also be balanced with the proviso that where a matter is too complicated (irrespective of whether the cause of action is a labour contract or not) the commissioner has a right in terms of section 23 of the Act to stop the proceedings. However, the court should not do so lightly as the plaintiff might not have the means to pursue the claim elsewhere and the court should as always seek to bring finality to the matter at hand. The matters which are however clearly excluded are those where the statutory fairness of the labour action is disputed.

Monetary jurisdiction

The monetary limit is not specified by the Act, and is left to the Minister to determine from time to time by notice in the Government Gazette. Currently the amounts has been set at R15 000.

Representation

No legal representation is allowed in the Small Claims Court except where a juristic person may be represented by a director or a duly authorised officer of the company who happens to be legally qualified.

Commissioners should ascertain that the representative of a juristic person is actually an employee and is duly authorised by the juristic person.

Consent

The Small Claims Court does not have jurisdiction to hear a matter, which exceeds its jurisdiction, even if the parties have consented thereto.¹⁷ A party to the action may, with the consent of all the parties, or upon the application of one of the parties who satisfies the court that the hearing of the action in that court may result in undue expense or inconvenience to him or her, be transferred to another

¹⁷ Section 22

court that has jurisdiction to hear the transferred action.¹⁸

Complicated cases

If a Commissioner is of the opinion that a case before him or her contains difficult or complex questions of law or of fact, which cannot adequately or fairly be decided upon, he/she must stop the proceedings. The plaintiff may institute a new action in another competent court of law.¹⁹

3. CUMULATIVE JURISDICTION

The monetary jurisdictional limit does not prevent a plaintiff from instituting different claims in one and the same summons against the same defendant(s). If two or more claims, each based on a different cause of action, are set out in one summons, the court has the same jurisdiction to adjudicate upon each claim as if each claim had been the subject of a separate cause of action.

4. INCIDENTAL JURISDICTION

The following matters do not influence the court's jurisdiction to hear claims²⁰ -

- Actions in which the sum claimed does not exceed the jurisdiction of the court and is the balance of an account, the court may enquire into and hear evidence upon the whole account, even though that account relates to items and transactions exceeding the jurisdiction of the court;
- Where the amount claimed does not exceed the jurisdiction of the court, the court is not deprived of jurisdiction merely because it is necessary for the court, in order to arrive at a decision, to give a finding upon a matter beyond its jurisdiction; and
- In determining whether a claim falls within the jurisdiction of a court, no claim for interest on a principal sum or for costs or alternative relief may be taken into account.

¹⁸ Section 13

¹⁹ Section 23

²⁰ Section 17

CHAPTER 3: DUTIES OF THE CLERK OF THE COURT

1. Registers which the clerk of the court must maintain:

- **Summons control register**

In terms of rule 3(1) of the Rules, every clerk of the court must open a summons control register and enter the serial number for the year which is allocated to the summons, therein.

- **Enquiries register**

In order to furnish monthly statistics correctly to the Director-General the clerk of the court must keep an enquiry register.

- **Warrant Register**

In order to control the issuing and handing-over of warrants the clerk of the court must maintain a warrant register.

- **Register of reviews**

It is necessary that proper control be exercised over notices of reviews and therefore the clerk of the court must keep a register of reviews.

- **Register of commissioners**

In order to exercise control over the appointment of commissioners a register must be kept. Particulars of commissioners, who are no longer available as commissioners due to resignation, moving or any other reason, must be entered in the register.

2. The daily duties of the clerk of the court

- **Handling of enquiries:**

The clerk of the court can expect written, telephonic and in-person enquiries on a daily basis.

Written enquiries must be answered in writing. The details of all enquiries must be entered in the enquiry register.

The clerk of the court must upon enquiry, advise persons concerning the procedure regarding the institution of a claim, trial dates and other general information. In order to assist the clerk of the court in answering enquiries, the Department of Justice and Constitutional Development has compiled a brochure which sets out in layman's language the procedure in the small claims court. These brochures

must be given free of charge to persons making enquiries.

The clerk of the court must use the correspondence system or the file numbers as directed by the magistrate, in consultation with the advisory board, of the district in which the seat of the court is situated.

- **Advice to prospective plaintiffs:**

The clerk of the court must request a prospective plaintiff to furnish the information of the intended claim. If the prospective plaintiff is illiterate, the clerk of the court must assist him or her with the claim. If necessary the service of an official court interpreter must be used.

The clerk of the court must then determine, on the basis of the facts, whether the court has jurisdiction to hear the intended claim and whether the facts disclose a cause of action. The prospective plaintiff must be informed accordingly.

The clerk of the court may not refuse to assist the plaintiff in writing a letter of demand or in issuing a summons, since the court must in the final instance, make the decision (including whether it has jurisdiction or not).

Bear in mind that if the court does not have jurisdiction over the person of the defendant the possibility still exists that the defendant may not object to the jurisdiction of the court.

The facts will disclose a cause of action if there is a claim that originates:

- (a) Ex contractu - through a contract/agreement.
- (b) Ex delictu - through a delict/unlawful act by which the plaintiff suffered damage.
- (c) Ex lege - where statutes or other government measures confer a claim.
- (d) Through unjust enrichment - where a person obtains a benefit/money/asset to which she or he is not entitled.

If the clerk of the court is uncertain whether the court has jurisdiction and whether the complainant has a claim she/he shall refer the prospective plaintiff to the legal assistant.

The clerk of the court shall maintain a list of available legal assistants, which he/she obtained from the advisory board.

The list shall contain the addresses, telephone numbers and consultation hours of each legal assistant. The clerk of the court must assist the prospective plaintiff with the arrangement of an appointment with an available legal assistant. If the prospective plaintiff decides to proceed with the institution of the claim after he has been advised, the next step is to send a letter of demand.

3. Planning of the court roll

- The court roll must be planned in consultation with the local advisory board. The advisory board must indicate how many courts will sit, where, on which days, what the sitting times are and number of cases that must be allocated for trial to a court per sitting.
- When the clerk of the court enters a case on a specific court date in the trial diary he/she must ensure that the maximum number of cases are not exceeded.
- If the court roll is fully booked for three months in advance, the clerk of the court must approach the advisory board for the consideration of the institution of a further court.
- Where returns of non-service are received before the trial date, these cases must be deleted in the trial diary. All the other cases, regardless of whether returns of service were received or not, form part of the court roll.
- The court roll must be typed or written in neat and legible writing and must be attached to a notice board or to the door of the court at least one hour before the commencement of the court

4. Court programme for commissioners

- The clerk of the court must obtain a court programme of the sitting dates of commissioners from the advisory board.
- A commissioner must be assigned for every court day and a court programme must be planned in advance for a period of at least three months.

