

GUIDELINES FOR COMMISSIONERS AND CLERKS OF **THE SMALL CLAIMS COURTS**



ACCESS TO JUSTICE FOR ALL

ISSUED 2020



the doj & cd

Department:
Justice and Constitutional Development
REPUBLIC OF SOUTH AFRICA

TABLE OF CONTENTS	PAGE
Foreword by the Deputy Minister of Justice and Constitutional Development, Mr John Jeffery, MP	3
Purpose and application of the Guide	4
Historical background	5
Small Claims Court Terms and Definitions	7
 Chapter 1: The form and nature of the Small Claims Court	10
 Chapter 2: Jurisprudence	14
 Chapter 3: Commissioners	25
 Chapter 4: Duties of the clerk of the court	27
 Chapter 5: Instituting a claim	31
 Chapter 6: Defending a claim	36
 Chapter 7: Counterclaims	37
 Chapter 8: Applications	38
 Chapter 9: Trial	42
 Chapter 10: Evaluation of evidence	47
 Chapter 11: Judgments and orders	49
 Chapter 12: Steps following judgment	52
 Chapter 13: Review	54
 Chapter 14: Miscellaneous	56
 Synopsis of case law	57
 Changes in rate of interest and applicable case law	60
 Sources of reference	64
 Pro-forma orders	65

FOREWORD BY THE DEPUTY MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT, MR JOHN JEFFERY, MP



Small Claims Courts are a vital part of improving access to justice and they have truly been a success story of our Department.

In a little over a decade, we've managed to increase the number of Small Claims Courts from 152 in 2007 to 414 Small Claims Courts nationwide as well as 49 additional places of sitting as at March 2019.

This is no small achievement - given that, in the past, most of these courts were in white or urban areas and today we have at least one functioning Small Claims Court in every magisterial district across the country - many in traditionally Black and/or rural areas and thereby increasing access to many people who were previously excluded. We have also established new Advisory Boards and revived inactive ones.

Of course, now that we have succeeded in attaining 100% rollout of Small Claims Courts across the country, it is imperative that we look at ways in which we can ensure that these courts work better.

It means looking not only at operational matters such as security, hours of sitting or the capturing of statistics, but at the Codified Instructions, at the Guidelines to assist Commissioners and Clerks, as well as amending the Rules where necessary and updating the Small Claims Courts Act, 61 of 1984, which is a piece of legislation which pre-dates the Constitution.

The Guidelines for Commissioners and Clerks of Small Claims Courts were drafted and finalized in 2010. A few years later it became apparent that there was a need to review the Guidelines to bring them on par with the legislative and pragmatic realities within these courts.

A Steering Committee was established and the Department started the process of drafting new Guidelines in 2016. The Guidelines were circulated for two rounds of comment and we received various comments from legal practitioners, magistrates, Commissioners, members of Advisory Boards and from bodies such as the Law Society of South Africa.

These comments were all considered and, more importantly, where the comments offered differing views on particular issues, additional legal opinions were obtained to assist in clarifying issues.

Small Claims Courts are a powerful mechanism to provide access to justice, especially for the poor and we are confident that these Guidelines will assist and strengthen our Small Claims Courts.

John Jeffery, MP

PURPOSE AND APPLICATION OF THE GUIDELINES

1. This guide will benefit Commissioners and Clerks of the Small Claims Courts, and other professionals working with matters involving small civil claims between parties who seek fast and inexpensive legal redress. It is specifically designed to equip Commissioners and Clerks with the basic skills needed to deal with and adjudicate over certain small civil claims in terms of the Small Claims Courts Act of 1984.
2. The guide is there to **provide guidance and is not intended to constitute legal advice**, nor can it provide for each and every type of case or matter that comes before a Small Claims Court.
3. The primary source of information for the development of the guide is the Small Claims Courts Act, 1984 (as amended), and the Rules Regulating Matters In Respect Of Small Claims Courts (as amended).
4. It must be emphasized that these Guidelines must be read with the Codified Instructions¹ and any Circulars, issued by the Department of Justice and Constitutional Development, from time to time.
5. Any person who requires more information or assistance with any matter pertaining to the institution of a small civil claim in the Small Claims Courts, may contact the clerk of the Small Claims Court at any local Magistrate's Court, or may visit <http://www.justice.gov.za/scc/scc.htm>.

¹ The Codified Instructions are available on the DOJCD website: www.justice.gov.za

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 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 an 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 Courts Act, 1984 to align it with the Constitution of the Republic of South Africa, 1996, and any other legislation that has effect on the operation of the Small Claims Courts. (Progress: This is receiving attention and is currently work in progress.)
- Proper training for Commissioners and court officials. (Progress: This is receiving continuous attention.)
- The development of a manual/guide for the training of Commissioners and court officials. (Progress: Guidelines for Commissioners and Clerks of the Small Claims Courts were developed and this document is the reviewed and updated version.)
- The development of an all-inclusive public education and communication strategy. (Progress: Continuous communication is dealt with in line with the DOJ&CD communication strategies that were developed.)
- The decentralisation of Small Claims Courts to rural and peri-urban areas. (Progress: A Policy was adopted to focus on the rural and peri-urban areas whenever new or additional places of sitting of Small Claims Courts were considered. As a result, there is now a total of 415 Small Claims Courts, throughout the country, with at least one Small Claims Court in each of the magisterial districts.)
- The appointment of a National Steering Committee to co-ordinate, manage and facilitate the re-engineering of the Courts. (Progress: A National Steering Committee was established, under the Chairpersonship of the Deputy Minister of Justice and Constitutional Development, which dealt with the guiding and monitoring of the activities mentioned above, as part of the financial and technical assistance provided by the Swiss Agency for Development and Co-operation.)

The National Steering Committee focused in particular on training and it is against this background that Guidelines for Commissioners and Clerks of the Small Claims Courts were developed.

To assist more persons, the monetary jurisdiction of the Small Claims Courts were increased from R15 000.00 to R20 000.00 with effect from 1 April 2019.

