



SMALL CLAIMS COURTS: GUIDELINES FOR CLERKS



the doj & cd

Department:
Justice and Constitutional Development
REPUBLIC OF SOUTH AFRICA



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FOREWORD

The establishment of Small Claims Courts is one of the measures through which the Department of Justice and Constitutional Development implements its vision of Access to Justice for All. Small Claims Courts provide a prompt and inexpensive way to resolve minor disputes. Legal procedures are held to a minimum and lawyers may not participate. These courts are therefore meant for the ordinary man or woman in the street who cannot afford civil litigation in the normal courts and can benefit especially the destitute and indigent of our country to be able to access Justice in a very informal, cost effective and user-friendly manner.

It is with great pleasure that the Department is now able to disseminate the Guidelines for the Commissioners of Small Claims Courts and the Guidelines for the Clerks of Small Claims Courts, both of which have been developed with the financial assistance of the Swiss Agency for Development and Cooperation (the SDC) and the assistance and guidance of various other relevant role players. Our sincere appreciation is expressed to them all, but in particular to the SDC, not only for their continuing interest in our administration of justice, but also for their unwavering willingness to contribute to the improvement of our courts and through that, to access to justice and the building of a better life for all in South Africa.

The Commissioners of Small Claims Courts have formerly not received any formal training on Small Claims Courts legislation and practice and though they all have significant years of experience after having been admitted to practice law in our courts, they have largely been left to their own devices in terms of presiding in the Small Claims Courts. They have had to largely depend on their experience as legal practitioners and academics in carrying out their mandate of presiding over these courts. These Guidelines will help fill that gap. It is trusted that newly appointed Commissioners will, in particular, benefit from the Guidelines.

The Department is not blind to the numerous sacrifices that the Commissioners and Advisory Board members have made in order to ensure that Small Claims Courts are functioning. The Department acknowledges and is indeed grateful to all for their tireless work in the Small Claims Courts. This is indeed a great contribution to Access to Justice, more especially for the indigent.

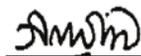
The Clerks of the Small Claims Courts have been receiving some training, but the Guidelines for Clerks will strengthen that training and empower them to perform their functions optimally. The Guidelines will assist the Clerks to deal with matters that are presented before them and also enable them to assist the public in an improved manner regarding matters which are to be heard in these courts.

The purpose of these guidelines is to guide the users thereof, and in particular trainers assisting with training in this regard, on the legislative framework of Small Claims Courts and the practical implications of dealing with matters in a Small Claims Court set-up.

The Department will continue to provide all assistance in its power to ensure that the working environment in Small Claims Courts is safe and conducive for all personnel and officials involved in Small Claims Court to carry out their duties and for the public to exercise their right to a fair and speedy hearing in a court of law.

The Department trusts that these Guidelines will go a long way in improving and strengthening the services in Small Claims Courts and so help improve Access to Justice in general.

PRETORIA**DATE:** 18/05/10

Mr J T Radebe, MP**Minister of Justice and Constitutional Development**

Mr A C Nel, MP**Deputy Minister of Justice and Constitutional Development**

SWISS CONTRIBUTION

Small Claims Courts play a crucial role in facilitating access to justice for all, particularly the poor. Within their jurisdictions, small claims courts allow the settlement of disputes without the need to go through the standard court system.

A poor woman who paid R5 000.00 on the false premise that she would get employment through a job search agency, or an elderly man who could not get back the R1 000.00 he loaned a neighbour in good faith can approach the small claims courts and have their disputes resolved. Such courts are a fast, effective and relatively cost-effective means to resolve disputes and reduce the caseload on other courts. The quicker settlement of cases improves justice and diminishes the sense of impunity among law offenders.

The Government of Switzerland through the Swiss Agency for Development and Cooperation (SDC) is pleased to provide support to the initiative of the Government of South Africa through the Department of Justice and Constitutional Development (DOJ&CD) to re-engineer its Small Claims Courts.

The initiative's aim is to allow free and fair access to justice for every South African citizen and resident in South Africa through the strengthening of Small Claims Courts. A key focus is to empower the most vulnerable people in South Africa to exercise their rights, thereby assisting in poverty reduction.

The Swiss involvement in this project aims at complementing the transformation process of the justice system and the strengthening of democracy in South Africa. The involvement is also in line with Switzerland's support for previous projects initiated by the DOJ&CD, specifically "Transformation of the Sheriff's Profession" and the "Small Claims Court Conference" in 2003 which was part of the process to develop a blueprint for Small Claims Courts.

The present publication is meant as a guideline for commissioners and clerks. It contributes to the re-engineering of the Small Claims Courts and clarify the procedures and augments the skills required by commissioners and professionals to carry out their responsibilities effectively. It also helps to standardise the practice of the Small Claims Courts, thereby enhancing their performance and their ability to provide justice to all.

In this light, I would like to emphasize the commitment of the Government of Switzerland to support the Small Claims Courts in South Africa.

A handwritten signature in blue ink, appearing to read 'R. Baerfuss', is positioned above a horizontal line.

Rudolf Baerfuss

Ambassador of Switzerland to South Africa

ACKNOWLEDGEMENTS

The Department of Justice and Constitutional Development would like to thank and appreciate the various persons and organisations that have assisted in promoting the Small Claims Courts in South Africa. The process of developing the guidelines was highly consultative.