- Each commissioner must be reminded at least one week prior to his or her sitting date telephonically or in writing thereof. If a commissioner indicates that she or he is not available, alternative arrangements must be made with the advisory board.

5. Delivery of court rolls to court

- The clerk of the court must prepare the court roll according to the enrolment in the trial diary at least three days prior to the court date.
- The court files together with sufficient writing paper must be delivered to the commissioners. An endorsement to this effect must be made in the trial date diary.
- The clerk of the court must see to it that the court roll is delivered to the commissioner.
- In cases where the court sittings are held at centres other than the seat of the clerk of the court, the court files may be sent to the commissioner by registered mail. Care must, however, be taken that such court files reach the commissioner at least two days prior to the trial date. Arrangements may also be made that commissioners fetch the court files at a specific place.
- The clerk of the court must follow the instructions determined by the advisory board in this regard.
- Court files must be handled in such a manner that they are not lost or that unauthorised access thereto is obtained.

6. Recovery of court files

- The clerk of the court must make satisfactory arrangements for the recovery of the court files after the sitting of the court. He or she must arrange with the commissioner for the safe-keeping of files until they can be collected or make arrangements that they be sent back to by registered post.
- Upon receipt of the files the clerk of the court must check them with the trial date diary and make an appropriate endorsement in the trial date diary.
- Completed cases must be inspected for the issuing of orders. After order has been issued, the particulars of the outcome must be endorsed in the summons control register, after which the files must be filed.
- Cases postponed to specific dates must be entered against the

date in the trial date diary and the parties that were absent when the court postponed the case, must be informed of the date.

- An endorsement must also be made whether the case is part heard or not. If the case is part heard, the particulars of the commissioner must also be recorded.
- Where part-heard matters are postponed *sine die*, a date must be determined in consultation with the commissioner and the parties informed accordingly. This date must thereafter be entered in the trial date diary.
- Postponed cases that are not part-heard may be assigned to any commissioner.

7. Inspection of court documents by public

- In terms of section 6 of the Act the documents of a court shall be available for inspection by members of the public under the supervision of the clerk of the court at the prescribed times and on payment of the prescribed fees.
- At present no times and fees are prescribed and the clerk of the court must therefore, on request, during official working hours, make the documents available to members of the public.
- The furnishing of lists of civil judgments to private individuals and instances is discouraged and should only be furnished if insisted upon and with the permission of the local advisory board and the magistrate of the district in which the seat of the court is situated.
- Court files may not be taken out of the office of the clerk of the court. The clerk of the court certifies the copies free of charge.

8. Return of documents

- If an action is based on a document and the original document is filed in the court file, the document may after the completion of the case, against an acknowledgement or receipt, be returned to the party that handed it in.
- This also applies to all other documentary evidence that have been handed in.

9. Furnishing of extracts of judgment

- The clerk of the court issues an extract of a judgment on the form J. 444. Where the extract is provided for the purpose of Section 41(2) of

the Act, fees are not payable.

10. Certifying of court records

- The clerk of the court must ensure that there are no mistakes or omissions in a copy of a court record that is certified as a true copy of the original.

11. Furnishing of statistical information to the Director-General: Justice and Constitutional Development

- It is necessary to collect and analyse statistics regarding certain aspects of the small claims procedure in order to properly evaluate the small claims court.
- The clerk of the court must therefore provide the particulars on a monthly basis to the Director-General: Justice and Constitutional Development.

CHAPTER 4

1. PROCESS PRIOR TO THE INSTITUTION OF A CLAIM

- Proceedings are usually instituted in the court of the area where the defendant resides, carries on business or is employed, or where the cause of action arose.
- On the basis of the facts, the clerk of the Small Claims Court must then determine whether the court has jurisdiction to hear the intended claim and whether the facts disclose a cause of action.

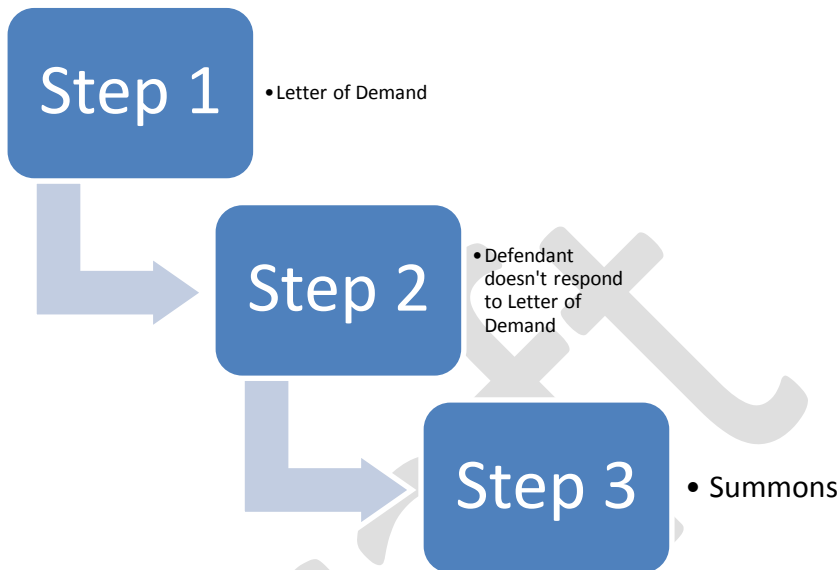
The facts will normally disclose a cause of action if there is a claim that originates:

- ✓ from a contract/agreement;
- ✓ from a delict/unlawful act as a result of which the plaintiff suffered damage
- ✓ from statutes or other government authorisations confer a claim; or
- ✓ from unjust enrichment – where a person obtains a benefit/money/asset to which she or he is not entitled.

The clerk of the Small Claims Court must ascertain the following:

- The person instituting a claim is not a juristic person (such as companies, corporations or associations).
- The person instituting the claim is 18 years or older. If not 18 years or older, the person should be assisted by a parent or legal guardian.
- The claim is not against the State.
- The claim is not a labour matter over which the CCMA, bargaining counsel or Labour Court has exclusive jurisdiction, e.g. unfair dismissal, unfair labour practise or unfair discrimination.
- The claim amount after any abandonment does not exceed the current monetary jurisdiction.
- The person intending to institute a claim is informed that he/she may, prior to the institution of the claim seek legal advice.
- The summons must detail the claim of the plaintiff against the defendant.
- Check if the court has jurisdiction over the claim and the defendant.
- The plaintiff has sent a letter of demand to the defendant, in which the latter is given 14 days to pay the claim. The letter of demand must be in duplicate and the court file must contain proof of delivery thereof to the defendant. If the claim is against an individual, the plaintiff must give the defendant's full name and address and in case of a company, the plaintiff must give the correct company name and address.