This increase in the monetary jurisdiction follows previous increases over the years:

20/09/1985 (The first seven Small Claims Courts in the country were proclaimed on this date)	R1 000.00
15/09/1995	R3 000.00
1/04/2004	R7 000.00
1/11/2010	R12 000.00
1/04/2014	R15 000.00

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	This relates to the situation 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.
Absolution from the instance	This relates to the situation where if either the plaintiff or the defendant fails to prove his/her case, the Commissioner may grant a judgment of absolution from the instance.
Act	The Small Claims Courts Act, 1984 (Act 61 of 1984).
Advisory Board	A body, consisting of appointed members of the public, legal representatives, officials of the Department and magistrates, established, for a magisterial district or area, 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	Means the redress, such as the amount of compensation or damages, which the plaintiff is seeking from the defendant.
Clerk	Means a clerk of the court appointed in terms of 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.
Contempt of court	When a person willfully insults a Commissioner during the session of his/her court, or a clerk or messenger or other officer present at that session, or willfully interrupts the proceedings of a court or otherwise misbehaves himself/herself in the place where the session of a court is held.
Counterclaim	A claim the defendant may have 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.
Deliver	Means to file documentation with the clerk of the court and serve a copy on the opposite party and delivery and delivered and delivering have a corresponding meaning (see also below the definition of Service).
Ejectment/Eviction	The legal process of removing someone from immovable property.
Execution	The enforcement of a judgment.
Incidental jurisdiction	<p>In terms of section 17 of the Act the following indirect matters do not influence the court's jurisdiction to hear actions:</p> <ul style="list-style-type: none"> (a) If a claim is instituted for the balance of an account which falls within the court's jurisdiction² (i.e. less than R20 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 R20 000). The amount claimed must, however, be R20 000 or less. (b) Where the claim does not exceed the R20 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 area	The area of jurisdiction of a court shall be the area or district for which it was established.
Jurisdictional limit	The maximum amount that can be awarded by a Small Claims Court in respect of a claim (currently R20 000). ²

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 institutes 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 the sheriff or an affidavit by a plaintiff.
Record	Means to take down information presented in court by the parties in writing or electronically, but such recording is mainly limited to the writing of appearances and the judgement/order of the court by the Commissioner and does not entail a word-by-word account of the proceedings. (The other documents and information will be recorded in the relevant register kept by the clerk of the court.)
Service	Presenting a document to another person in accordance with the rules of the court by the sheriff or a party and explaining to the defendant the urgency thereof.
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

- 1.1 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 Small Claims Courts Act is based on certain provisions of the Magistrate's Courts Act and the provisions of the latter can be used as a *guide* – however, there are important differences.
- 1.3 In a Small Claims Court the Commissioner is obliged to proceed **inquisitorially** and a Commissioner is not bound by the ordinary rules of evidence.
- 1.4 *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.
- 1.5 *The Small Claims Court is 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.
- 1.6 *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.³
- 1.7 *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 Correctional Services. Currently the limit is R20 000.

2. ROLE-PLAYERS IN THE SMALL CLAIMS COURTS

2.1 Advisory Boards

- 2.1.1 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. The Advisory Boards consist of members who are experts nominated from the local community and who are appointed by the Minister.⁴ The Minister also appoints the chairperson and vice-chairperson of the said board. If the chairperson and vice-chairperson are not available, a chairperson is to be appointed from the members present.⁵ The inclusion of lay persons from the community is to be encouraged as they make valuable inputs regarding the concerns of the public at large.

3 In *Raman v Barlow Motor Investments (Pty) Ltd t/a Natal Motor Industries Prospecton and Others 1999 (4) SA 606 (D)* it was held that the Small Claims Court does have jurisdiction to entertain a counterclaim by a juristic person having been brought before the court as defendant.

4 Rule 2(1).

5 Rule 2(1)(c).

- 2.1.2 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 (which will mainly entail the appointment of new persons to the Advisory Board and new or additional Commissioners.)
- 2.1.3 The Advisory Board may advise the Minister on a variety of matters such as the appointment of suitable persons as Commissioners; the recruitment and utilisation of persons as Commissioners, clerks, interpreters and such other persons as may be necessary; suitable court and office accommodation; the times for the holding of court; and any other matter which may be necessary for the proper functioning of the court.

2.2 Commissioners

- 2.2.1 Presiding Officers in the Small Claims Court are called Commissioners.⁶ The Minister or the Deputy Minister appoints a Commissioner for the Small Claims Court.⁷ A magistrate can also be appointed as a Commissioner. The qualifications for appointment as Commissioner are set out in section 9(1) and (2) of the Act. An officer in the employ of a national or provincial department of the State shall not be appointed as a Commissioner. Any Commissioner appointed in respect of a specific Small Claims Court shall be deemed to be appointed for any such court established in that specific province.
- 2.2.2 If a Commissioner is unable due to his/her 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.
- 2.2.3 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.

2.3 Functions of the Commissioners

- 2.3.1 Commissioners are authorised to make a finding regarding a dispute.
- 2.3.2 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.⁸
- 2.3.3 Commissioners can hold a financial inquiry relating to the debtor's ability to pay in instalments or otherwise.

⁶ Section 8.

⁷ Sections 9(1)(a) and (1A).

⁸ Section 34(a)-(b).

2.4 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 with 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);
- 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 Magistrate's Court for execution purposes;
- Provide the plaintiffs and defendants with copies of documents of process, if so requested;
- Provide the court file to the Commissioner and ensure that it is received back.
- Assist with the review of judgments/ orders of the court. Rule 53(1) of the Uniform Rules of Court stipulates that the applicant is to deliver (preferably by the sheriff) a copy of the Notice of Motion of the Review proceedings on all parties affected thereby, including the presiding Commissioner and clerk of the Small Claims Court. The clerk of the Small Claims Court must immediately, upon receipt of a Notice of Motion for Review of the judgment/order, enter the particulars thereof in the Review Register for Small Claims Court Reviews and inform the National Office of the Department of the Notice of Motion and supply it with a scanned copy thereof, as well as of the court file and the presiding Commissioner's written reasons. The file must be indexed and paginated and a copy prepared. The original indexed and paginated file must then be delivered to the Registrar of the relevant High Court.

2.5 Other court officers

- 2.5.1 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. (In view of budgetary constraints legal assistants are currently not employed.)
- 2.5.2 Rule 5(3) empowers and obliges the clerk of the court to exercise the functions of a legal assistant where such is not employed. This would, for example, assist a Commissioner in knowing to whom to refer litigants for advice, a situation that often arises in practice.
- 2.5.3 The clerk is there to advise any person in regard to any action which falls within the jurisdiction of the court. The clerk may also assist with the drafting of the process of court.⁹

2.6 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.

2.7 Legal Aid SA

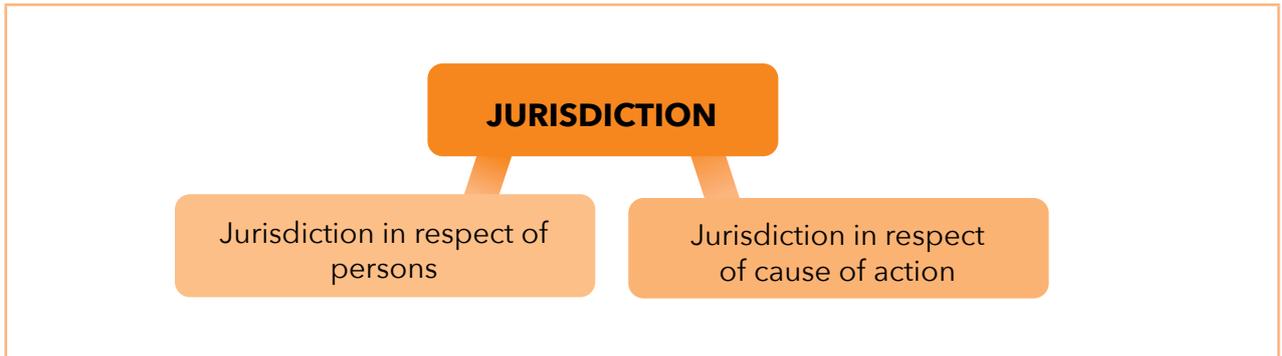
- 2.7.1 Legal Aid SA currently has 64 local offices, 64 satellite offices, 6 provincial offices and 1 National Office. In addition to providing legal representation to those who qualify for it, Legal Aid SA also has a toll-free Legal Aid Advice Line which anyone can use (**0800 110 110**) as well as a "Please Call Me" service (**079 835 7179**).
- 2.7.2 Appropriately experienced lawyers employed by Legal Aid SA can be appointed as Commissioners for Small Claims Courts on application, if they qualify.