In particular, sincere appreciation is expressed to the following persons and instances:

- The former and the current Deputy Ministers of Justice and Constitutional Development for their vision and guidance on the transformation of Small Claims Courts and in particular towards the development of these practical Guidelines;
- The Swiss Agency for Development and Cooperation, for their kind and continuous support to the Small Claims Courts initiatives and the Project Office, which has made the development of these Guidelines possible;
- The members of the National Steering Committee, who are tasked with the re-engineering of the Small Claims Courts and who have also made a substantial contribution towards the development of the Guidelines through their strategic and policy guidance;
- The Task Team members, the participants of the consultative workshops, the Materials Review Committee, the representatives of Justice College, the Law Societies and the Bar Councils, and all the many other stakeholders which are now not specifically thanked by name, for their inputs, comments and assistance with the development of the Guidelines;
- The Project Office, and staff of the Chief Directorate under whose auspices the Small Claims Court portfolio resorts, for their tireless efforts in ensuring that all the contributions and inputs were put together;

- PEC for their assistance in the layout, design and production of the Guidelines.

With sincere thanks

A handwritten signature in black ink, appearing to read 'Ms N Msomi', is written over a horizontal line.

Ms N Msomi
Director-General
Department of Justice and Constitutional Development

HISTORICAL BACKGROUND

GENERAL

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.

Chapter 13 of the final Report of the Commission envisaged the procedure Small Claims Courts to be similar to 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; and in particular in an atmosphere where the rules of evidence would be relaxed. As a result of the findings, the Small Claims Courts 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:

- Amendment of the Small Claims Court Act 61 of 1984 to take the Constitution of the Republic of South Africa, 1996, and any other legislation that has effect on the operation of the Small Claims Courts, into account.
- Proper training for Commissioners and court officials.
- Development of a manual/guide for training of commissioners and court officials

- Development of an all inclusive public education and communication strategy.
- Introduction of a Student Internship Programme in Small Claims Courts for students who would like to volunteer their services in these courts.
- Decentralisation of Small Claims Courts to rural and peri-urban areas.
- 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 as part of the transformation process of the courts.

SMALL CLAIMS COURT TERMS AND DEFINITIONS

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

Act – Refers to the Small Claims Courts Act 61 of 1984.

Advisory Board – A body consisting of appointed members of the public and officials of the Department.

Affidavit – A written statement made under oath or upon affirmation before a person authorized to administer oaths.

Cause of action – Essential facts of a claim which the plaintiff must prove in order to succeed with the claim.

Clerk – A person appointed to attend to the administration of the Small Claims Court;

Commissioner – A Presiding Officer in a Small Claims Court.

Claim – A written statement made by the plaintiff detailing the claims against the defendant.

Contempt of court – Deliberately disobeying a court order or disrupting court proceedings.

Costs – Charges payable to institute and pursue an action in a Small Claims Court, limited to the sheriff's fee.

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

Damages – Monetary loss suffered by either party.

Debtor – A person who owes money.

Default judgment – A judgment awarded by the court in the absence of one of the parties.

Defendant – The person against whom a claim is made.

Dismissal – When the Commissioner dismisses a claim.

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

Evidence rules – The rules surrounding the presentation of evidence.

Execution – The enforcement of a judgment.

Judgment/Order – A 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.

Letter of Demand – Notice of intention to institute proceedings against the defendant should the claim not be complied with.

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

Plaintiff – The person who files a claim.

Proof of service – A document filed with the court proving that a party has been properly presented with copies of the court papers.

Record – Means to take down information presented in court by the parties in writing, shorthand or electronically.

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

Settlement – An agreement between the parties themselves with or without the involvement of a Commissioner.

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

Subpoena – An official order of the court requiring a person to appear in court to testify.

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 express agreement and requires an assessment by the court; for example damages arising out of a motor vehicle collision.

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

PURPOSE AND APPLICATION OF THE GUIDE

This guide will benefit court personnel and other professionals working with matters involving small claims between parties who seek fast and inexpensive legal redress. It is specifically designed to equip clerks of the court with the basic skills needed to assist members of the public who lodge small civil claims, that do not exceed a specified limit, in terms of the Small Claims Court Act, 1984.

However, the guide is not intended to constitute legal advice or take the place of a legal assistant. Legal assistants appointed for the Small Claims Courts are responsible to give legal advice, alternatively the parties can be referred to approach their respective attorneys for legal advice. Where such assistance is not available the Clerks of the Small Claims Courts should, however, assist applicants to the best of their ability in dealing with their litigation, the completion of documentation and additional tasks required to deal with the Small Claims matters speedily and efficiently.

The primary source of information for the development of the guide is the Small Claims Court Act, 61 of 1984 (as amended) and the **Rules Regulating Matters In Respect Of Small Claims Courts** published under Government Notice R1893 in Government Gazette 9909 of 30 August 1985 (as amended).

Any person requiring more information or assistance with any matter pertaining to the guide, may contact the clerk of the Small Claims Court at any local Magistrate's Court, or may visit the address or contact the telephone numbers below:

The Manager / Secretary
Small Claims Courts Project
329 Pretorius Street, 8th Floor Momentum Centre (West Tower)
Pretoria
Tel No.: 012 357 8236/8258
Fax No.: 086 640 0641/086 500 5549

CHAPTER 1

THE FORM AND NATURE OF SMALL CLAIMS COURTS

1.1 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.

1.2 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.

1.3 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.¹ The information will be recorded in the relevant register kept by the clerk of the court.

1.4 Who may institute a claim?

Only a natural person can institute a claim in the Small Claims Court, but juristic persons may only file counterclaims.²

1.5 The nature of claims in the Small Claims Court

A person can only file an action for monetary compensation. The current monetary jurisdictional limit is R7 000. Therefore, by suing in a Small Claims Court, the plaintiff typically waives any right to claim more than the court can award.

1 See Small Claims Courts Act, s 3(2).

2 **Raman v Barlow Motor Investments (PTY) LTD t/a Natal Motor Industries Prosecution and Others** 1999 (4) SA 606 (D).