2. INSTITUTION OF A CLAIM



Step 1: The Letter of Demand

- The plaintiff is required to write a letter of demand and deliver the same to the defendant.²¹
- The letter of demand can be delivered to the defendant by the plaintiff by hand or by registered post.
- The plaintiff must prove by means of an affidavit or by a registered post receipt that the letter of demand has been delivered to the defendant.²²
- The letter of demand must briefly but adequately set out the particulars of the facts upon which the claims is based and the amount.²³
- It must allow the defendant at least 14 days to satisfy the plaintiff's claim.
- The 14 days is counted from the date of receipt of the letter of demand.
- If the plaintiff requires assistance with the drafting of the letter of

²¹ Section 29(1).

²² Rule 8

²³ Rule 8(a)

demand, the clerk of the Small Claims Court should assist him or her.

Step 2: Failure by Defendant to Respond to Letter of Demand

If the defendant fails to satisfy the plaintiff's claim as set out in the letter of demand, the plaintiff may issue a summons against the defendant after 14 days of receipt of that letter.

Step 3: Issuing of Summons

The process by which an action is commenced is by way of a summons which is a document calling upon the defendant to satisfy a claim as set out in the summons or, alternatively, to defend the action within a specified period of time. The summons also sets out the consequences of failure to comply.

Forms of summons

The summons must in all respects comply with form 1, as contained in **Annexure 1** of the Rules. The form numbers are J 141 A (Afrikaans) and J 141 E (English). The forms are supplied free of charge to plaintiffs. The summons must be prepared in triplicate. If there is more than one defendant, additional copies must be prepared for each additional defendant.

Important aspects of the summons

- The summons must be served on the defendant not less than 10 days before the trial.
- The summons must be signed by the clerk of the court and must bear the date of issue by the clerk.
- The summons must include a notice drawing the defendant's attention to the provisions of sections 29(3), 35, 38, 39, 40 and 43 of the Act.
- The summons must be signed by the plaintiff.
- The summons must contain the full address of the plaintiff.
- The particulars of claim must show the nature and amount of the claim(s).
- The particulars of claims must also show any abandonment of part of the claim under section 18 or any set-off under section 19.
- The summons must also show the name of the defendant as the defendant is known to the plaintiff, the defendant's sex and residence or place of business and in the case of juristic person under the name by which it is known to the plaintiff.

Essentials of the Claim

The following essential requirements apply to claims brought before the Small Claims Court:

- the claim must be legally valid, which is a determination reserved exclusively for the Court;
- the claim must be brought against the right person; and
- the details of the claim must be properly formulated and include the following:
 - ✓ Case number
 - ✓ Date, time and place including the court number
 - ✓ Names, surnames and addresses of the parties
 - ✓ Signature of the plaintiff
 - ✓ District in which the summons is issued
 - ✓ District where the proceedings will be held
 - ✓ Date, time and place at which the trial will take place
 - ✓ Amount of the claim
 - ✓ Brief but sufficient particulars of the claim (as set out in the letter of demand)
 - ✓ If any amount exceeding the current monetary jurisdiction has been abandoned, this amount should be specified and the plaintiff should sign in the space provided
 - ✓ If there is more than one defendant, an extra copy of the summons should be made for each defendant
 - ✓ The plaintiff must place his or her initials next to any amendments made to the summons.

After the clerk of the court has confirmed that all the particulars on the summons have been properly completed, he/she must issue the summons and inform the plaintiff of the following:

- The summons may be served either by the plaintiff personally or through the sheriff. Should the plaintiff elect to attend to service, an affidavit should be handed to the clerk of the court to the effect that proper service has taken place.
- The plaintiff is liable for the sheriffs' fee for service of summons.

- The summons should be served at least ten days before the hearing date.
- The date, time and the place at which the proceedings will take place.
- The plaintiff must contact the clerk of the court before the proceedings to ensure that a return of service was obtained.
- The plaintiff must produce all the supporting documents on which the claim is based for filing in the court file.
- If the plaintiff has any witnesses, the witnesses should be present at the court on the relevant hearing date.

Checklist for issuing of a Summons:

The clerk of the Small Claims Court, before and after issuing a summons, must –

- ensure that the claim sought does not exceed the monetary jurisdiction;
- be satisfied with the contents of the summons before allocating a number to the summons or allocating a date and place of hearing;
- number the original claim document, which number must be marked on all documents relating to the claim;
- ensure that a hearing date is determined;
- hand to the plaintiff the original copies of the claim marked with the claim number for service on each defendant;
- retain and file the original summons; return of service, letter of demand and proof of delivery;
- place one copy of the summons in the file cover and hand the original summons to the plaintiff together with the other copies for service; and
- ensure that the case number and names of the parties on the file cover are entered in a diary that is specially kept for this purpose (trial date diary), and the files are filed in numerical order.

Amendment of summons

If the plaintiff makes an error with the drafting of the summons, he/she may amend the document before it is served on the defendant by simply noting the amendment on the original and on the copies and initialling the alterations to the

summons before it is served.

The clerk of the court must also initial and date stamp the amendment(s).

If the summons has already been served, the plaintiff will have to apply to the court for permission to amend the summons. A court may at any time before judgment amend any summons or other document in connection with a case, provided that no amendment will be made if the other party will be prejudiced thereby. The amendment may be made upon such conditions as the court may deem reasonable.²⁴

²⁴ Section 33

CHAPTER 5

1. DEFENDING A CLAIM

The summons that is served on the defendant must provide details of the plaintiff and the basis of the plaintiff's claim. The summons informs the defendant of the steps that he/she should follow if deciding to defend the case.

- **The defendant may admit the claim against him/her**

A defendant who does not dispute a claim may make an arrangement with the plaintiff to pay the claim.

In the event that the defendant, while admitting the claim, declares that he/she cannot afford to satisfy the claim immediately, the defendant may make a proposal for "terms of payment" to the plaintiff, e.g. weekly or monthly payments.

The defendant can also make a proposal for terms of payment for that part of the amount claimed which he/she admits.

- **The defendant may defend the action**

If the defendant wishes to defend the plaintiff's claim, he or she may lodge with the clerk a written statement setting forth the nature of his defence and particulars of the grounds on which it is based, and a copy of that statement shall be furnished to the plaintiff by the defendant.²⁵

The written statement of defence must contain the particulars of the plaintiff and defendant, as they appear on the summons and must contain the basis of the defence.