⁹ 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 the action and the prospective litigant who wishes to proceed with the case will have to institute the claim again from the beginning in a competent court.
- 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.
- It is the duty of every Commissioner to ensure his/her court has jurisdiction to hear a matter before it. In some instances a presiding officer has a duty to raise the issue of jurisdiction out of his/her own accord.

1.1 Jurisdiction in respect of persons¹⁰

1.1.1 Only a **natural person** may institute an action as a 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.¹¹

1.1.2 Bodies such as partnerships or stokvels can therefore not appear as a plaintiff in the Small Claims Court as these are associations. (Generally, there is no legal distinction between a sole proprietor and the name of the firm that he/she conducts. Therefore, a sole proprietor may sue in his/her own name or the name of his/her firm as a plaintiff. It is important for

¹⁰ Note the general principle of Actor sequitur forum rei, which means the plaintiff follows the defendant to his/her forum.

¹¹ Section 7(1).

Clerks to establish this, so that they do not turn such people away. Clerks will need to satisfy themselves that it is indeed a sole proprietorship and not some other legal entity.)

1.1.3 The Small Claims Courts Act, 1984, 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 office or principal place of business**.
- In the case of a body, such as 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. (In such an instance, it will be irrelevant whether or not the defendant resides, works or carries on business within the area of jurisdiction of the court.)¹²
- The address of plaintiff's home or workplace is irrelevant for purposes of determining jurisdiction.
- 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/herself to the jurisdiction of the court, which would otherwise not have had jurisdiction.¹³ The Commissioner should, however, inform the defendant of his/her right and determine whether the defendant objects or whether he/she is prepared to submit to the court's jurisdiction.¹⁴
- 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.¹⁵ In other words, the action relates to the immovable property in question and not to some other immovable property.¹⁶

¹² Section 14(1)(d).

¹³ Section 14(1)(e).

¹⁴ A Clerk of the Small Claims Court can only advise a litigant that a specific Small Claims Court does not have territorial jurisdiction to entertain a matter. The clerk cannot refuse to enrol the matter where a litigant insists that the matter be enrolled even where the court does not have jurisdiction, because of the provisions of Section 14(1)(e) of the Small Claims Courts Act. This sub-section stipulates that a court will have jurisdiction where any defendant appears after being served with a summons and takes no objection to the jurisdiction of the court which will include territorial jurisdiction.

Where the plaintiff therefore insists that a summons must be issued despite the court not having territorial jurisdiction in the matter, the clerk must proceed to issue the summons if there was compliance with the other requirements and enrol the matter after service.

The clerk should then address a formal letter to the Commissioner which should be filed in the court file, informing the Commissioner that the litigant/plaintiff was informed that the court does not have territorial jurisdiction to hear the matter but that the plaintiff insisted that the summons be issued.

It is up to the Commissioner to make a ruling whether the court has jurisdiction, whether the defendant objects or not. Where the finding is against the plaintiff and the court finds that it does not have territorial jurisdiction, the plaintiff may then pursue an application in terms of Section 13 of the Small Claims Courts Act to transfer the matter to another court.

¹⁵ Section 14(1)(f).

¹⁶ This means that the owner does not need to reside, work, or carry on business within the court's jurisdiction.

- 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/her, be **transferred by the court to any other court**.¹⁷
- The court also has jurisdiction over incidental proceedings, meaning that if an action is instituted in a specific court, the court may hear facts and evidence in relation to other matters related to the case.

1.2 Jurisdiction in respect of causes of action¹⁸

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 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.

1.2.1 Actions for the delivery or transfer of movable or immovable property

These are actions 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, the clerk must advise the party to put in a claim for damages.¹⁹

1.2.2 Actions for ejectment

The Small Claims Court has jurisdiction in actions for ejectment against the occupier of land or premises which are unlawfully occupied and used for commercial - **and not residential** purposes, which are 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**.

¹⁷ Section 13.

¹⁸ Once the court has jurisdiction it retains it until the matter is concluded. (*Standard Credit Corporation Ltd v Bester and Others 1987 (1) SA 812(W) at 819*).

¹⁹ This might not be possible for the clerk ascertain at the commencement of the action. The clerk should therefore, as a matter of course, advise the plaintiff to claim a monetary amount in damages as an alternative.

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/she resides.

- ***The meaning of “unlawful occupier” in terms of the 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, 1998²⁰.

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/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 for ejectment from business premises are exceedingly rare, if not unknown, in the Small Claims Court. However, when faced with such a claim, a Commissioner is to determine whether a claim for ejectment from business premises is within its monetary jurisdiction. In such instances guidance can be obtained from the similar provision in the Magistrate’s Courts Act and how that is to be applied.

1.2.3 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.

²⁰ Act No 19 of 1998.

1.2.4 Actions based on credit agreements

The Small Claims Court's jurisdiction in actions based on or resulting from a credit agreement²¹ as defined in the National Credit Act (NCA), 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.

In order for such a matter arising out of a credit agreement to be brought before a court there are certain procedures that have to be complied with before the matter can be heard. In this regard section 129 and section 130 of the NCA are of crucial importance.

The relevant provisions of section 130(1) of the NCA read as follows:

- "(1) Subject to subsection (2), a credit provider may approach the court for an order to enforce a credit agreement only if, at that time, the consumer is in default and has been in default under that credit agreement for at least 20 business days and–*
- (a) at least 10 business days have elapsed since the credit provider delivered a notice to the consumer as contemplated in section 86(9), or section 129(1), as the case may be;*
 - (b) in the case of a notice contemplated in section 129(1), the consumer has–*
 - (i) not responded to that notice; or*
 - (ii) responded to the notice by rejecting the credit provider's proposals; and*
 - (c) in the case of an instalment agreement, secured loan, or lease, the consumer has not surrendered the relevant property to the credit provider as contemplated in section 127."*

There has to be a notice in terms of section 129 of the NCA, which has to be served on the defendant and then there has to be a period of at least 10 days before the letter of demand is issued in the Small Claims Court.