1.6 Functionaries / Officials in Small Claims Court

1.6.1 Advisory Boards

(a) Members of the Advisory Board

The Advisory Board consists of members who are appointed by the Minister of Justice and Constitutional Development.³ The Minister also appoints the chairperson and vice-chairperson of the Board.⁴

(b) Functions of the Advisory Board

The Advisory Board is, *inter alia*, responsible for the following:

- (i) To determine, at every centre, the needs of the community for Small Claims Court services, the availability of Commissioners, court and administrative officials, and to identify members for the Advisory Board and make recommendations in this regard to the Minister and to regulate court sessions and recesses;
- (ii) To identify a building to accommodate the court, investigate the accessibility and the suitability of the building and determine whether the facilities are sufficient for the needs of the court;
- (iii) To obtain the names and particulars of suitable persons for the positions of clerk of the Small Claims Court as well as legal assistant(s) and interpreters to be appointed by the magistrate of the district in which the seat of a Small Claims Court is situated.⁵
- (iv) With the assistance of the clerk of the Small Claims Court, to resolve any administrative challenges that may arise in the district;
- (v) To facilitate training of Commissioners and court officials;
- (vi) To meet regularly and submit a copy of the minutes of the meetings to the Director-General: Justice and Constitutional Development who must be notified in writing of any resignation, death or change in respect of the members of the Board.

³ See Rule 2(1).

⁴ See Rule 2(3).

⁵ See Small Claims Courts Act, s 11(1).

1.6.2 Commissioners

Presiding Officers in the Small Claims Court are called Commissioners.⁶ In terms of the Small Claims Act, the Minister, a magistrate or any other person to whom the power is delegated, may appoint a Commissioner for the Small Claims Court.⁷

1.6.2.1 Functions of the Commissioners

Commissioners are authorised to –

- To make a finding regarding a dispute.
- To grant judgment for the plaintiff or the defendant, in so far as either party has proved his/her case.⁸

1.6.3 Appointment of Other Court Officers

Other functionaries/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.

6 See Small Claims Courts Act, s 8.

7 See Small Claims Courts Act, s 9(1)(a) and (1A).

8 See Small Claims Courts Act, Section 34(a)-(b).

CHAPTER 2

JURISDICTION

2.1 General

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 can lead to a 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 which is to be instituted.

2.1.1 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.⁹

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):

- (a) The plaintiff may sue the defendant where the defendant resides, works or carries on business.
- (b) 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.
- (c) The plaintiff may sue a company or a close corporation where it has its

⁹ See Small Claims Courts Act, s 7(1).

registered head office or principal place of business.

- (d) In the case of a syndicate, unincorporated company, club, society or church, at the local office or place of business of such body.
- (e) 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.¹⁰
- (f) The court further has jurisdiction in respect of a defendant who appears and does not object to the court's jurisdiction. In doing so, the defendant actually subjects himself or herself to the jurisdiction of the court, which would otherwise not have had jurisdiction.¹¹
- (g) In actions regarding immovable property (such as a house, municipal 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.¹²
- (h) 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, and in such a case the latter court must, notwithstanding anything to the contrary contained in this Act have jurisdiction to hear that action.¹³
- (i) The court also has jurisdiction on grounds of incidental proceedings. If an action is instituted in a specific court, the court may hear matters related to the case.

10 See Small Claims Courts Act, s 14(1)(d).

11 See Small Claims Courts Act, s 14(1)(e).

12 See Small Claims Courts Act, s 14(1)(f).

13 See Small Claims Courts Act, s 13.

2.1.2 Jurisdiction in respect of causes of action (Sections 15 – 17)

(a) Causes of action

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

(i) **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 R7 000.¹⁴

(ii) **Actions for ejectment**

The Small Claims Court has jurisdiction in actions for ejectment against the occupier of land or premises which is unlawfully occupied but not used for residential purposes and 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 value¹⁵ of that right to the occupier does not exceed the amount of R7 000.

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 business 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

This 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 (PIE Act). The concept "unlawful occupier" in the PIE Act includes only those persons who occupy premises unlawfully for residential purposes and excludes

¹⁴ See Small Claims Courts Act, s 15(a).

¹⁵ For a discussion of 'clear value' - see p 66 and further of Volume 1 of Jones and Buckle Eighth Edition of the *Civil Practice of the Magistrates' Courts in South Africa*.

those who occupy premises or land unlawfully for business purposes.¹⁶ The Small Claims Court has jurisdiction in actions for ejection from premises occupied for business purposes as ejection 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 ejection 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. Put differently, the Small Claims Court may not apply the provisions of the PIE Act.

(iii) **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.¹⁷

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 R7000.

The following are examples of liquid documents:

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

(iv) **Actions based on credit agreements**

The Small Claims Court’s jurisdiction in actions based on or resulting from a credit agreement (hire–purchase contract) as defined in section 1 of the **National Credit Act 34 of 2005** (NCA), is limited to claims where the value of the goods in dispute is not more than the prescribed amount (R7 000). Commissioners are cautioned to take note of the

¹⁶ See **Ndlovu v Ngcobo, Bekker and Another v Jika** 2003 (1) SA 113 SCA.

¹⁷ See **Rich v Lagerwey** 1974 (4) SA 748 (A).

provisions of section 129 and 130 of the NCA.

The value referred to is the market value of the goods at the time of the institution of the claim.

(b) Claims excluded from the jurisdiction of the Small Claims Court

Claims excluded from the jurisdiction of the court are:¹⁸

- Claims exceeding R7 000 in value;
- Claims against the State;
- 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;
- Labour related disputes; and
- Validity of legislation.

(c) Abandonment of portions of the claim

A party, whose claim exceeds the prescribed limit, is allowed in terms of section 18 of the Act, to abandon a part of the claim which exceeds the limit in order to bring the claim within the jurisdiction of the court.