²⁵ Section 29(3)

If a defendant approaches the clerk of the Small Claims Court to file a written statement of defence, the clerk or legal assistant must assist him or her with the formulation thereof. The clerk must advise the defendant to furnish the plaintiff with a copy of the plea prior to the hearing.

- **The defendant may file a counterclaim**

If the defendant elects to file a counterclaim, he or she or it must deliver a written statement, which contains the same particulars as those required for a summons, to the clerk before the hearing.

The counterclaim may also be included in the defendant's written statement of defence.

The defendant may approach the clerk or legal assistant for assistance with the formulation thereof.

Lodging a written statement is crucial if the defendant has a counterclaim against the plaintiff. It is important to advise the defendant that documents assisting in the proof of his or her counter-claim must go in the court file and that the defendant can also call witnesses.

Checklist for lodging a written statement of defence:

- ✓ Case number
- ✓ Personal particulars of the plaintiff and defendant
- ✓ The plaintiff's address
- ✓ Supporting documentation

CHAPTER 6

COUNTERCLAIMS

- A counterclaim (also called a claim in reconvention) is a claim brought by the defendant against the plaintiff. A counterclaim may be any type of claim mentioned in section 15(1) of the Act.
- The parties in the main claim and in the counterclaim must be the same.
- The defendant must file a counterclaim by no later than a day before the trial date (the counterclaim can be brought to court on the day of the trial if the court allows it).
- The maximum amount that may be claimed in a counterclaim must be within the current monetary jurisdiction.
- The defendant may, however, as already pointed out, abandon a portion of his or her claim so as to bring it within the jurisdiction of the Small Claims Court.
- If an action is instituted in a specific court, the court may hear matters related to the case. The defendant may therefore institute a counter-claim against the plaintiff even if the plaintiff does not live or work within the jurisdiction of the said court. The counter-claim must, however, be related to the claim, that is, it must in one way or another be relevant to the issue raised by the plaintiff.²⁶
- The Small Claims Court does have jurisdiction to entertain a counterclaim by a juristic person having been brought before the court as defendant.²⁷
- If the counterclaim exceeds the jurisdiction of

Checklist for counterclaims:

- ✓ Case number;
- ✓ Particulars of the parties and the claim;
- ✓ The grounds of the claim (cause of action);
- ✓ The value of the claim; and
- ✓ The counterclaim may be accompanied by the defendant's plea to the summons.

²⁶ *Swart v Sher and Another* 1987 (2) SA 454 (SE) at 457

²⁷ *Raman v Barlow Motor Investments (Pty) Ltd t/a Natal Motor Industries Prospector and Others* 1999 (4) SA 606 (D)

the Small Claims Court the commissioner is obliged to stay the small claims proceedings to enable the defendant to bring his claim against the plaintiff in a higher court. A failure to stay the proceedings is reviewable.

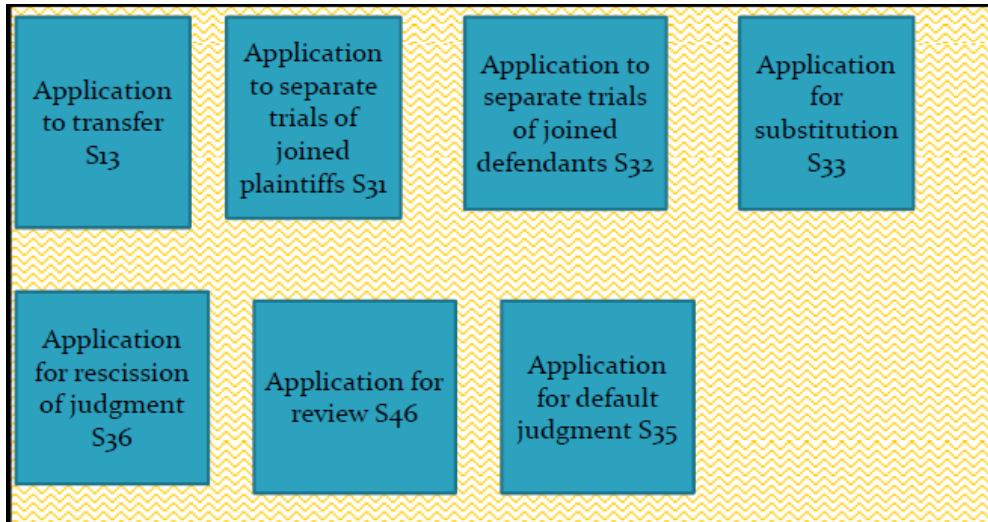
A typical **example** of a counterclaim would be a tenant claiming a deposit back at the end of a lease, and a landlord might say that the tenant has caused damages to the premises in excess of the amount of the deposit.

Another example might be a vehicle accident in which the defendant asserts that the plaintiff was negligent in causing damage to the defendant's car and therefore the plaintiff is indebted to the defendant.

CHAPTER 7: APPLICATIONS

- The Rules and the Act do not prescribe in which form an application must be made and therefore both oral and written applications are permissible - although it is advisable that all applications be made in writing accompanied by the necessary founding affidavit setting out the grounds for the application.
- The application should be accompanied by the necessary founding affidavit setting out the grounds for the application and be served on the opposing party.
- If there is no affidavit, oral evidence may be presented.
- The applicant must approach the clerk of the court who must make arrangements for the hearing of the application.
- The clerk of the court must arrange that the applicant appears at a specific time on a specific date before a commissioner.
- Although, as already mentioned, the Rules and the Act do not prescribe the form in which an application must be made it is prudent to recommend to the applicant that the application is submitted in writing and to request him/her to hand a copy of the application to the opposing party prior to the date of the trial.
- If the application pertains to a pending or completed case, the clerk of the court must arrange for a date of appearance. The clerk will then make arrangements for the hearing of the application. The clerk must arrange for a date, time and venue for the hearing of the application.

Examples of types of applications:



1 Applications for rescission of certain judgments

Any person who is affected by a judgment may apply to the court to have the judgment rescinded, varied or corrected provided that ⁻²⁸

- if the judgment was granted by the court in the absence of the person against whom that judgment was granted, the application must be brought within six week after the applicant first had knowledge of the judgment;
- if the judgment was void *ab origine* or was obtained by fraud or as a result of a mistake common to the parties, provided the application is made not later than one year after the applicant first had knowledge of the voidness, fraud or mistake; or
- if there was a patent error in the case of a judgment, the affected party who intends to apply for the rescission of an order must do so within one year after he / she first had knowledge of any errors. There is no time limit within which the court may *suo motu* rescind, vary or correct an order in

²⁸ Section 36

order to correct a patent error in the said order.