Without the proof of delivery of the notice in terms of section 129 of the NCA, the letter of demand cannot be issued. The Court may determine the matter only once it is satisfied of the provisions of section 130(3) of the NCA:

- "(3) Despite any provision of law or contract to the contrary, in any proceedings commenced in a court in respect of a credit agreement to which this Act applies, the court may determine the matter only if the court is satisfied that -*
- (a) in the case of proceedings to which sections 127, 129 or 131 apply, the procedures required by those sections have been complied with;*
 - (b) there is no matter arising under that credit agreement, and pending before the Tribunal, that could result in an order affecting the issues to be determined by the court; and*
 - (c) that the credit provider has not approached the court -*

²¹ An agreement constitutes a credit agreement if it is a credit facility, a credit transaction, a credit guarantee or any combination of the aforementioned.

- (i) *during the time that the matter was before a debt counsellor, alternative dispute resolution agent, consumer court or the ombud with jurisdiction; or*
 - (ii) *despite the consumer having -*
 - (aa) *surrendered property to the credit provider, and before that property has been sold;*
 - (bb) *agreed to a proposal made in terms of section 129(1)(a) and acted in good faith in fulfilment of that agreement;*
 - (cc) *complied with an agreed plan as contemplated in section 129(1)(a); or*
 - (dd) *brought the payments under the credit agreement up to date, as contemplated in section 129(1)(a).*
- (4) *In any proceedings contemplated in this section, if the court determines that -*
- (a) *the credit agreement was reckless as described in section 80, the court must make an order contemplated in section 83;*
 - (b) *the credit provider has not complied with the relevant provisions of this Act, as contemplated in subsection (3)(a), or has approached the court in circumstances contemplated in subsection (3)(c) the court must -*
 - (i) *adjourn the matter before it; and*
 - (ii) *make an appropriate order setting out the steps the credit provider must complete before the matter may be resumed;*
 - (c) *the credit agreement is subject to a pending debt review in terms of Part D of Chapter 4, the court may -*
 - (i) *adjourn the matter, pending a final determination of the debt review proceedings;*
 - (ii) *order the debt counsellor to report directly to the court, and thereafter make an order contemplated in section 85(b); or*
 - (iii) *if the credit agreement is the only credit agreement to which the consumer is a party, order the debt counsellor to discontinue the debt review proceedings, and make an order contemplated in section 85(b);*
 - (d) *there is a matter pending before the Tribunal, as contemplated in subsection (3)(b), the court may -*
 - (i) *adjourn the matter before it, pending a determination of the proceedings before the Tribunal; or*
 - (ii) *order the Tribunal to adjourn the proceedings before it, and refer the matter to the court for determination; or*
 - (e) *the credit agreement is either suspended or subject to a debt re-arrangement order or agreement, and the consumer has complied with that order or agreement, the court must dismiss the matter."*

Claims excluded from the jurisdiction of the Small Claims Court -

- Claims exceeding the current monetary jurisdiction;
- Claims against a national or provincial department of the State (although Section 14(2) of the Small Claims Court Act stipulates that you cannot institute action against the "State" in the Small Claims Court, that only refers to National and Provincial Government Departments. 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. The case law and authorities are clear, however, that Local Government, such as Municipalities and Metropolitan Council's may be sued in the Small Claims Court, including "Semi State Institutions" such as Eskom, Telkom, SABC, SAA, CSIR, and all Universities);
- 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/her mental capacity;
- Claims in which specific performance is sought without an alternative claim for damages;
- Perpetual silence;
- Validity of legislation.

2. ABANDONMENT OF PORTIONS OF THE CLAIM

- 2.1 A party, whose claim exceeds the prescribed limit, is allowed to abandon that part of the claim that exceeds the limit in order to bring the claim within the jurisdiction of the court.²² A party may explicitly abandon a part of the 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 counterclaim.
- 2.2 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.²³

3. ACTIONS AGAINST THE STATE

- 3.1 Small Claims Courts are prohibited from entertaining actions instituted against the State.²⁴
- 3.2 In terms of section 14(2) of the Act, no action shall be instituted against the State in a Small Claims Court. This means that a national or provincial department of the State may not be summoned to appear in the Small Claims Court. 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.
- 3.3 "Semi-state institutions", such as universities and research councils do not for the purpose of section 14(2) of the Act, form part of the State and may be sued in the Small Claims Courts.

²² Section 18.

²³ Section 19.

²⁴ Section 14(2).

This also applies to statutory boards and bodies, such as state entities.

- 3.4 Local government, such as a municipality, is however problematic.²⁵ A Commissioner would have to ensure, where the municipality is cited as a defendant and because the Institution of Legal Proceedings Against Certain Organs of State Act, 2002²⁶ applies, that notice in terms of section 3(2) of the said Act was given to the municipality in writing, within 6 months of the date upon which the debt became due, of the intention to institute legal proceedings. The Act further stipulates in section 4(1)(b) that the notice be served on the municipal manager. The Commissioner will also have to ensure that there was proper service of the summons on the municipality and allow the municipality the opportunity to address the court fully on whether it deems itself to fall within the ambit of the definition of “the State” or not.

4. LIMITATIONS

4.1 Parties

Only a natural person may institute an action in the Small Claims Court.²⁷ 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.

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 R20 000.
- If a labour matter, determine whether court has jurisdiction.
- Check jurisdiction.
- Inform parties that no legal representation is allowed.

²⁵ In terms of section 7 of the Act the plaintiff may sue a person in a particular Small Claims Court if the person resides, carries on business or is employed in the relevant area for which the court is established. In terms of section 2 of the Interpretation Act, 33 of 1957, the word “person” in any Act includes a “municipal council”. Section 239 of the Constitution defines an “organ of state” as “any department of state or administration in the national, provincial or local sphere of government”.

Section 4A of the State Liability Act, 20 of 1957, however, in defining “department” only refers to “a national or provincial department” and does not include local municipalities. The Institution of Legal Proceedings against Certain Organs of State Act, 40 of 2002 defines an “organ of state” as “any national or provincial department” and “a municipality contemplated in section 151 of the Constitution”. Section 151 of the Constitution refers to municipalities as the “local sphere of government”.

In *Greater Johannesburg Transitional Metropolitan Council v Eskom* it was held that public corporations such as Sasol, Iscor the Land and Agricultural Bank and the SA Mint are not government departments as they are wholly or partly independent from ordinary administrative departments and therefore not the State. The court however also held that municipal councils came into existence as part of a restructuring of the constitutional and political order and that they operate as a form of local government at regional level. At par. 16 the court further held that “the State” is extensively employed in legislation, is not used with any consistency and its precise meaning depends on the context within which it is used.

In *Holeni v Land and Agricultural Development Bank of South Africa* 2009 (SA) 437 (SCA) at par 11 the following was held:

“The State as a concept does not have a universal meaning. Its precise meaning always depends on the context within which it is used. Courts have consistently refused to accord it any inherent characteristics and have relied, in any particular case, on practical considerations to determine its scope. In a plethora of legislation, no consistency in meaning has been maintained”, and at par 16 and 17:

“The definition of ‘organ of State’ in the Constitution might be important in respect of constitutional and administrative law matters and for other related purposes... It should also be borne in mind that, when the [Prescription] Act was promulgated, the definition of ‘organ of State’ in s 239 of the Constitution was more than two decades into the future. It can hardly be contended that the legislature, at that time, had in mind a broader meaning of ‘the State’ to coincide with what is presently contained in that definition. In any event, the Constitution itself differentiates between the State and organs of State. The Constitution can therefore not be used as authority for the proposition that ‘the State’ in the Act should be interpreted so as to include organs of State.”