A party must specifically express that he/she abandons that part of the claim in the summons or counter claim;

A party may also in terms of section 19 of the Act deduct an amount that he/she admits is owed to the other party from the claim in order

18 See Small Claims Courts Act, ss 14, 15 and 16.

to bring it within the jurisdiction of the court.

(d) Actions against the State

Small Claims Courts are prohibited from entertaining actions instituted against the State.¹⁹ The term “State” includes the provincial administrations and municipalities (Local Government).

The prohibition against summoning the state also includes all the employees of the state if the proposed action is against them in their official capacity.

Institutions such as universities, ESKOM, TELKOM and research councils do not form part of the state and may be sued in the Small Claims Courts.

Section 2 of the **Interpretation Act** 9 Act 33 of 1957, defines the term “person” to include:

- (a) Any divisional council, municipal council, village management board, or like authority;
- (b) any company incorporated or registered as such under any law; or
- (c) any body of persons corporate or unincorporated.

(e) Cession of rights (Section 22)

A Small Claims Court does not have jurisdiction in respect of any claim or counterclaim based in whole or in part upon a cession or assignment of rights.²⁰ Therefore a person or a company cannot transfer a claim to someone else (e.g. to a debt collector).

¹⁹ See Small Claims Courts Act, s 14(2).

²⁰ See Small Claims Courts Act, s 14(4).

2.2 Limitations in terms of the Act

2.2.1 Parties

As pointed out above, only a natural person may institute an action in the Small Claims Court.²¹ 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.²²

2.2.2 Splitting of claims is not permissible

A claim may not be divided into several smaller claims in order to recover the full amount that exceeds the Small Claims Court jurisdiction.²³

All claims that are based on a single cause of action must be instituted in one action.²⁴

2.2.3 Labour matters

Labour matters are regulated by the **Basic Conditions of Employment Act** 75 of 1997 and the **Labour Relations Act** 66 of 1995, as amended. Such claims are normally not part of the scope of the Small Claims Court. Representatives of the Law Societies have, however, indicated that there may be circumstances where specific claims, although related to labour matters, may be of a different nature and could be heard in the Small Claims Court. This issue will be canvassed further and future amendments to the Guidelines will deal with the issue in more detail. In the meantime, we suggest that Clerks of the Small Claims Court and Commissioners take the Background Note directly hereunder into consideration when dealing with claims of this nature:

21 See Small Claims Courts Act, s 7(1).

22 See Strauss at 9-10.

23 See Small Claims Courts Act, s 20.

24 See **Custom Credit Corp (Pty) Ltd v Shembe** 1972 (3) SA 462 (A) at 472 A.

It is generally accepted that the Small Claims Court does not have jurisdiction in labour matters. However this approach could result in claims for agreed remuneration being excluded. This approach seems to be an unnecessary burden to an employee who has simply not been paid what was agreed. It also seems incorrect in the light of **FEDLIFE ASSURANCE LTD v WOLFAARDT** 2002 (1) SA 49 (SCA)2002 (1) SA p49 which can be distinguished from the *Khumalo v Potgieter* 2001 (3) SA 63 (SCA) judgment. The relevant paragraph of the 2002 case majority judgment reads as follows:

“[27] Whether a particular dispute falls within the terms of s 191 depends upon what is in dispute, and the fact that an unlawful dismissal might also be unfair (at least as a matter of ordinary language) is irrelevant to that enquiry. A dispute falls within the terms of the section only if the ‘fairness’ of the dismissal is the F subject of the employee’s complaint. Where it is not, and the subject in dispute is the lawfulness of the dismissal, then the fact that it might also be, and probably is, unfair, is quite coincidental for that is not what the employee’s complaint is about. **The dispute in the present case is not about the fairness of the termination of the G respondent’s contract but about its unlawfulness and for that reason alone it does not fall within the terms of the section (even assuming that the termination constituted a ‘dismissal’ as defined in chap 8). In those circumstances the respondent’s action is not a ‘matter’ that is required to be adjudicated by the Labour Court as contemplated by s 157(1) and the special plea was correctly set aside. ”**

If claims re “Labour Related Disputes” are totally excluded from the jurisdiction of Small Claims Courts, the impact that this could potentially have on an indigent member of the public that merely wants to claim a small salary due in terms of a contract, is drastic and thus the facts of each case should be carefully scrutinised and where feasible should be considered for action in the Small Claims Courts.

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 Small Claims Court Act to stop the proceedings.

The matters which are however clearly excluded, are those where the fairness of the Labour action is disputed.

2.2.4 Area of jurisdiction

The area of jurisdiction of the court is the area or district for which it was established.

The Small Claims Court Rules state that a claim can be instituted in the area or district –

- (i) where the transaction or occurrence actually took place; or
- (ii) where the obligation or debt was incurred; or
- (iii) where the obligation is to be performed; or
- (iv) where the defendant resides; or
- (v) where the defendant has his or her place of employment at the time of filing the claim or suit.

2.2.5 Monetary jurisdiction

The financial 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.²⁵ The current financial limit determined by the Minister is R7 000.

2.2.6 Representation

No legal representation is allowed in the Small Claims Court except where a juristic person is represented by a legally qualified employee.

25 See Small Claims Courts Act, s 15(1).

2.3 Cumulative Jurisdiction

In terms of section 21 of the Small Claims Court Act, the R7 000 jurisdictional limit does not prevent a plaintiff from instituting 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 try each claim as it would have had, had each claim been the subject of a separate cause of action.

2.4 Incidental Jurisdiction

In terms of section 17 of the Act the following matters do not influence the court's jurisdiction to hear claims:

- 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.

(a) Consent

The Small Claims Court does not have jurisdiction to hear a matter, which exceeds its jurisdiction, even if the parties have consented thereto.²⁶

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

²⁶ See Small Claims Courts Act, s 22.

jurisdiction to hear the transferred action.²⁷

(b) Cases already pending in another court

Section 50 of the Act stipulates that cases that are pending in another court of law (e.g. a Magistrate's Court) at the commencement of the Act cannot be transferred to the Small Claim Court. A pending case must be concluded in that particular court as if the Act had not been passed.