- In the instance of a default judgment, the applicant should provide a sound reason why he/she was in default and also provide a bona fide defence.

2 Application to transfer a matter from one court to another

- A claim can be transferred from one court to another, with the consent of all the parties, or upon the application of one of the parties. The party bringing the application must satisfy the court that the hearing of the action in that court may result in undue expense or inconvenience to him or her.²⁹
- If the application is granted the latter court will, notwithstanding anything to the contrary in the Act, have jurisdiction to hear that action.

3 Application for separate trials in case of joinder of plaintiffs

- Section 31 of the Act provides for the joinder of any number of persons each of whom has a separate claim against the same defendant, as plaintiffs in one claim. The defendant may, however, apply to the court that separate trials are held, and the court may in its discretion make such order as it deems just and expedient.

4 Application for separate trials in case of joinder of defendants

- Two or more defendants may be sued in the alternative or jointly in one claim. As in the case of the plaintiffs, a defendant, upon application, may request a joinder of defendants and the court may in its discretion agree or make such other order as it may deem just and expedient.³⁰

²⁹ Section 13

³⁰ Section 32

5 Application to substitute the correct name of any person or place before or after judgment / application for substitution

- The name of any person or place as commonly known may be used and the court may, upon application, at any time before or after judgment substitute the correct name for that name.³¹

6 Application for default judgment

- If a defendant admits liability and consents to a judgment in writing, or fails to appear before the court, the court may, on application by the plaintiff grant judgment for the plaintiff and dismiss the counterclaim, if any, by the defendant.³²
- If the plaintiff fails to appear before the court, the court may, on application by the defendant, dismiss the plaintiff's claim, and if there is a counterclaim, grant judgment for the defendant.³³

7 Application for review

A judgment of the Small Claims Court cannot be appealed against. However, the Commissioner's decision may be taken on review to the High Court on the following grounds: -

- Absence of jurisdiction;
- Interest in the cause, bias, malice or corruption on the part of the Commissioner; and
- Gross irregularity in the proceedings.

³¹ Section 33(3)

³² Section 35(1)

³³ Section 35(2)

CHAPTER 8: PREPARATION FOR TRIAL

The clerk has dual responsibility in the preparation for the trial, i.e. advising the parties with regard to preparation of their cases and also ensuring that the hearing takes place on the trial date. The clerk is required to ensure that the Commissioner received the court file before the trial.

The court file must contain the following information:

- Case number;
- Copy of the letter of demand together with proof (registered post slip, signature and/or affidavit) that it has been delivered to the defendant;
- Date on which the summons was issued;
- Name, surname and address of the plaintiff;
- Signature of the plaintiff on the summons and the claim form;
- District in which the summons was issued;
- Court where the proceedings will be held;
- Full name, surname, identity number (if available) and address of the defendant;
- Amount for which claim is instituted. If any amount exceeding the monetary jurisdictional limit has been abandoned, particulars of that amount must have been stated on the space provided and the plaintiff must have signed in the space provided;
- The Sheriff's costs for service as reflected on the return of service;
- If the plaintiff served the summons personally - an affidavit proving that proper service took place;
- Proof that the summons has been served at least ten days prior to the trial date.

CHAPTER 9: JUDGMENTS AND ORDERS

1. TYPES OF JUDGMENT

- **Judgment for Plaintiff**

The Commissioner may grant judgment in favour of the plaintiff after hearing both sides. This judgment is final, and the defendant cannot appeal against it.³⁴ The defendant has ten days to satisfy the plaintiff's claim and costs as ordered by the Commissioner.

- **Judgment for Defendant**

The Commissioner may reject the plaintiff's claim if the plaintiff fails to prove his/her claim. The Commissioner may uphold the defendant's counterclaim. The plaintiff cannot appeal against this judgment.³⁵

- **Absolution from the Instance**

If either the plaintiff or the defendant fails to prove his or her case, the Commissioner may grant a judgment of absolution from the instance. The plaintiff may still present his or her claim at a later hearing if more evidence comes to light.

- **Default Judgment**

If the defendant fails to appear at the trial, the court may, upon application by the plaintiff, grant default judgment against the defendant. Before a default judgment is granted, the court may require the plaintiff to prove the following:

- ✓ That the letter of demand was properly delivered to the defendant and that 14 days has lapsed prior to summons having been issued against him / her.
- ✓ That the defendant was timeously served with the summons; and
That the plaintiff has a valid claim (damages is proven where appropriate) and is entitled to recover same from the defendant.
- ✓ The amount of the claim.

The defaulting defendant has ten court days to pay the claim after the

³⁴ Section 45

³⁵ Section 45

defendant has been informed of the default judgment.

- **Judgment in instances where the plaintiff is absent**

Where the plaintiff fails to appear in court, the Commissioner, by application by the defendant either remove the matter from the roll, dismiss the plaintiff's claim and / or grant judgment in terms of the defendant's counter claim. The plaintiff may re-institute the action where it was dismissed or apply for rescission with the consent of the court where there was a counterclaim.

2 COURT ORDERS

The Commissioner may make an order of payment of money by the judgment debtor in favour of the judgment creditor. Orders for payment of money must be satisfied within ten days, unless otherwise ordered. The judgment debtor must pay such money directly to the judgment creditor.

- **Cost Orders**

The Commissioner may award costs in favour of the successful party, which costs are limited to the Sheriff's fees.

- **Conditional Orders**

The Commissioner may order the judgment debtor to pay the judgment debt and costs in specified instalments, or suspend the order either wholly or in part on such conditions as to security or otherwise as the Commissioner may determine.

The inquiry may be conducted *in camera* or in chambers and the following must be considered: -³⁶

- the date of the judgment or order;
- the amount thereof;
- the balance of the capital; and
- the Sheriff's costs.

³⁶ Section 39(1)

In the enquiry the Commissioner determines the judgment debtor's ability to satisfy the judgment debt and costs. In determining this, the Commissioner would need to consider the following details:

- the judgment debtor's full names,
- residential and business address;
- marital status;
- the number of dependants and their ages;
- assets and liabilities;
- income and expenses; and
- dates of the proposed instalments.

CHAPTER 10

STEPS FOLLOWING JUDGMENT

1. Enquiry into financial position of the judgment debtor

When the Commissioner grants judgment for the payment of a sum of money, the court may conduct a financial enquiry into the judgment debtor's financial position if the latter indicates that he/she is unable to comply with the judgment.

