

DRAFT GUIDELINES FOR COMMISSIONERS OF THE SMALL CLAIMS COURTS

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| Table of Contents | Page |
|--|-------------|
| Historical background | 3 |
| Small Claims Court Terms | 5 |
| Chapter 1: The form and nature of the Small Claims Court | 9 |
| Chapter 2: Jurisprudence | 14 |
| Chapter 3: Commissioners | 22 |
| Chapter 4: Instituting a claim | 24 |
| Chapter 5: Defending a claim | 30 |
| Chapter 6: Counterclaims | 31 |
| Chapter 7: Applications | 33 |
| Chapter 8: Trial | 36 |
| Chapter 9: Evaluation of evidence | 41 |
| Chapter 10: Judgments and orders | 43 |
| Chapter 11: Steps following judgment | 45 |
| Chapter 12: Review | 47 |
| Chapter 13: Miscellaneous | 49 |
| Code of Conduct | 50 |
| Case law synopsis | 51 |
| Sources of reference | 56 |

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.
- 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.

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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

¹ Rule 2(1)

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 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

² Rule 2(1)(c)

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

³ Section 8.

⁴ Sections 9(1)(a) and (1A).

⁵ Section 34(a)-(b).

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.

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

2.5 Sheriffs

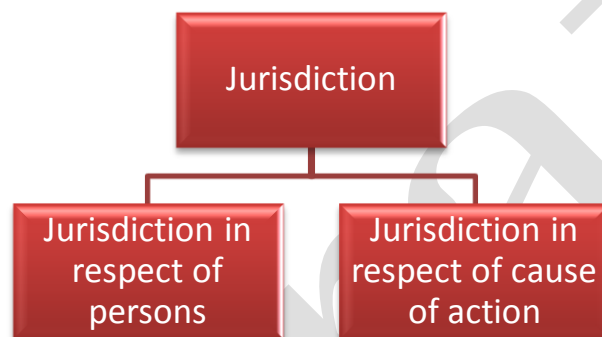
The sheriff is the official responsible for the service and execution of the process of the court referred to in rule 4(1). In terms of section 11(2) of the Act, the sheriff appointed for the magistrate's court of a district, must act as sheriff of the small claims court in that part of the district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

⁶ Rule 5

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.
- 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

⁷ Section 7(1)

⁸ Section 14(1)(d).

⁹ Section 14(1)(e).

¹⁰ Section 14(1)(f).

¹¹ Section 13

- 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

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.

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

¹³ Section 18

¹⁴ Section 19

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 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

¹⁷ Section 22

¹⁸ Section 13

¹⁹ Section 23

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.

²⁰ Section 17

CHAPTER 3: COMMISSIONERS

1. Appointment of Commissioners

- In terms of the Act, the Minister or a magistrate may establish a Small Claims Court. Section 9(1)(a) authorises the Minister or any officer of the Department of Justice and Constitutional Development with the rank of director, or an equivalent or higher rank, delegated thereto in writing by the Minister, to appoint one or more Commissioners for a Small Claims Court.
- Commissioners are drawn from the ranks of attorneys, advocates, retired magistrates and legal academics who are required to draw on their legal training and expertise in conducting Small Claims Court duties.
- 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 or 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.
- Commissioners generally respond when called upon to be appointed. They agree to be appointed for various reasons, including their commitment to serve the community; to develop skills and to gain valuable experience as a Commissioner.

Currently the small claims system in South Africa is dependent on the goodwill and dedication of Commissioners.

Sitting times are scheduled after hours (until late in the evenings) so that Commissioners can fulfill their Small Claims Court duties without interference with their legal practices.

2 Functions and powers of the Commissioner

- The function of the Commissioner is adjudicative or judicial in nature. He or she adjudicates over small civil disputes between a plaintiff and defendant.

- After the hearing, the Commissioner is empowered to grant judgment for either party in respect of the claim, the defense or counterclaim, in so far as the case has been proved.
- The Commissioner's decision is based solely on the evidence presented by the parties during the trial and in accordance with the law. If the Commissioner is of the opinion that the evidence does not enable him or her to give judgment for either party, he or she may grant absolution from the instance.
- The clerk of the court must obtain a court programme of the sitting dates of commissioners from the local 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 he or she is not available, alternative arrangements must be made with the advisory board.
- The Commissioner may also grant such judgment as to costs as may be just.
- The Commissioner performs his/her duties without the assistance of attorneys or advocates, with a considerable amount of discretion and flexibility in the procedure.
- The Commissioner's decision is final and subject to review only.