²⁶ Act 40 of 2002.

²⁷ Section 7(1).

4.2 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.

5. LABOUR MATTERS

- 5.1 Labour matters are regulated by the Basic Conditions of Employment Act, 1997²⁸ and the Labour Relations Act, 1995²⁹. Such claims are normally not part of the scope of the Small Claims Court.
- 5.2 Attention is specifically drawn to section 157(1) of the Labour Relations Act, which provides that, subject to the Constitution and section 173, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court.
- 5.3 A Small Claims Court thus has no jurisdiction under the Labour Relations Act and cannot hear:
 - **unfair dismissal cases;**
 - **unfair labour practice cases;**
 - **unfair discrimination cases, or**
 - **automatically unfair dismissal cases**
- 5.4 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.
- 5.5 So whilst the court should be cautious 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.
- 5.6 Thus the facts of each case should be scrutinized carefully and where feasible should be considered for action in the Small Claims Courts. A court should also guard against “forum shopping”.
- 5.7 In dealing with claims arising out of an employment contract the following should be noted:
 - 5.7.1 Employment/ Labour Claims: There are basically two types of claims arising out of an employment contract:
 - a) Claims for compensation arising in terms of the unfair practice and/or dismissal regime under the LRA or claims for compensation for discrimination under the Employment Equity Act; and
 - b) Claims arising from a contract of employment and sounding in money.
 - 5.7.2 Claims in respect of unfair labour practices or dismissal regimes and the Employment Equity Act, 55 of 1998 (EEA): If it was not clear before, the Constitutional Court

²⁸ Act 75 of 1997.

²⁹ Act 66 of 1995.

judgments in *Chirwa*³⁰ and *Gcaba*³¹ make it quite clear that despite the fact that they may arise from an employment contract, claims which are framed in terms of the statutory dispute resolution procedure of the LRA, are solely judicable by the Labour Court. The High Court does not enjoy concurrent jurisdiction with the Labour Court in connection with such claims. So the ordinary civil courts do not have jurisdiction to determine compensation for claims for unfair dismissal or unfair labour practices and accordingly these types of dispute cannot be heard in the SCC.

- 5.7.3 Claims arising out of an employment contract and sounding in money: The outcome of both the *Chirwa* and *Gcaba* cases is that all other matters, including those arising under a contract of employment, are judicable in the High Court. In terms of section 77(3) of the Basic Conditions of Employment Act (the BCEA) the Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition constitutes a term of that contract. It appears, therefore, that claims for the payment of a salary, wages or emoluments due under an employment contract in terms of the common law or claims made for the enforcement of a basic condition sounding in money. i.e. notice-pay and accrued leave pay would be permissible before the civil courts.³² By extension and having regard to section 15(e) of the Small Claims Courts Act and provided that the claims were under R20 000.00, the Small Claims Court would have jurisdiction to entertain these matters.³³

6. 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. As from 1 April 2019 the amount has been set at R20 000.

7. REPRESENTATION

- 7.1 No legal representation is allowed in the Small Claims Court. A juristic person may be represented by a *director* or a duly authorised *officer* of the company who happens to be legally qualified.³⁴
- 7.2 Where Commissioners are unsure as to whether the representative of a juristic person is actually a director or a prescribed officer the onus is on such representative to provide sufficient proof to the Commissioner. (The representation of a juristic entity by its director or duly authorized officer is distinctly different to representation by a legal representative.)

30 *Chirwa v Transnet Ltd* 2008 (4) SA 367 (CC).

31 *Gcaba v Minister of Safety and Security* 2010 (1) SA 238 (CC).

32 *Fourie v Stanford Driving School & others* [2010] JOL 26400 (LC).

33 The effect of these provisions is succinctly summarised by Paul Benjamin in his commentary on the Basic Conditions of Employment Act (BCEA): "An employee may choose to recover any amount owing to that employee in terms of the BCEA by making a claim in either the Small Claims Court, the Magistrate's Court, the High Court or the Labour Court -Thompson and Benjamin South African Labour Law, vol 1 BB1 - 44 at para 39.

34 The Companies Act determines that prescribed officers are required to perform their functions and exercise their duties to the standard of conduct as it applies to directors. Prescribed officers will be subject to the same liability provisions as it applies to directors. Prescribed officers include every person, by whatever title the office is designated, that:

- Exercises general executive control over and management of the whole, or a significant portion, of the business and activities of the company; or
- Regularly participates to a material degree in the exercise of general executive control over and management of the whole, or a significant portion, of the business and activities of the company.

8. CONSENT

The Small Claims Court does not have jurisdiction to hear a matter, which exceeds its jurisdiction, even if the parties have consented thereto.³⁵ 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/her, be transferred to another court.³⁶ The court to which the matter has been transferred will derive its jurisdiction by virtue of the transfer.³⁷

9. COMPLICATED CASES

If a Commissioner is of the opinion that a case before him/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 then institute a new action in another competent court of law.³⁸

10. 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.

11. INCIDENTAL JURISDICTION

The following matters do not influence the court's jurisdiction to hear claims³⁹ -

- In 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 interest⁴⁰ on a principal sum or for costs or alternative relief may be taken into account.

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

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

³⁵ Section 22.

³⁶ Section 13.

³⁷ What sometimes happens in practice is that the plaintiff starts the action in the wrong court and thereafter requests a transfer of the action to the correct court; however, this is generally not a ground for transfer.

³⁸ Section 23.

³⁹ Section 17.

⁴⁰ In terms of section 1(2)(b) of the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975) a rate of interest of 10,25 percent per annum is effective as from 1 January 2019.

CHAPTER 3: COMMISSIONERS

1. APPOINTMENT OF COMMISSIONERS

- 1.1 In terms of the Act, the Minister may establish a Small Claims Court. Section 9(1)(a) authorises the Minister to appoint one or more Commissioners for a Small Claims Court.
- 1.2 Commissioners are drawn from the ranks of attorneys, advocates, retired magistrates and legal academics, who are required to draw on their legal training, experience and expertise in conducting Small Claims Court duties.
- 1.3 It has also become common practice for magistrates and Legal Aid SA attorneys to volunteer their time and skills to serve as Commissioners - these services are rendered free of charge and such Commissioners also do not receive any additional remuneration for their work in the Small Claims Courts.
- 1.4 The qualifications for appointment as a Commissioner are set out in section 9(1) and (2) of the Act.
- 1.5 If a Commissioner is unable, due to his/her absence or incapacity to finalise a hearing, the case must be heard *de novo* before another Commissioner.
- 1.6 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.
- 1.7 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.