2 Enforcing the judgment

- If the judgment debtor still fails to satisfy the judgment, the matter is transferred to the Magistrate's Court for an execution procedure, as prescribed by the *Magistrate's Courts Act 32 of 1944*.
- The judgment creditor would then be advised to obtain a warrant of execution against moveable property of the judgment debtor.
- The clerk must assist the judgment creditor with the execution process.
- The judgment creditor must submit the warrant of execution to the Sheriff, who must enforce it. The warrant empowers the sheriff to seize any attachable property belonging to the defendant in order to cover the plaintiff's claim in addition to the Sheriff's own fees.

3 Process for execution of judgment

- The clerk should advise the plaintiff of the costs involved in executing a writ of execution.
- The warrant is addressed to the Sheriff in whose area the execution is to be enforced.
- The warrant is for the surrender of movable property or for ejectment of the judgment debtor from the property.
- Such process can only be withdrawn or suspended if the sheriff receives a notice from the judgment creditor.
- Any alterations in the warrant of execution must be initialled by the clerk before it is issued.
- The clerk must ensure that the correct judgment debtor is named in the warrant of execution, otherwise the warrant becomes invalid.
- The clerk will only reissue the warrant if requested to do so by the

judgment creditor.

4. Where judgment is granted in defendant's favour

If judgment is granted in the defendant's favour, he / she is not liable to pay the claimed amount to the plaintiff. If the defendant succeeds with his/her counterclaim, s/he may pursue the matter to enforce the judgment. In that case the processes to enforce and execute judgment as outlined in (9.2) and (9.3) above may apply.

Draft

CHAPTER 11: REVIEW

- A judgment of the Small Claims Court cannot be appealed against, so no litigant can appeal against the judgment of the Commissioner.³⁷ But the Commissioner's decision may be taken on review to the High Court on the following grounds: -
 - ✓ Absence of jurisdiction;
 - ✓ Interest in the cause, bias, malice or corruption on the part of the Commissioner; and
 - ✓ Gross irregularity in the proceedings.
- A review is the process whereby the litigants attack the method used during the proceedings in the Small Claims Court. The litigant cannot use review proceedings to complain about the result/finding made by the Commissioner. The litigant only notes (thus files) the review at the Clerk of Court, but the application to review is heard at the High Court. A Review may only be used by a litigant in respect of matters falling within Section 46 of the Small Claims Act.
- A case is taken on review by way of a notice of motion and a founding affidavit, which must, in terms of Rule 53(1) of the High Court Rules, be served on all parties.
- The Clerk of Court is actively involved in the review process and liaises with all the parties. The decision of the outcome of noted review is taken by the Advisory Board or the state Attorney. The Clerk receives the result of the outcome and notifies the Commissioner of the results.

³⁷ Section 45

Steps to be taken upon receipt of a notice of review

1. The particulars of the case must be entered in the review register.
2. The application for review together with all supporting affidavits and documents must be submitted to the Director: Law Enforcement. Voluminous papers should be couriered immediately to the National Office for the attention of the above-mentioned official. This office will further require a transcript of proceedings and reasons by the Commissioner within 14 days from date of service. Instructions to the State Attorney may only be given by the Directorate: Law Enforcement at National Office.
3. A copy of the review notice together with a copy of the court file must immediately be delivered by hand or sent per registered mail to -
 - (i) the Commissioner who presided during the proceedings;
 - (ii) the Chairperson of the Advisory Board of the relevant court
 - (iii) the relevant State Attorney in whose area the seat of the court is; and
 - (iv) the Director-General: Justice and Constitutional Development.
4. The Commissioner must send his/her written reasons to the clerk of the Small Claims Court, who in turn must send copies of the reasons to the Chairperson of the Advisory Board, the relevant State Attorney and the Director-General: Justice and Constitutional Development.
5. When the Commissioner's written reasons are received, a certified copy of the court file must be sent by registered mail to the registrar of the High Court. The date of dispatch must be endorsed in the review register.
6. The Advisory Board must in the meantime make a recommendation to the State Attorney regarding possible opposition to the application. The State Attorney in turn must make a recommendation to the Director-General: Justice and Constitutional Development, who decides in the final instance whether the application must be opposed at State expense or not.
7. When the certified copy of the court file is received from the registrar, the Commissioner must be informed of the decision. The decision must also be entered in the review register.

CHAPTER 12

MISCELLANEOUS

If the clerk of the court or a legal assistant gives incorrect legal advice or makes an error with the preparation of a summons, statement or other document, he or she may not be held liable for any damage suffered by a party, provided that he or she acted in good faith.

The State may also not be held liable to compensate a party for any damage.³⁸ A Commissioner is similarly indemnified against any action that may be brought against him or her whilst carrying out his or her duties as a Commissioner.

Travelling expenses of Commissioners

When a Commissioner has to travel to a nearby town and requests payment of his/her travelling costs, the clerk of the court must direct an application in writing for the payment of such travelling expenses via the magistrate to the Director-General.

The following information must be mentioned in the application:

- Parties involved in the case;
- Case number and date of trial;
- Name and address of the Commissioner;
- Purpose of journey;
- Vehicle travelled in;
- Distance of journey; and
- Costs determined according to State tariff (mention engine volume and tariff in cent per kilometre).

³⁸ Section 11(3)

CODE OF ETHICS FOR CLERKS OF THE SMALL CLAIMS COURT

PART 1

Purpose

The purpose for the existence of the post of clerk of the Small Claims Court is:

- to ensure the administrative efficiency of the court,
- to protect the court's integrity, and
- to help maintain public confidence in the court's dispensing of justice.

In executing the above functions, the clerk of the court is expected to comply with the values and ethical principles enunciated in the ***Public Service Act 103 of 1994*** and the relevant Code of Conduct applicable to non-judicial personnel in the Magistrates' Courts.

PART 2

Execution of Duties

The clerk of the Small Claims Court must faithfully carry out all appropriate duties striving at all times to perform the clerk's work diligently, efficiently, equitably, thoroughly and courteously; observing the highest standards of conduct and professionalism.

Accountability

The clerk of the Small Claims Court must:

- execute his / her duties to further the public interest;
- constantly look for better ways to perform the tasks which have been entrusted to him / her by the public;
- always commit himself or herself to pursuing the highest standard of excellence in the execution of duties.

Impropriety

The clerk of the court shall avoid subjecting him / herself to improper influences from any source whatsoever or in any activities that could impugn the dignity of the clerk's office.