(c) 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.²⁸

27 See Small Claims Courts Act, s 13.

28 See Small Claims Courts Act, s 23(2).

CHAPTER 3

OFFICE OF THE CLERK OF THE COURT

The clerk of the Small Claims Court is the co-ordinator of all administrative functions of the court.

3.1 Duties of the Clerk of the Small Claims Court²⁹

It is the duty of the clerk of the Small Claims Court to –

- interact with various people such as litigants, members of the public, Commissioners, Sheriffs, witnesses involved in court cases, etc;
- process summonses, attend to court cases, record warrants, account for court rolls, submit monthly reports to Court Managers, etc;
- provide information to serve as a liaison between the public and the court;
- maintain a list of Commissioners and a list containing the addresses, telephone numbers and consultation hours of each legal assistant;
- assist prospective plaintiffs with the arrangement of an appointment with the legal assistant and the institution of a claim;
- ascertain that claims brought are within the jurisdiction of the court;
- set trial dates;
- arrange the duty roster for the Commissioners;
- 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;

²⁹ The duties of the clerk of the Small Claims Court are set out in the Small Claims Courts Act and the Rules (See Small Claims Courts Act, s 11 and Rule 3 of the Rules).

- record warrants authorised by the Commissioner and process them in terms of section 41 of the Small Claims Courts Act;
- provide the prospective plaintiffs and defendants with copies of documents of process, if so requested;
- provide the court file to the relevant Commissioner and ensure that it is received back; and
- record cases on the Integrated Case Management System.

3.2 The process prior to the institution of a claim

- (a) 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.
- (b) 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.
- (c) The facts will normally disclose a cause of action if there is a claim that originates:
 - through a contract/agreement;
 - through a delict/unlawful act as a result of which the plaintiff suffered damage;
 - where statutes or other government authorisations confer a claim; or
 - through unjust enrichment – where a person obtains a benefit/money/asset to which s/he is not entitled.

3.3 Steps preceding the institution of a claim

Checklist for the institution of a claim:

Before the clerk of the Small Claims Court can assist a person with the institution of a claim, he/she 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 older than 18 years, 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, e.g. a CCMA related claim.
- The claim amount does not exceed the amount of R 7 000.
- The person wanting to institute a claim is informed that s/he might, prior to the institution of the claim, seek legal advice.
- The summons must detail the claim of the plaintiff against the defendant.
- The plaintiff cannot use the Small Claims Court to sue for possession of property or to evict a tenant ,except in respect of business premises.
- The claim is filed at the court in the magisterial district where the cause of action arose (i.e. where the event took place).
- The claim is filed at the court in the magisterial district in which the defendant lives or carries on business (if there are several defendants, it can be the court in the territorial district in which any one of them lives or carries on business); or the court that is nearest to the place where the defendant lives or carries on business (if there are several defendants, it can be the court nearest to the place where any one of them lives or carries on business).
- The plaintiff has sent a letter of demand to the defendant, in which the latter is given 14 working days to pay the claim. The letter of demand must be in duplicate.
- 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.
- The plaintiff has delivered the letter of demand by hand or by registered

post to the defendant.

- The plaintiff, after a lapse of a period of 14 days, reported in person to the clerk of the Small Claims Court with proof that the letter of demand was delivered to the defendant.

3.4 Filing a claim

3.4.1 Letter of demand

The plaintiff is required to write a letter of demand and deliver the same to the defendant.³⁰ The letter of demand must briefly set out the nature and the amount of the claim, allowing the defendant at least 14 days from the date of receipt to satisfy the plaintiff's claim. The 14 days is counted from the date of receipt of the letter of demand. If the plaintiff requires assistance with the drafting of the letter of demand, the clerk of the Small Claims Court should assist him or her.³¹

(a) Service of the Letter of Demand

- The letter of demand may be delivered personally by the plaintiff to the defendant who must sign a copy of the letter.
- If the defendant refuses to sign a copy of the letter, the plaintiff may post the letter by registered post or make an affidavit regarding delivery.
- The letter of demand may also be served by the Sheriff.

(b) 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 to the defendant after 14 days of receipt of that letter.

³⁰ See Small Claims Courts Act, s 29 (1).

³¹ Annexure H may be used as an example of a letter of demand.

3.4.2 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.

(a) Checklist for issuing of Summons:

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

- ensure that the claim sought does not exceed R7 000;
- 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 set up;
- 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 and return of service;
- 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.

(b) 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. Summonses must be prepared in triplicate. If there is more than one defendant, additional copies must be prepared for each additional defendant.

(c) Essentials for a claim

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

- the claim must be legally valid;
- the claim must be brought against the right person; and
- the details of the claim must be kept simple.

(d) Drawing up of Summons

Summons can only be issued 14 days after the defendant has failed to satisfy the claim lodged against him or her and if there is proof of service of the letter of demand.

The following information should be contained in the summons, which should be in triplicate:

- Case number.
- Date on which the summons is issued.
- Name, surname and address 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 particulars of the claim (as mentioned in the letter of demand).
- If any amount exceeding the amount of R7 000 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, s/he must issue the summons and must inform the plaintiff of the following:

- The summons will either be served on the defendant by the Sheriff who will charge a fee for the service for which the plaintiff will be liable, or the plaintiff can serve the summons personally, in which case an affidavit should be handed to the clerk of the court to the effect that proper service has taken place.
- 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.

(e) 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 after it has been issued but before it is served. The clerk of the court must also initial the amendment.