2. FUNCTIONS AND POWERS OF THE COMMISSIONER

- 2.1 The function of the Commissioner is adjudicative or judicial in nature. He/she adjudicates over small civil disputes between a plaintiff and defendant.
- 2.2 In a Small Claims Court the Commissioner is obliged to proceed inquisitorially and is not bound by the ordinary rules of evidence.
- 2.3 After the hearing, the Commissioner is empowered to grant judgment for either party in respect of the claim, the defence or counterclaim, in so far as the case has been proved.
- 2.4 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/her to give judgment for either party, he/she may grant absolution from the instance.
- 2.5 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/her sitting date telephonically or in writing thereof. If a Commissioner indicates to the clerk that he/she is not available, alternative arrangements must be made with the Advisory Board or another Commissioner.

- 2.6 The Commissioner performs his/her duties without the assistance of attorneys or advocates, with a considerable amount of discretion and flexibility in the procedure.
- 2.7 The Commissioner's decision is final and subject to review only.

3. CRITERIA FOR APPOINTMENT

- 3.1 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. Commissioners who are legal practitioners, should also be in good standing with the Legal Practice Counsel or their bar association.
- 3.2 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.
- 3.3 Commissioners are appointed on a voluntary basis and are not remunerated.
- 3.4 The Minister, or any person delegated thereto by the Minister, may at any time, if in his/her opinion there is sufficient reason for doing so, withdraw the appointment of a Commissioner.

CHAPTER 4: DUTIES OF THE CLERK OF THE COURT

1. REGISTERS WHICH THE CLERK OF THE COURT MUST MAINTAIN:

- **Summons control register**

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

- **Enquiries register**

In order to furnish correct monthly statistics to the Director-General, the clerk of the court must keep an enquiry register and also keep statistics on the departmental Integrated Case Management System (ICMS).

- **Warrant register**

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

- **Register of reviews**

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

- **Register of Commissioners**

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

2. THE DAILY DUTIES OF THE CLERK OF THE COURT

2.1 Handling of enquiries:

- 2.1.1 The clerk of the court can expect written, telephonic and in-person enquiries on a daily basis. Written enquiries must be answered in writing. The details of all enquiries must be entered in the enquiry register.
- 2.1.2 The clerk of the court must, upon enquiry, advise persons concerning the procedure regarding the institution of a claim, trial dates and other general information. In order to assist the clerk of the court in answering enquiries, the Department of Justice and Constitutional Development has compiled a user-friendly brochure, which sets out the procedure in the Small Claims Court. These brochures must be given free of charge to persons making enquiries.
- 2.1.3 The clerk of the court must use the correspondence system or the file numbers as directed by the magistrate, in consultation with the Advisory Board, of the district in which the seat of the court is situated.

2.2 Advice to prospective plaintiffs:

- 2.2.1 The clerk of the court must request a prospective plaintiff to furnish the information of the intended claim. If the prospective plaintiff is illiterate, the clerk of the court must assist him/her with the claim. If necessary, the service of an official court interpreter must be used.
- 2.2.2 The clerk of the court must then determine, on the basis of the facts, whether the court has jurisdiction to hear the intended claim and whether the facts disclose a cause of action. The prospective plaintiff must be informed accordingly.

- 2.2.3 The clerk of the court may not refuse to assist the plaintiff in writing a letter of demand or in issuing a summons, since the court must in the final instance, make the decision (including whether it has jurisdiction or not).
- 2.2.4 Bear in mind that if the court does not have jurisdiction over the person of the defendant the possibility still exists that the defendant may not object to the jurisdiction of the court.
- 2.2.5 The facts will disclose a cause of action if there is a claim that originates:
- (a) *Ex contractu* - through a contract/agreement.
 - (b) *Ex delictu* - through a delict/unlawful act by which the plaintiff suffered damage.
 - (c) *Ex lege* - where statutes or other government measures confer a claim.
 - (d) Through unjust enrichment - where a person obtains a benefit/money/asset to which he/she is not entitled.
- 2.2.6 If the clerk of the court is uncertain whether the court has jurisdiction and whether the complainant has a claim he/she shall refer the prospective plaintiff to the legal assistant or Legal Aid SA.
- 2.2.7 The clerk of the court must assist the prospective plaintiff by providing the plaintiff with the number of Legal Aid SA.
- 2.2.8 If the prospective plaintiff decides to proceed with the institution of the claim after he/she has been advised, the next step is to send a letter of demand.

3. PLANNING OF THE COURT ROLL

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

4. COURT PROGRAMME FOR COMMISSIONERS

- 4.1 The clerk of the court must obtain a court programme of the sitting dates of Commissioners from the Advisory Board.
- 4.2 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.
- 4.3 Each Commissioner must be reminded at least one week prior to his/her sitting date telephonically or in writing thereof. If a Commissioner indicates that he/she is not available, alternative arrangements must be made with the Advisory Board or clerk of the court.

5. DELIVERY OF COURT ROLLS TO COURT

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

6. RECOVERY OF COURT FILES

- 6.1 The clerk of the court must make satisfactory arrangements for the recovery of the court files after the sitting of the court. He/she must arrange with the Commissioner for the safe-keeping of files until they can be collected or make arrangements that they be sent back to by registered post.
- 6.2 Upon receipt of the files the clerk of the court must check them against the trial date diary and make an appropriate endorsement in the trial date diary.
- 6.3 Completed cases must be inspected for the issuing of orders. After an order has been issued, the particulars of the outcome must be endorsed in the summons control register, after which the files must be filed.
- 6.4 Cases postponed to specific dates must be entered against the date in the trial date diary and the parties that were absent when the court postponed the case, must be informed of the date.
- 6.5 An endorsement must also be made whether the case is part heard or not. If the case is part heard, the particulars of the Commissioner must also be recorded.
- 6.6 Where part-heard matters are postponed *sine die*, a date must be determined in consultation with the Commissioner and the parties informed accordingly. This date must thereafter be entered in the trial date diary.
- 6.7 Postponed cases that are not part-heard may be assigned to any Commissioner.

7. INSPECTION OF COURT DOCUMENTS BY PUBLIC

- 7.1 In terms of section 6 of the Act, the documents of a court shall be available for inspection by members of the public under the supervision of the clerk of the court, at the prescribed times and on payment of the prescribed fees.

- 7.2 At present no times and fees are prescribed and the clerk of the court must therefore, on request, during official working hours, make the documents available to members of the public.
- 7.3 The furnishing of lists of civil judgments to private individuals and instances is discouraged and should only be furnished if insisted upon and with the permission of the local Advisory Board and the magistrate of the district in which the seat of the court is situated.
- 7.4 Court files may not be taken out of the office of the clerk of the court. The clerk of the court certifies copies free of charge.

8. RETURN OF DOCUMENTS

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

9. FURNISHING OF EXTRACTS OF JUDGMENT

The clerk of the court issues an extract of a judgment on form J. 444. Where the extract is provided for the purpose of section 41(2) of the Act, fees are not payable.