Fairness

The clerk of the court shall conduct his/her work without bias or prejudice and without regard to race, colour, religion, age, national origin, language, marital status, socio-economic status, physical or mental challenge, etc.

Honesty and Truthfulness

The clerk of the court shall express the truth as best as s/he knows it with complete candour and sincerity.

Involvement in Actions before the Court

The clerk of the court shall notify the appropriate authority whenever he/she or anyone in his/her immediate family is named in any action pending before the court.

Non-discrimination and Harassment

The clerk of the court shall avoid discriminatory, biased, or prejudicial acts or words based on race, colour, gender, age, religion, national origin, language, appearance, disability, marital status, sexual orientation, socio-economic status, or political affiliation, and shall refrain from harassing other staff members, litigants or members of the public either sexually or non-sexually.

Privilege

The clerk of the court shall not –

- use his / her official position for the purpose of securing privileges for himself /herself or others;
- dispense special favours to anyone;

- accept remuneration in any form for the commission or omission of any act;
- attempt to take advantages of his/her access to the Commissioners and court files to further any personal interest s/he might have in a case;
- discuss or divulge information to anyone outside the clerk's office or the court system without the express permission of the Commissioner; or
- use his/her position or title to influence others in any manner whatsoever.

Gifts

The clerk of the court shall not solicit, accept, or agree to accept, or dispense any gift, favour or loan either for himself / herself or on behalf of any other person.

Independence

The clerk of the court shall be vigilant of conflicts of interest or the potential for same, and ensure that outside interests are not of a nature as to impair the ability to perform his / her duties.

Attempts at Influence

The clerk of the court shall immediately report any attempt to compel him to violate these tenets in any manner to the appropriate authority.

Proper Records Maintenance

The clerk of the court shall not inappropriately destroy, alter, falsify, mutilate, backdate or fail to make required entries on any records within the clerk's control unless ordered in writing to do so by the court.

Confidentiality

The clerk of the court shall maintain legally required confidentialities of the office, by not disclosing information, whether or not confidential, to any unauthorized person for any purpose, and shall properly provide confidential information that is available to specific individuals authorised to receive such by reason of statute, court rule or administrative order.

Use of Public Resources

The clerk of the court shall use the resources, property and funds under his/her official control judiciously and solely in accordance with prescribed procedures and appropriate law(s).

Participation in Politics

The clerk of the court shall participate in such activities only during non-working hours or take unpaid leave of absence upon declaring any intent to run for political office.

Draft

SYNOPSIS OF CASE LAW

1. ***DA SILVA v PILLAY NO AND ANOTHER [1997] 2 All SA 217 (D)/1997 (3) SA 760 (D)* – Uncertainty as to identity of party instituting action: -**

Where an action is instituted in a Small Claims Court by an individual partner in respect of a partnership debt and uncertainty exists as to the identity of the party instituting the action, the Commissioner ought to *suo motu* raise the issue of identity where clarification of the position in this regard is fundamental to a just and lawful decision of the case. The failure to raise the issue constitutes a gross irregularity as contemplated in the Small Claims Court Act 61 of 1984, s 46 (c).

Held, that the failure of the commissioner *suo motu* to have raised and decided the issues as to the identity of the owner of the rights sought to be enforced in the proceedings had been an irregularity with regard to the proceedings within the meaning of s 46 (c) of the Act.

2. ***NATIONWIDE CAR RENTALS (PTY) LTD v COMMISSIONER, SMALL CLAIMS COURT, GERMISTON, AND ANOTHER 1998 (3) SA 568 (W)* – Review Proceedings: -**

The Commissioner in a Small Claims Court is required to listen to the relevant evidence, weigh it to determine what is probable and reach a conclusion according to the law.

Section 36 of the Act invests the Commissioner in a Small Claims Court with the jurisdiction to rescind any judgment granted by him or her in the absence of the person against whom that judgment was granted. The Commissioner is empowered to rescind a judgment provided the applicant has showed sufficient cause. The discretion of the Commissioner is exercised, *inter alia*, by the presence or absence of good cause shown. Failure by the Commissioner to properly apply his mind will render the proceedings reviewable.

Held, that there can be no criticism of the Commissioner where he has applied his mind to these matters but nonetheless reached a conclusion which is incorrect either in relation to the facts or the law. No more is required of him than that he should properly apply his mind to the matter,

which ought to result more often than not in the correct conclusion being reached. However, where he fails to properly apply his mind at all to one or more of the issues, he commits a gross irregularity, because then he has failed entirely to perform the function which then was required of him. The proceedings will then be reviewable.

3. *SMIT v SELEKA EN ANDERE 1989 (4) SA 157 (O)* – Adjudication of cases: -

Proceedings – Legislature intending in section 26 and 27 (2) of Small Claims Court to give commissioners a fairly free hand in order to effect speedy and an inexpensive adjudication of cases. However this object should not be so predominant that the quality of the administration of justice is prejudiced.

The court found that the Commissioner had erred by (1) following a procedure which in essence amounted to the joinder of parties without the provisions contained in section 30 of the Act having been brought to the applicant's attention and which joint hearing in the particular circumstances of the case was prejudicial to the applicant; (2) granting judgment in favour of the three plaintiffs respectively for an amount which was clearly arbitrary; (3) committing a mistake of law by hearing the case notwithstanding non-compliance with the provisions of section 30 of the **Basic Conditions of Employment Act 3 of 1983**.

Held, that the Commissioner's aforementioned conduct amounted to an irregularity as intended in s 46 (c) of the **Small Claims Court Act**, that the judgments should be set aside and that the cases be remitted to the Small Claims Court for proper adjudication.

4. *SWART v SHER NO AND ANOTHER 1987 (2) SA 454 (SE)* – Jurisdiction: -

In terms of section 22 of the **Small Claims Court Act 61 of 1984**, a Small Claims Court cannot determine claims beyond its jurisdiction, even if the parties consent thereto. Where a defendant in a claim brought against him in a Small Claims Court has a counterclaim against the plaintiff, and the claim and counterclaim are interrelated and depend upon a determination of the same issues, the small claims court cannot hear the matter if the counterclaim exceeds jurisdiction.

Held, that the Commissioner would be obliged to stay or stop the proceedings in the Small Claims Court to enable the defendant to bring his claim against the plaintiff in a higher court, and the plaintiff would be able to advance his claim in the higher court in the form of a counterclaim. Should the presiding Commissioner fail or refuse to stay or stop proceedings conducted by him or her, it would be subject to review by the High Court in terms of s 46 (a) of the ***Small Claims Court Act***.