If the summons has already been served, the plaintiff will have to apply to the court for permission to amend the summons. The Commissioner may allow this, provided that the amendment does not prejudice the defendant.³²

32 See Small Claims Courts Act, s 33(10).

CHAPTER 4

DEFENDANT'S CASE

The summons which is served on the defendant must provide details of the plaintiff and the basis of the plaintiff's claim.

4.1 Response upon service of Summons

Upon receipt of the summons, the defendant may at any time before the hearing, lodge a written statement setting out the nature of the defence and the grounds on which the defence is based with the clerk.³³

The summons informs the defendant of the steps that s/he should follow if deciding to defend the case.

The following steps may be taken by the defendant after receipt of the summons:

4.1.1 The defendant may defend the action

If the defendant wishes to defend the plaintiff's claim, s/he may lodge a plea with the clerk.

The plea 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 plea, the clerk or legal assistant must assist him/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.

4.1.2 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.

³³ See Small Claims Courts Act, s 29(3).

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.

4.1.3 The defendant may institute a counterclaim

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

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

4.2 Lodging a written statement with the clerk

Although the defendant is not obliged to lodge a plea with the clerk, he/she may wish to lodge a written statement setting out the nature of the defence and the grounds on which it is based.

Lodging a written statement is crucial if the defendant has a counterclaim against the plaintiff.

Checklist for lodging a plea

- The case number;
- Inclusion of personal particulars of both the plaintiff and the defendant;
- Full personal details of the defendant as they appear in the original summons;
- The plaintiff's address; and
- Supporting documents.

CHAPTER 5

COUNTERCLAIMS

5.1 General

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. It may involve the same dispute as the plaintiff's claim or a completely different dispute – (see Eckard's Principles of Civil Procedure in Magistrate Courts 5th Ed. See also Jones & Buckle Rule 20-2).

A counterclaim must be filed by the defendant by no later than a day before the trial date. The maximum amount that may be claimed in a counterclaim is R7 000.

- In **Raman v Barlow Motor Investments (Pty) Ltd T/A Natal Motor Industries Prospecton and Others**,³⁴ it was held that the Small Claims Court has jurisdiction to entertain a counterclaim by a juristic person that does not exceed the monetary jurisdiction of the court. 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.
- The defendant's counterclaim may not exceed the jurisdiction of the Small Claims Court as far as monetary value or the type of claim is concerned – (see Jones and Buckle Rules 20-5).
- Where both the plaintiff's claim and the counterclaim that is beyond the court's jurisdiction are for payment of money and the Commissioner is satisfied that the defendant is likely to succeed with his or her counterclaim, the Commissioner should stay the proceedings and give the defendant an opportunity to bring the claim in a competent court. If the counterclaim is unlikely to succeed, the counterclaim will be ignored – (see Jones & Buckle at 201).
- If the defendant's counterclaim exceeds the jurisdiction of the Small Claims Court and the counterclaim and the plaintiff's case depend

³⁴ 1999 (4) SA 606 (D).

on determination of the same issues, the Commissioner is obliged to stay the proceedings to enable the defendant to bring his/her claim against the plaintiff in a court having jurisdiction. The proceedings will be stayed only if the defendant files a written statement in terms of section 29(3) and satisfies the Commissioner that (a) his or her counterclaim exceeds the jurisdiction of the court (R7 000) and (b) that the counterclaim involves same issues relevant to the plaintiff's claim. A failure to stay the proceedings is reviewable in terms of section 46(a) of the Act – (see **Swart v Sher NO And Another** 1987(2) SA 454(SE)).

- Where the proceedings are stayed in order to give the defendant an opportunity to institute his or her claim in a competent court, the plaintiff may file a counterclaim in that court.
- The commissioner is not obliged to stay the proceedings where the counterclaim exceeding the jurisdiction of the court involves issues completely different from those that are relevant to plaintiff's claim and/or where one claim sounds in money and the other does not. An example is where the plaintiff claims payment of money and the defendant claims for ejection. In such a case the Commissioner may use his discretion whether or not to stay the proceedings according to the circumstances of the case – (see *Jones & Buckle* at 201).
- A summons issued in the High Court or a Magistrate's Court does not amount to a counterclaim in a Small Claims Court. Thus the Commissioner may not stay proceedings simply because summons was issued in a higher court. The defendant must file a counterclaim in the Small Claims Court – (**Esterhuizen v Holmes** 1947(2) SA 789(T) at 797).
- Where proceedings are stayed because the defendant filed a counterclaim exceeding the jurisdiction of the Small Claims Court and the defendant fails to institute proceedings in a competent court within the time stipulated by the Commissioner or where the matter is dismissed, stayed, withdrawn, abandoned or absolution is granted in a higher court, a plaintiff who has not instituted a counterclaim in a higher court may, on notice to the defendant, place the matter on the roll for the hearing of his or her claim. In such a case the counterclaim

will be ignored.³⁵

5.2 Checklist for counterclaim

A counterclaim must contain the following:

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

³⁵ The Small Claims Courts Act has no provisions similar to section 47. It is submitted that these provisions are implied or ancillary powers emanating from various empowering provisions of the Small Claims Courts Act namely sections 15(f), 22, 26(1) and 29(3). See Jones & Buckle at 34 for a discussion of the principle.

CHAPTER 6

APPLICATIONS

Neither the Act nor the Rules prescribe the form in which an application should be brought. Oral and written applications are permissible. It is, however, recommended that the application is submitted in writing. The application should be accompanied by the necessary founding affidavit setting out the grounds for the application.

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.

6.1 Application to transfer a matter from one court to another

Section 13 of the Act allows a claim to be transferred from one court to another, with the consent of all the parties, or upon the application of one of the parties.

If the application is granted the latter court will, notwithstanding anything to the contrary in the Act, have jurisdiction to hear that action.

6.2 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 be held, and the court may in its discretion make such order as it may deem just and expedient.