10. CERTIFYING OF COURT RECORDS

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

11. FURNISHING OF STATISTICAL INFORMATION TO THE DIRECTOR-GENERAL: JUSTICE AND CONSTITUTIONAL DEVELOPMENT

- 11.1 It is necessary to collect and analyse statistics regarding certain aspects of the small claims procedure in order to properly evaluate the Small Claims Courts.
- 11.2 The clerk of the court must therefore enter the particulars of the cases on a daily basis into the ICMS. Training is supplied to the clerks on the use of the ICMS.

CHAPTER 5:

1. PROCESS PRIOR TO THE INSTITUTION OF A CLAIM

- 1.1 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.
- 1.2 On the basis of the facts, the clerk of the Small Claims Court must determine whether the court has jurisdiction to hear the intended claim and whether the facts disclose a cause of action.

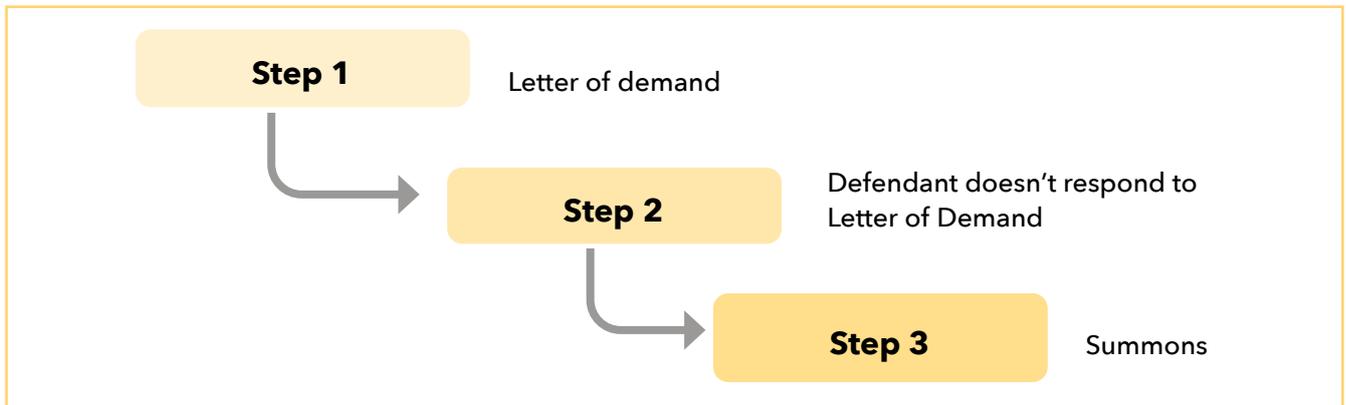
The facts will normally disclose a cause of action if there is a claim that originates:

- ✓ from a contract/agreement;
- ✓ from a delict/unlawful act as a result of which the plaintiff suffered damage;
- ✓ from statutes or other government authorisations that confer a claim; or
- ✓ from unjust enrichment - where a person obtains a benefit/money/asset to which he/she 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 a national or provincial department of 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.⁴¹
- 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.⁴²
- The letter of demand must briefly but adequately set out the particulars of the facts upon which the claim is based and the amount.⁴³
- 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/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.

2.1 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

⁴¹ Section 29(1).

⁴² Rule 8.

⁴³ Rule 8(a).

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.

2.2 Important aspects of the summons

- 2.2.1 The summons must be served on the defendant not less than 10 days before the trial.
- 2.2.2 The summons must be signed by the clerk of the court and must bear the date of issue by the clerk.
- 2.2.3 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.
- 2.2.4 The summons must be signed by the plaintiff.
- 2.2.5 The summons must contain the full address of the plaintiff.
- 2.2.5 The particulars of claim must show the nature and amount of the claim(s).
- 2.2.6 The particulars of claims must also show any abandonment of part of the claim under section 18 or any set-off under section 19.
- 2.2.7 The summons must also show the name of the defendant as the defendant is known to the plaintiff, the defendant's gender and residence or place of business and in the case of a juristic person under the name by which it is known to the plaintiff.

2.3 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 case number
 - ✓ Names, surnames and addresses of the parties
 - ✓ Signature of the plaintiff
 - ✓ Court in which the summons is issued
 - ✓ Court 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/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.⁴⁴
- 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.
- Rule 24(2) can also be considered where during the hearing. The plaintiff must be required to serve the summons in the usual fashion. It is only if the service cannot be achieved through the usual means that the court should consider whether to possibly entertain a substituted manner of service. Service by email, although progressive, can be inherently unreliable and should generally not be encouraged when it becomes apparent that the summons was not successfully served for whatever reason, but the court will use its discretion.

⁴⁴ Section 29(2) of the Act, read with Rule 12 of the Small Claims Court Rules, allows for service of the summons by the plaintiff or his/her representative which would include SAPS. The requirement that whoever served the summons must file an affidavit indicating how and when the summons was served is not a prerequisite of the Act or the Rules, but merely a practical solution which assists Commissioners to assess whether the defendant received notice of the proceedings and whether there has been compliance with the 10 day notice period required by Rule 9(1) of the Small Claims Court Rules.

If both parties are before court and there is no affidavit filed the presiding Commissioner can also establish from the defendant how and when he/she received the summons and whether there was compliance with the notice period. If there was compliance, there is no prejudice for any of the parties and the Commissioner can order that the matter proceed.

Checklist for the 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 case 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.

2.4 Amendment of summons

- 2.4.1 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 by hand on the original and on the copies and initialling the alterations to the summons before it is served.
- 2.4.2 The clerk of the court must also initial and date stamp the amendment(s).
- 2.4.3 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.⁴⁵

CHAPTER 6

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.

1.1 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.

Checklist for lodging a written statement of defence:

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

1.2 The defendant may defend the action

1.2.1 If the defendant wishes to defend the plaintiff's claim, he/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.⁴⁶

1.2.2 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.

1.2.3 If a defendant approaches the clerk of the Small Claims Court to file a written statement of defence, the clerk or legal assistant must assist him/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.

1.3 The defendant may file a counterclaim

1.3.1 If the defendant elects to file 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 hearing.

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

1.3.3 The defendant may approach the clerk for assistance with the formulation thereof.

1.3.4 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/her counterclaim must be filed in the court file and that the defendant can also call witnesses.

⁴⁶ Section 29(3).

CHAPTER 7: COUNTERCLAIMS

1. A counterclaim (also called a claim in reconvension) 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.⁴⁷
2. The parties in the main claim and in the counterclaim must be the same.
3. 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).
4. The maximum amount that may be claimed in a counterclaim must be within the current monetary jurisdiction.
5. The defendant may, however, as already pointed out, abandon a portion of his/her claim so as to bring it within the jurisdiction of the Small Claims Court.
6. If an action is instituted in a specific court, the court may hear matters related to the case. The defendant may therefore institute a counterclaim against the plaintiff even if the plaintiff does not live or work within the jurisdiction of the said court. The counterclaim 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.⁴⁸
7. The Small Claims Court does have jurisdiction to entertain a counterclaim by a juristic person having been brought before the court as defendant.⁴⁹
8. 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/her claim against the plaintiff in a higher court. A failure to stay the proceedings is reviewable.