3. Criteria for Appointment

- It is a requirement that a Commissioner should have legal qualifications and an uninterrupted period of at least five years of practical experience or involvement in the tuition of law.
- This restriction to limit the appointment of Commissioners to those with legal qualifications and experience is in line with approaches followed in other small claims court systems.
- Commissioners are appointed on a voluntary basis and are not remunerated.
- A Commissioner holds office during the Minister's pleasure, who may at any time withdraw the appointment if in his opinion there is sufficient reason for doing so.

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.

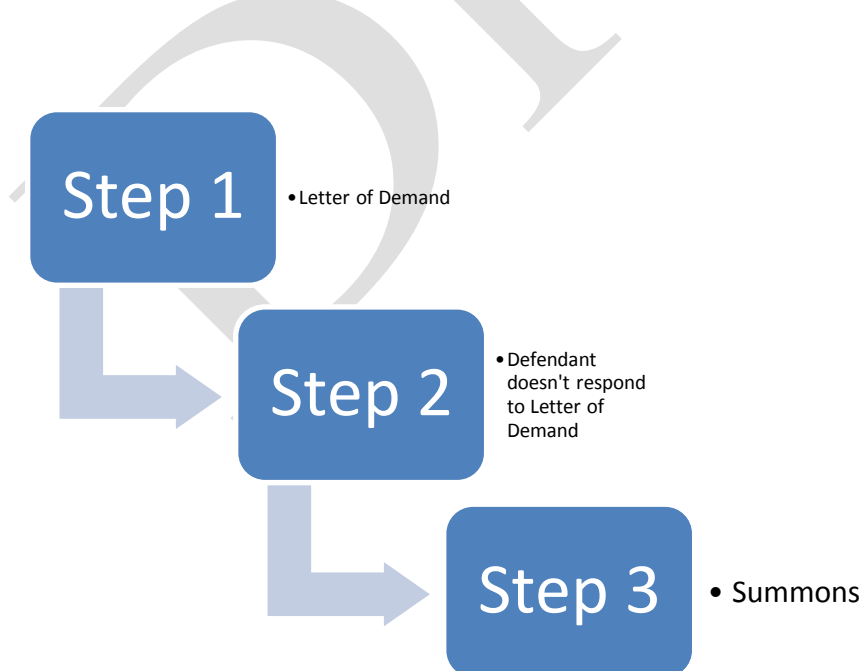
The facts will normally disclose a cause of action if there is a claim that originates:

- ✓ 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 are counted from the date of receipt of the letter of demand.
- If the plaintiff requires assistance with the drafting of the letter of 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.

²¹ Section 29(1)

²² Rule 8

²³ Rule 8(a)

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.

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

Checklist for lodging a written statement of defence:

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

²⁵ Section 29(3)

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.

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

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

counterclaim by a juristic person having been brought before the court as defendant.²⁷

- If the counterclaim exceeds the jurisdiction of 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.

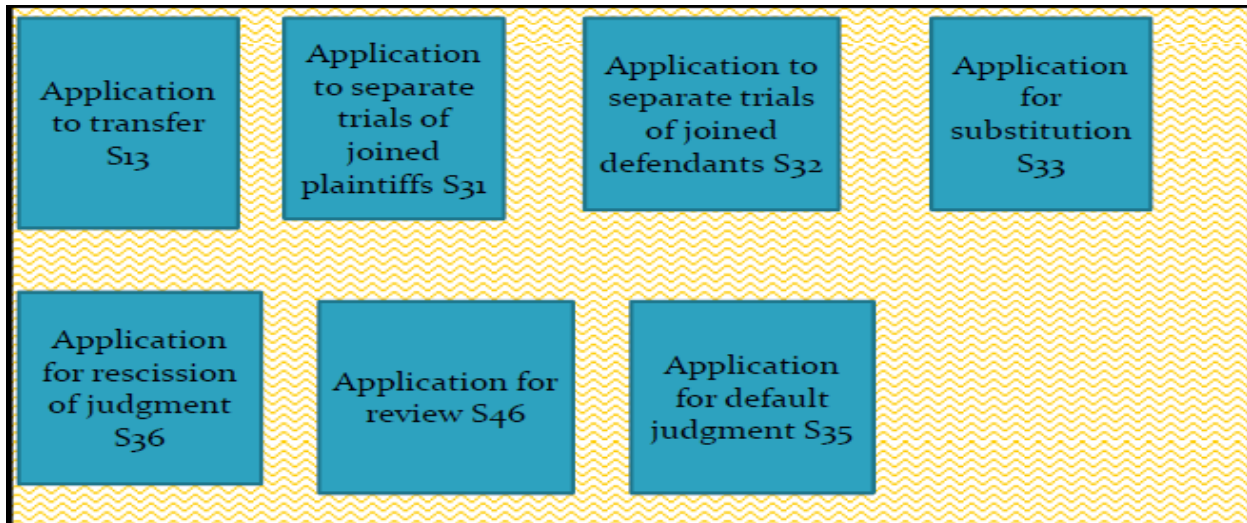
A typical **example** of a counterclaim would be a tenant claiming a deposit back at the end of a lease, and a landlord might say that the tenant has caused damages to the premises in excess of the amount of the deposit.