6.3 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.³⁶

³⁶ See Small Claims Courts Act, s 32.

6.4 Application to substitute the correct name of any person or place before or after judgment

In terms of section 33(3) of the Act 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.

6.5 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 –³⁷

- if the judgment was granted by the court in the absence of the person against whom that judgment was granted;
- if the judgment was void 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 an application, provided the application is made not later than one year after the applicant first had knowledge of any errors.

37 See Small Claims Courts Act, s 36

CHAPTER 7

PREPARATION FOR TRIAL

The clerk has dual responsibility in the preparation for the hearing, i.e. advising the parties with regard to preparation of their cases and also ensuring that the hearing takes place on the trial date.

The clerk is required to ensure that the Commissioner has received the court file at least ten days before the hearing date.

The court file must contain the following information:

- Case number;
- Date on which the summons was issued;
- Name, surname and address of the plaintiff;
- Signature of the plaintiff on the summons and the claim form;
- District in which the summons was issued;
- District where the proceedings will be held;
- Full name, surname, identity number (if available) and address of the defendant;
- Amount for which claim is instituted. If any amount exceeding the amount of R7 000 has been abandoned, particulars of that amount must have been stated and the plaintiff must have signed in the space provided;
- Copy of the letter of demand together with proof (registered post slip, signature and/or affidavit) that it has been served on the defendant;
- The Sheriff's fee for service for which the plaintiff paid;
- An affidavit if the plaintiff served the summons personally as proof that proper service took place;
- Proof that the summons have been served at least ten days in advance of the hearing date; and
- Availability of the Commissioner on the date of the hearing.

CHAPTER 8

JUDGMENTS AND ORDERS

8.1 Types of Judgments

(a) 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.³⁸ The defendant has ten days to satisfy the plaintiff's claim and costs as ordered by the Commissioner.

(b) 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.³⁹

(c) 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.

(d) Default Judgment

If the defendant fails to appear at the hearing, the court may, upon application by the plaintiff, grant default judgment against the defendant. Before a default judgment is awarded, the court may require the plaintiff to give testimony from the witness stand, in order to prove the following:

- That the defendant was timeously served with a summons; and
- that the plaintiff has a valid claim and is entitled to recover same from the defendant.

The defaulting defendant has ten court days to pay the claim after the defendant has been informed of the default judgment.

(e) Judgment in instances where the plaintiff is absent

³⁸ See Small Claims Courts Act, s 45.

³⁹ See Small Claims Courts Act, s 45.

Where the plaintiff fails to appear in court, the Commissioner may remove the matter from the roll, or may, on application by the defendant, dismiss the plaintiff's claim. The plaintiff may re-institute the action or apply for a rescission.

8.2 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. Such money must be paid by the judgment debtor directly to the judgment creditor.

(a) Cost Orders

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

(b) 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.

CHAPTER 9

STEPS FOLLOWING JUDGMENT

9.1 Enquiry into financial position of the judgment debtor

- (a) When the Commissioner grants judgment for the payment of a sum of money, he/she 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.
- (b) The inquiry must be conducted *in camera* or in chambers and the following must be considered:⁴⁰
- the date of the judgment or order;
 - the amount thereof;
 - the balance of the capital; and
 - the Sheriff's costs.
- (c) In the enquiry the Commissioner determines the judgment debtor's ability to satisfy the judgment debt and costs. In determining this, the Commissioner would need to consider the following details:
- the judgment debtor's full names,
 - residential and business address;
 - marital status;
 - the number of dependants and their ages;
 - assets and liabilities;
 - income and expenses; and
 - dates of the proposed instalments.

40 See Small Claims Courts Act, s 39(1).

9.2 Enforcing the judgment

- (a) 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.
- (b) The judgment creditor would then be advised to obtain a warrant of execution against moveable property of the judgment debtor.
- (c) The clerk must assist the judgment creditor with the execution process.
- (d) The judgment creditor must submit the warrant of execution to the Sheriff who will 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.

9.3 Process for execution of judgment

- (a) Commissioners are urged to advise the plaintiff of the costs involved in executing a writ of execution.
- (b) The warrant is addressed to the Sheriff in whose area the execution is to be enforced.
- (c) The warrant is for the surrender of movable property or for ejection of the judgment debtor from the property.
- (d) Such process can only be withdrawn or suspended if the sheriff receives a notice from the judgment creditor.
- (e) Any alterations in the warrant for execution must be initialed by the clerk before it is issued.
- (f) The clerk must ensure that the correct judgment debtor is named in the warrant for execution, otherwise the warrant becomes invalid.
- (g) The clerk will only reissue the warrant if requested to do so by the judgment creditor.

9.4 Where judgment is granted in defendant's favour

If judgment is granted in the defendant's favour, he/she is absolved from paying the claimed amount to the plaintiff. If the defendant succeeds with his/her counterclaim, s/he may pursue the matter to enforce the judgment. In that case the processes to enforce and execute judgment as outlined in (9.2) and (9.3) above may apply.

CHAPTER 10

FURTHER PROCEEDINGS

A decision or an order of the Commissioner is final.⁴¹ However, the Act recognises that there may be situations in which the proceedings need to be reviewed by a higher court, with a view to preventing a miscarriage of justice.

- (a) Checklist for rescission and variation of judgments proceedings**
- The Commissioner may, upon good cause shown, rescind or vary a default judgment on such terms as s/he deems fit. The Commissioner must be satisfied that there is good reason to do so.
 - If a default judgment was given against a defendant, s/he may within six weeks after the judgment or after obtaining knowledge of the judgment, apply for a rescission or variation thereof.
 - The Commissioner may vary or rescind the judgment if it was obtained by fraud or as a result of a mistake common to the parties.
- (b) Contempt of court proceedings**
- Where a person wilfully insults, interrupts or otherwise misbehaves at a hearing, that person may be sentenced summarily by the Commissioner.
 - The sentence that may be imposed is a fine not exceeding R500 or a period of imprisonment not exceeding six months or imprisonment without the option of a fine.
 - The Commissioner is obliged to transmit details of the sentence to the Registrar of the High Court for consideration and review by a Judge in chambers.