5. ***RAMAN v BARLOW MOTOR INVESTMENTS (PTY) LTD t/a NATAL MOTOR INDUSTRIES PROSPECTON, AND OTHERS 1999 (4) SA 606 (D) – Jurisdiction: -***

In terms of section 7 (1) of the ***Small Claims Court Act*** only a natural person may institute an action and a juristic person may become a party to an action only as a defendant. However, section 7 (1) should not be interpreted as precluding a juristic person, having been brought before the court as a defendant, from raising a counterclaim. Section 7 (1) should be interpreted to include within the concept “defendant” a “plaintiff in reconvention” who is a juristic person.

Held, that it does not violate the language of s 7 (1) of the Act in any way to include within the concept of ‘defendant’ a ‘plaintiff in reconvention’ who is a juristic person. Held further that the Small Claims Court Commissioner had jurisdiction to deal with the counterclaim and give the judgment in favour of the defendant notwithstanding that the defendant is a juristic person.

6. ***NDLOVU v NGCOBO, BEKKER AND ANOTHER v JIKA 2003 (1) SA 113 (SCA) - Eviction – Unlawful occupation: -***

“Unlawful occupiers” in terms of the ***Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998*** includes an owner who has mortgaged property but continues to remain in occupation despite his / her right of ownership having been terminated by a sale in execution and a tenant whose lease lawfully terminated but who refuses to vacate the property.

Held, that provided the procedural requirements had been met; the owner was entitled to approach the court on the basis of ownership and the respondent's unlawful occupation. Unless the occupier opposed or disclosed circumstances relevant to the eviction order, the owner, in principle, would be entitled to an order for eviction.

Held, that building structures that did not perform the function of a form of dwelling or shelter for humans did not fall under the Act. Since juristic persons did not have dwellings, their unlawful possession was not protected by the Act

7. *SANTAM VERSEKERINGSMAATSKAPPY BPK v BROWN 1973(2) SA 326(C)* – Action for damages: -

The correct interpretation of section 38 (2) of the ***Magistrates Court Act 32 of 1944*** is that the part of the claim which is not granted must be subtracted from that part of the claim which was waived, and that, if, for example, a plaintiff's damages should be R2 000 and 15% thereof is to be granted, the full R300 must be granted, and that the R1 000 which was waived, must be subtracted from R1 799 which was not recovered. This means that if plaintiff's damage amounts to R2 000, she should recover the full amount of R300.

The appellant, the insurer of a motor vehicle driven by Servern was the defendant in the magistrate's court where respondent as the plaintiff pedestrian has sued it for damages for injuries sustained in a collision at night. The claim was for R2 000 but the summons was reduced to R1 000. The magistrate found that Servern's negligence was partly a cause of the plaintiff's damages and fixed it at 15%. He assessed the damages at "at least R1 000" and granted R150. The appellant appealed against the finding that Servern had been negligent and there was a cross-appeal against the award of only R150.

Held, that the magistrate's finding in regard to negligence should be upheld.

Held, further that the damages amounted to R2 000 and accordingly the plaintiff was entitled to R300.

8. ***DA SILVA v PILLAY NO AND ANOTHER [1997] 2 ALL SA 217 (D)/1997 (3) SA 760 (D): -***

The Applicant had been sued in the Small Claims Court by the Second Respondent who had described himself in the summons as “PM Collins t/a Watermans Business”. Judgment was granted against the Applicant and he sought to have the judgment reviewed on the grounds that: (1) the cause of action was founded on the right of partnership, which was not a natural person and therefore lacked jurisdiction within the meaning of section 46 (a) of the Act.; alternatively, (2) there was a gross irregularity with regard to the proceedings as contemplated in section 46 (c) of the Act.

Held, that the right sought to be enforced was not that of a partnership but the right of the Second Respondent trading as Watermans Business, the first ground of review was dismissed.

Held, because there was an uncertainty, the court *a quo* should have *mero motu* raised the issue as to such identity, that there was gross irregularity with regard to the proceedings within the meaning of section 46 (c) of the Act, and the application was accordingly granted.

9. ***ESTHER CRISH v THE COMMISSIONER SMALL CLAIMS COURT – BUTTERWORTH & OTHERS (774/2005) [2007] ZAEHC 114 (26 July 2007)***

The applicant seeks to impugn the constitutional validity of ss 7(2) and 45 of the ***Small Claims Courts Act***. In the first place the constitutional validity of sec 7(2) is impugned on the sole basis that it denies litigants in the Small Claims Court their constitutional right to legal representation and therefore effectively denying them justice. In the second place the constitutional validity of sec 45 is impugned on the sole basis that it denies a party who is aggrieved by an adverse judgment of the Small Claims Court of the right to take that judgment on appeal. It is therefore contended on behalf of the applicant that the denial of these fundamental rights infringed her rights as enshrined in sections 9 and 35 of the ***Constitution of the Republic of South Africa 108 of 1996***.

Held that the two sections of the ***Small Claims Courts Act*** under consideration do not infringe any of the rights alleged by the applicant but demonstrate a justification of the limitation which satisfies the threshold required in terms of sec 36 of the Constitution.

Draft

SOURCES OF REFERENCE

1. Legislation

- 1.1 Small Claims Court Act, 1984 (Act 61 of 1984)
- 1.2 Rules Regulating Matters in Respect of Small Claims Courts, 1985.

2. Publications

- 2.1. Justice College: *A Guide to the Small Claims Court*, 2008 Edition.
- 2.2. Strauss, SAS: *You in the Small Claims Court* 2 Edition 1990.
- 2.3. Bredenkamp, I M: *The Small Claims Court* (1986): Introduction.
- 2.4. Gough, I: *The Small Claims Court: A Court with a Human Face?* (Unpublished LLM thesis, University of Natal, Durban, 1992).
- 2.5. Jones and Buckle: *Civil Practise of the Magistrates' Courts in South Africa: Volume 1* Eighth Edition.
- 2.6. "Paying a small claims court debt in instalments." DR, September 2012: 34-36 [2012] DEREBUS 19
- 2.7. *Small Claims Courts: Frequently Asked Questions* , Cape Bar (<https://capebar.co.za/cape-bar/small-claims-court/small-claims-courts-faq/>)

3. Brochures: Department of Justice and Constitutional Development

- 3.1. STEP BY STEP GUIDE ON HOW TO INSTITUTE A CLAIM – Small Claims Court.
- 3.2. SMALL CLAIMS COURT – INSTITUTE YOUR OWN CLAIM BROCHURE.

3.3. Small Claims Court FAQ's.

Draft