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.

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

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 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

²⁸ Section 36

- 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

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

²⁹ Section 13

³⁰ Section 32

³¹ Section 33(3)

³² Section 35(1)

³³ Section 35(2)

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.

CHAPTER 8: THE TRIAL

1. Nature of Trial

- Any evidence having reasonable value as proof may be offered subject to the provisions of the Act. However, the Commissioner may refuse to accept irrelevant or repetitious evidence or arguments.
- The Commissioner may decide whether parties can ask each other questions or whether to direct the question to him before he directs it to the other party.
- The proceedings take place in open court.
- However, if it is in the interest of the administration of justice or of good order or of public morals or at the request of the parties to the proceedings for reasons considered sufficient, the Commissioner may order that the proceedings be held behind closed doors or that specified persons not be present at the proceedings.

2. Comparison: The Inquisitorial and Accusatorial System

- The inquisitorial system is a method of adjudication in which the presiding officer endeavors to ascertain the facts by questioning the parties, weighing the evidence and arriving at a decision. In this system the presiding officer actively steers the parties to determine the facts and is not a passive recipient of information.
- In the adversarial system two or more opposing parties gather and present evidence and arguments to a presiding officer. The presiding officer would be unfamiliar with the facts of the case. The role of the presiding officer is essentially to remain impartial, weigh the facts and to

intervene only to ensure that each party presents its case according to the rules.

- On the other hand, the difference in the judicial role-description has profound implications for the way in which the objectives of the inquisitorial system are pursued. The facts must be established in a way that is regarded as fair. Exclusionary rules are thus avoided. It means therefore, that the inquisitorial system has to comply with the fair trial requirements of the Constitution.
- The system of adjudication used to conduct proceedings in the Small Claims Courts is inquisitorial in nature. However, the facts must be established in a way that is regarded as fair. Exclusionary rules are thus avoided.

3. Preparation for Trial

- Upon receipt of the case file the Commissioner must peruse the file with the aim of determining if the contents of the file are in order.
- The letter of demand and summons must disclose the plaintiff's cause of action. The plea by the defendant (if any) must disclose the defendant's defense, whether the defendant admits the claim or whether a counterclaim against the plaintiff is instituted.
- Before the hearing commences, the Commissioner must ensure that the following has been complied with:
 - ✓ That he or she has already perused the file and is familiar with its contents;
 - ✓ That he or she has jurisdiction to hear the matter.
- If the matter is a default judgment, the Commissioner must ensure that there was proper service of the summons in terms of the court rules and that the prescribed time limits have been adhered to.

4. Checklist for Trial

The Commissioner must ensure that the following information appears in the case file:

- If any amount exceeding the monetary jurisdictional has been abandoned, particulars of the said amount must have been stated and the plaintiff must have signed in the space provided;
- Case number;
- Date of issue of summons;
- Full names and address of the plaintiff;
- Signature of the plaintiff appears on the summons together with the date stamp by the clerk of the court;
- District in which the summons is issued;
- District where the proceedings will be held;
- Full names, identity number (if available) and address of the defendant;
- Particulars of the claim (as mentioned in letter of demand);
- The court has both geographical and monetary jurisdiction;
- The plaintiff has placed his or her initials next to any amendments made;