41 See Small Claims Courts Act, s 45.

CHAPTER 11

APPEAL AND REVIEW

A judgment of the Small Claims Court cannot be appealed against.⁴² However, the Commissioner's decision may be taken on review to the High Court on the following grounds:⁴³

- Absence of jurisdiction;
- Interest in the cause, bias, malice or corruption (as provided for in the **Combating of Corrupt Activities Act**, 2004) on the part of the Commissioner; and
- Gross irregularity with regards to the proceedings.

A case is taken on review by way of a notice of motion and a founding affidavit must, in terms of Rule 53(1) of the High Court Rules, be served on all parties.

Steps to be taken upon receipt of a notice of review

- (a) The particulars of the case must be entered in the review register.
- (b) The application for review together with all supporting affidavits and documents must immediately be faxed to the Director: Law Enforcement on 012-315 1105. 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.
- (c) 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;

⁴² See Small Claims Courts Act, s 45.

⁴³ See Small Claims Courts Act, s 46.

- (iii) the relevant State Attorney in whose area the seat of the court is; and
 - (iv) the Director-General: Justice and Constitutional Development.
- (d) 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.
- (e) 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.
- (f) 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.
- (g) When the certified copy of the court file is received from the registrar, the Commissioner must be informed of the decision. The decision must also be entered in the review register.

CHAPTER 12

MISCELLANEOUS

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

The State may also not be held liable to compensate a party for any damage (see section 11(3) of the Act). A Commissioner is similarly indemnified against any action that may be brought against him/her whilst carrying out his/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).

CODE OF ETHICS FOR CLERKS OF THE SMALL CLAIMS COURT

PART 1

Purpose

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

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

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

PART 2

Execution of Duties

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

Accountability

The clerk of the Small Claims Court must:

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

Impropriety

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

Fairness

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

Honesty and Truthfulness

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

Involvement in Actions before the Court

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

Non-discrimination and Harassment

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

Privilege

The clerk of the court shall not –

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

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

Gifts

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

Independence

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

Attempts at Influence

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

Proper Records Maintenance

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

Confidentiality

The clerk of the court shall maintain legally required confidentialities of the office, by not disclosing information, whether or not confidential, to any

unauthorized person for any purpose, and shall properly provide confidential information that is available to specific individuals authorised to receive such by reason of statute, court rule or administrative order.

Use of Public Resources

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

Participation in Politics

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

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 *mero motu* raise the issue of identity where clarification of the position in this regard is fundamental to a just and lawful decision of the case. The failure to raise the issue constitutes a gross irregularity as contemplated in the Small Claims Court Act 61 of 1984, s 46 (c).

Held, that the failure of the commissioner *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 proviso to section 30 of the Act having been brought to the applicant's attention and which joint hearing in the particular circumstances of the case was prejudicial to the applicant; (2) granting judgment in favour of the three plaintiffs respectively for an amount which was clearly arbitrary; (3) committing a mistake of law by hearing the case notwithstanding non-compliance with the provisions of section 30 of the **Basic Conditions of Employment Act 3** of 1983.

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

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

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

upon a determination of the same issues, the small claims court cannot hear the matter if the counterclaim exceeds jurisdiction.

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

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

In terms of section 7 (1) of the Small Claims Court Act 61 of 1984, 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 is not violating the language of s 7 (1) of the Act in any way to include within the concept of 'defendant' a 'plaintiff in reconvention' who is a juristic person. *Held* further that the Small Claims Court Commissioner had jurisdiction to deal with the counterclaim and give the judgment in favour of the defendant notwithstanding that the defendant is a juristic person.

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

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

refuses to vacate the property.

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

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

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

The correct interpretation of section 38 (2) of 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)/1997 (3) SA 760 (D)

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

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

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

9. ESTHER CRISH v THE COMMISSIONER SMALL CLAIMS COURT – BUTTERWORTH & OTHERS 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 ss 9 and 35 of the Constitution of the Republic of South Africa Act, 1996.

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

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- 2.2 Strauss, SAS: *You in the Small Claims Court* 2 Edition 1990
- 2.3 Bredenkamp, I M: *The Small Claims Court* (1986): Introduction
- 2.4 Gough, I: *The Small Claims Court: A Court with a Human Face?* (Unpublished LLM thesis, University of Natal, Durban, 1992)
- 2.5 Jones and Buckle: *Civil Practise of the Magistrates' Courts in South Africa: Volume 1* Eighth Edition

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

4. Decided cases

- 4.1 *Ndlovu v Ngcobo, Bekker and Another v Jika* 2003 (1) SA 113 SCA

- 4.2. Raman v Barlow Motor Investments (Pty) Ltd T/A Natal Motor Industries Prospecton and Others 1999 (4) SA 606 (D)
- 4.3. Custom Credit Corp (Pty) Ltd v Shembe 1972 (3) SA 462 (A) at 472 A)
- 4.4. S v Van Staden en `n Ander 1973 (1) SA 70 (SWA)
- 4.5. S v Mamabolo (ETV and others intervening) 2001 (3) SA 9 (CC)
- 4.6. Lewis v S (610/06) [2007] ZASCA 3; [2007] SCA 3 (RSA) (2 March 2007)
- 4.7. Custom Credit Corp (Pty) Ltd v Shembe 1972 (3) SA 462 (A) at 472 A)
- 4.8. Santam Versekeringsmaatskappy Bpk v Brown 1973(2) SA 326(K) at 329B_