- If the summons has been served on the defendant by the Sheriff, a return of service showing the method of service must be attached. The Sheriff's fee for service must also be reflected on the return of service;
- If the plaintiff served the summons personally, an affidavit must be in the file as proof that that proper service took place;
- The summons must have been served at least ten court days in advance of the trial date;
- The date, time and the place at which the proceedings will take place;
- 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 below 18 years, the person should be assisted by his/her parent or legal guardian;
- The claim is not against the state;
- If the claim is a labour matter, whether it is a matter that the Small Claims Court can hear;
- The claim has not prescribed;
- The return of service has been obtained from the Sheriff, alternatively an affidavit and signature in cases where the summons has been served on the defendant by other means; and
- A copy of the letter of demand together with proof (registered post slip, signature and/or affidavit) that it has been served on the defendant.

5. Adherence to the Duty Roster

The Commissioner must –

- ✓ observe the duty roster arranged by the clerk of the court; and
- ✓ ensure that each file is returned to the clerk of the court after the relevant case is finalised.

6. The Commissioner as a Presiding Officer

- The conduct of the proceedings lies in the hands of the Commissioner. In terms of the Act he or she has a large measure of discretion in conducting the hearing.
- The case file containing witnesses' statements and other materials must be placed at the disposal of the Commissioner.
- The Commissioner's judicial dominance continues during the court proceedings.
- He or she, in seeking the truth, does most of the questioning of the litigants and the witnesses who are familiar with the facts in order to resolve the dispute.
- The litigants determine which witnesses to call but the Commissioner conducts the questioning.
- The litigants may ask questions only with permission of the Commissioner.

7. The Proceedings

7.1 The Commissioner must:

- conduct a hearing as informally as possible while maintaining the dignity and decorum of the court;
- explain to the parties the essence of the proceedings and the manner in which it is conducted;
- ensure that the parties are ready to proceed and are ready to participate in the proceedings; and ensure that a witness is properly identified and that he/she takes oath **or** makes an affirmation before testifying.

7.2 The Commissioner must always keep in mind that -

- He or she assumes an active inquisitorial role and is responsible for supervising the presentation of the evidence necessary to resolve the dispute;
- He or she has an obligation to assist the parties and their witnesses in presenting their respective evidence-in-chief;
- Each party may only question the witnesses with the permission of the Commissioner;
- Although the proceedings are not recorded, she or he must keep notes of all the evidence;
- Although the proceedings are conducted inquisitorially, she or he must maintain a neutral role during the proceedings; and
- The Small Claims Court does not have jurisdiction to hear any matter which exceeds its jurisdiction, even if the parties have consented thereto.

7.3 During the proceedings the Commissioner may –

- examine witnesses;
- investigate the claims of a party to an action and carry out any necessary inspections;
- receive evidence presented by affidavit;
- inform himself or herself in any other manner as to the matters in dispute;
- administer oaths and affirmations to all witnesses; and
- adjourn the trial.

8. The process

- The clerk of the Small Claims Court will call the case and both parties will appear before the Commissioner.
- Normally the Commissioner will scrutinize the documents and decide whether any key facts are in dispute. Based on disputed facts the Commissioner may enquire about the possibility of a settlement.
- If both parties agree to a settlement in the presence of the Commissioner, he or she must

record the settlement and it is made an order of the court. If both parties appear but fail to come to an agreement, the Commissioner must proceed and conduct the hearing.

- The Commissioner must ask the defendant if he or she admits the plaintiff's claim.
- If the defendant admits the claim, the plaintiff is entitled to judgment.
- If the defendant does not admit the claim, the plaintiff must be allowed to present his/her case first.
- All evidence has to be given under oath or affirmation.
- The Commissioner must ask the parties and witnesses which language they prefer. Any one of the eleven official languages may be used in the proceedings, and where necessary a competent interpreter must be made available by the court.
- The Commissioner must allow the interpreter sufficient time to translate before proceeding with the next question.
- The Commissioner proceeds inquisitorially to ascertain the relevant facts and may do so by requesting the plaintiff to describe the facts stated in the summons, the order in which they occurred, and to show details of the amount claimed. The Commissioner must advise the plaintiff as follows:
 - ✓ to describe the facts stated in the summons in the order in which they occurred;
 - ✓ to show details of the amount owed;
 - ✓ to listen carefully when the defendant and his/her witnesses give evidence; and
 - ✓ to advise the Commissioner, at the time determined by the Commissioner, if the defendant or his/her witnesses are omitting anything or misrepresenting facts.
- The Commissioner must likewise advise the defendant of the following:
 - ✓ to present his defense by testifying, presenting physical evidence and calling witnesses;
 - ✓ to listen carefully when the plaintiff or any of his/her witnesses give evidence; and
 - ✓ to advise the Commissioner, at the time determined by the Commissioner, if the plaintiff or his/her witnesses are omitting anything or misrepresenting facts.
- The Commissioner may ask both parties questions to clarify any evidence that they have presented.

9. Witnesses and evidence for the hearing

- Physical evidence such as receipts, written leases or other items to support a claim may be shown to the Commissioner.
- The attendance of witnesses and the presentation of exhibits at the trial are the sole responsibility of each party. Each party should try to get all witnesses to attend the trial.
- It is important that the proper documents or other exhibits are brought to the trial and shown to the Commissioner during the trial. Exhibits are identified and become part of the evidence.

- If for any reason a party must retain the original documents, he or she must bring along certified photocopies thereof.
- If the Commissioner is satisfied as to the genuineness of the copies and there is no objection by the other party, the photocopies may be identified and made part of the evidence of the trial in place of the original documents.
- If evidence is presented by affidavit, the Commissioner may adjourn the proceedings to permit the party presenting the affidavit to call the person who made the affidavit to be examined orally.
- During the proceedings the Commissioner may at any time before judgment grant an application for amendment of the summons or other documents if it will not prejudice the other party.
- Each party may, at the Commissioner's discretion, make a final statement to the Commissioner in summation of his or her position.

CHAPTER 9: EVALUATION OF EVIDENCE

- The Commissioner's duty in a hearing is to adjudicate a dispute between parties who are unable to settle the dispute themselves. He or she gives judgment based on the evidence given by the parties at the time of the trial and in accordance with the applicable law.
- His or her knowledge of the rules of the law of evidence and the law in general are the instruments which he or she applies to arrive at a decision. The Commissioner should evaluate only available evidence.
- He or she needs to weigh such evidence and determine if it supports any of the claims made. The person who has the burden of proof must not only prove that he or she is entitled to judgment, but must prove the amount due.

1. Evidence Assessment by Commissioner

- The evidence at the Commissioner's disposal mainly comprises of direct evidence and circumstantial evidence.
- The process of reasoning which is appropriate will depend on the nature of the evidence before the court. Importantly, the judgment of the Commissioner must be consistent with the evidence presented to court.
- There are considerations which apply specifically to the evaluation of certain parts of the

evidence. In considering whether evidence is reliable, the quality of that evidence must of necessity be evaluated, as must corroborative evidence, if any. The evidence must, of course, be evaluated against the onus in respect of any particular issue or in respect of the case in its entirety.

- The Commissioner must also consider whether the party's evidence is corroborated by other evidence. In doing so, the Commissioner must not lose sight of the fact that the trial is conducted in a forum where the rules of civil procedure and evidence are relaxed and the parties represent themselves.
- The plaintiff has the burden of proof. In the event of a Commissioner not being able to make a finding based on the evidence of the respective parties, he or she may grant absolution from the instance. This means that the plaintiff is unsuccessful but may on a later date (in a new case) bring another claim provided that there is new evidence. Each party has to prove (by providing evidence) the facts needed to support their respective cases, to the satisfaction of the Commissioner.
- The Commissioner must also be vigilant in the assessment and evaluation of evidence to eliminate any possible risk of making an erroneous judgment.
- The plaintiff needs only to prove his or her case on a balance of probabilities.

2. Burden of Proof

- Generally the burden of proof, in the sense of producing evidence, passes from party to party as the case progresses. Ordinarily, the party that makes an allegation should prove it.
- The law provides that a party seeking judgment must prove both liability and amount (quantum) before a judgment is entered in his or her favour.
- The plaintiff must prove through his or her evidence that the defendant has done something that makes him or her liable for damages. Examples of this would be that the defendant has failed to pay rent owed; caused an accident resulting in damage to the plaintiff's property; or ordered and received goods without paying for them.
- The plaintiff must also then prove the actual amount (quantum) of his or her claim - the value of which should not exceed the prescribed limit.

CHAPTER 10: JUDGMENTS AND ORDERS

1. TYPES OF JUDGMENTS

- **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.

³⁴ Section 45

³⁵ Section 45

- ✓ 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 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.

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:

³⁶ Section 39(1)

- 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 11: 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 above may apply.

CHAPTER 12: 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 13: 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. 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).

THE COMMISSIONER'S CODE OF CONDUCT

The role of the Commissioner is central to the South African legal system and the rule of law. Intrinsic to this are the precepts that Commissioners, individually and collectively, must respect and honor their responsibilities as presiding officers and strive to enhance and maintain confidence in the legal system. Commissioners are not detached from their social surroundings. The Commissioner's conduct, morality, logic, common sense, tradition and life experience, which have guided and are still guiding Commissioners in our legal system, continue to guide Commissioners in their adjudication responsibilities.

Commissioners, in executing their role as presiding officers, contribute to the enablement of vulnerable groups to access justice. Their role incorporates a social responsibility aspect in the sense that they are not compensated for their services. Commissioners offer their professional skills and valuable time for free in the interests of justice, democracy and the rule of law.

In executing their functions, Commissioners are guided by their professional codes of conduct as applicable to their respective professions as well as the following general Code of Conduct standards

However, in all matters not expressly discussed in these conduct standards, the Commissioner must act in the spirit of the Code, in accordance with the Constitution and the law and subject to the general ethical norms applicable to in the legal profession.

The Code of Conduct standards require that:

1. A Commissioner shall from the time of notice of acceptance of appointment until termination of the appointment comply with the provisions of the Code of Ethics and not allow family or other relationships to influence his professional conduct and shall:-
 - (a) faithfully maintain his competence in the law and perform his duties without bias or prejudice;
 - (b) accord full right to be heard to those entitled;
 - (c) avoid *ex parte* communications, except as specified in this Code;
 - (d) dispose matters fairly and promptly;
 - (e) make proper arrangements with other Commissioners in the event that he/she would not be able to attend court;
 - (f) discharge administrative responsibilities without bias and with competence;
 - (g) require court officials and personnel to observe standards of conduct and refrain from bias and prejudice;
 - (h) not personally solicit memberships or donations for political, religious, fraternal, educational, civic, or charitable organizations from the parties and witnesses;
 - (i) under no circumstances accept a gift, bequest or favor if the donor is a party, person, or

entity whose interests are or are likely to come before him/her;

- (j) discourage members of his/her family from accepting benefits from parties who are or are likely to come before him/her.

2. A Commissioner shall be expected to recuse him/herself from the proceedings for any of the following reasons:

- (a) If he or she believes his or her recusal would further the interests of justice;
- (b) If he or she believes there is a substantial doubt as to his or her capacity to be impartial;
- (c) A person aware of the facts in dispute might entertain a doubt that he or she would be partial, biased or prejudiced to either of the parties;
- (d) He or she has an arrangement concerning prospective employment or other compensated service or is participating in or within the last two years has participated in discussions regarding prospective employment or has been engaged in such employment or service, and any of the following applies:
 - (i) The arrangement or current employment is, or the prior employment or discussion was with a party to the proceedings;
 - (ii) The Commissioner directs the parties to participate in an alternative dispute resolution process in which the dispute resolution person will be an individual or entity with whom;
 - (iii) the Commissioner has the arrangement is currently employed or serves, has previously been employed or served, or is discussing or has discussed the employment or service.

3. The Commissioner shall not seek to induce a waiver and shall avoid any effort to discover which parties favored or opposed a waiver.

4. The Commissioner shall not make any public comment about pending or impending proceedings before him or her; however, this Rule does not prohibit the following:

- (a) Statements made in the course of the official duties of the Commissioner;
- (b) Explanations for public information about the procedures of the court.

5. A Commissioner shall not:

- (a) disclose confidential or private information obtained in his capacity as a presiding officer unless required by law;
- (b) commend or criticize fellow commissioners for their verdicts/ orders;
- (c) use his/her title in any written communication intended to advance his/her, or another person's pecuniary or personal interests.

6. A Commissioner shall comply with the provisions of this Code until the appointment has been formally terminated.

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, s46 (c).

Held, that the failure of the commissioner *mero 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 favor 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 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 Courts 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 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 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 (5(A) - 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 Magistrate's 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 Severn 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 Severn'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 Severn 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)/1 997 (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 2008

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 Act 108 of 1996.

Held that the 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 section 36 of the Constitution.

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.
- 2.5. 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.

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