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.

A typical **example** of a counterclaim would be a tenant claiming a deposit back at the end of a lease, and a landlord counterclaiming that the tenant had 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.

⁴⁷ The defendant may therefore institute a counterclaim against the plaintiff even if the plaintiff does not live or work within the jurisdiction of the said court. The counterclaim 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.

⁴⁸ *Swart v Sher and Another 1987 (2) SA 454 (SE) at 457.*

⁴⁹ *Raman v Barlow Motor Investments (Pty) Ltd t/a Natal Motor Industries Prospecton and Others 1999 (4) SA 606 (D).*

CHAPTER 8: APPLICATIONS

1. GENERAL:

- 1.1 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.
- 1.2 The application should be accompanied by the necessary founding affidavit setting out the grounds for the application and be served on the opposing party.
- 1.3 If there is no affidavit, written evidence and oral evidence may be presented.
- 1.4 The applicant must approach the clerk of the court who must make arrangements for the hearing of the application.
- 1.5 The clerk of the court must arrange that the applicant appears at a specific time on a specific date before a Commissioner.
- 1.6 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.
- 1.7 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.

- 1.8 Examples of types of applications:

Application to transfer S13	Application to separate trials of joined plaintiffs S31	Application to separate trials of joined defendants S32	Application for substitution S33
Application for rescission of judgment S36	Application for review S46	Application for default judgment S35	

2. 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 ⁻⁵⁰

- 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 weeks of the applicant first becoming aware of the judgment. As it currently stands the Small Claims Courts Act does not provide for condonation of the six week time limit. In the circumstances should an application not be brought within the six week period, the applicant is time barred;
- if the judgment was void *ab origine* or was obtained by fraud or as a result of a mistake common to the parties, 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.

3. APPLICATION TO TRANSFER A MATTER FROM ONE COURT TO ANOTHER⁵¹

- 3.1 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/her.⁵²
- 3.2 If the application is granted the latter court will, notwithstanding anything to the contrary in the Act, have jurisdiction to hear that action.

4. 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.⁵³

5. APPLICATION FOR SEPARATE TRIALS IN CASE OF JOINDER OF DEFENDANTS

Two or more defendants may be sued in the alternative or both in the alternative and jointly in one action, if the plaintiff alleges that he/she is uncertain which of the defendants is in law liable for his/her claim. Section 32 of the Act, however, allows a defendant, upon application, to request a separation of trials and the court may in its discretion order that separate trials be held, or make such other order as it may deem just and expedient.

6. 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.⁵⁴

7. APPLICATION FOR DEFAULT JUDGMENT

- 7.1 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.⁵⁵
- 7.2 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.⁵⁶

⁵¹ A party applying for the transfer of a matter must satisfy the court that the hearing of the action in that court may result in undue expense or inconvenience to him/ her.

⁵² Section 13.

⁵³ Section 32.

⁵⁴ Section 33(3).

⁵⁵ Section 35(1).

⁵⁶ Section 35(2).

8. APPLICATION FOR REVIEW

A judgment of the Small Claims Court cannot be appealed against.⁵⁷ A litigant may take the judgment on review to the High Court. The review may only be used by a litigant in respect of matters falling within section 46 of the Act.

The Commissioner's decision may be taken on review to the High Court on the following grounds: -

- Absence of jurisdiction;
- Interest in the case, bias, malice or corruption⁵⁸ on the part of the Commissioner; or
- Gross irregularity in the proceedings.

9. PROCEDURE FOR REVIEW:

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

10. STEPS TO BE TAKEN UPON RECEIPT OF A NOTICE OF REVIEW

10.1 The clerk of the court must:-

- ✓ enter the particulars of the case in the review register;
- ✓ fax the application for review together with all supporting affidavits and documents immediately to the Director: Law Enforcement on fax: 012-315 1105. (Voluminous papers should be couriered immediately to the National Office);
- ✓ forward a transcript of the proceedings;
- ✓ forward the reasons of the Commissioner within 14 days from date of service; and
- ✓ deliver a copy of the review notice together with a copy of the court file immediately by hand or 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.

10.2 The Commissioner must on receipt of the notice immediately send his/her written reasons to the clerk of the Small Claims Court.

10.3 The clerk of the court must, on receipt thereof, send copies of the reasons to the Chairperson of the Advisory Board, the relevant State Attorney and the Director-General: Justice and Constitutional Development.

10.4 The clerk of the court must, when the Commissioner's written reasons are received, send a certified copy of the court file by registered mail to the Registrar of the High Court. The date of dispatch must be endorsed in the review register.

⁵⁷ No litigant can appeal against the judgment delivered by a Commissioner in the cases which he/she adjudicated - section 45 of the Act.

⁵⁸ See the Combating of Corrupt Activities Act, 2004.

- 10.5 The Advisory Board must make a recommendation to the State Attorney regarding any possible opposition to the application. The State Attorney in turn must make a recommendation to the Director-General: Justice and Constitutional Development who is the final decision maker to oppose the application for review.
- 10.6 The clerk of the court must, when the certified copy of the court file is received from the Registrar, inform the Commissioner of the decision to oppose the application for review and enter the decision in the review register.

CHAPTER 9: THE TRIAL

1. NATURE OF TRIAL

- 1.1 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.
- 1.2 Any correspondence by e-mail between the parties may be used as evidence during the trial.
- 1.3 The Commissioner may decide whether parties can ask each other questions or whether to direct the question to him/her before he/she directs it to the other party.
- 1.4 The proceedings take place in open court.
- 1.5 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 SYSTEMS

- 2.1 The inquisitorial system is a method of adjudication in which the presiding officer endeavours to ascertain the facts by considering the information provided, 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.
- 2.2 In the adversarial system, two or more opposing parties gather and present evidence and arguments to a presiding officer. The presiding officer is unfamiliar with the facts of the case before it is presented. 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.
- 2.3 The differences in the judicial role-description have 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. It means therefore, that the inquisitorial system has to comply with the fair trial requirements of the Constitution. Exclusionary rules are to be avoided.
- 2.4 The system of adjudication used to conduct proceedings in the Small Claims Courts is inquisitorial in nature.

3. PREPARATION FOR TRIAL

- 3.1 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.
- 3.2 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 defence, whether the defendant admits the claim or whether a counterclaim against the plaintiff is instituted.
- 3.3 Before the hearing commences, the Commissioner must ensure that the following has been complied with:

- ✓ That he/she has perused the file and is familiar with its contents;
- ✓ That he/she has jurisdiction to hear the matter;
- ✓ That a court interpreter has been arranged, if required;
- ✓ That a court orderly has been arranged with the clerk of the court, if required.

3.4 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 on the summons together with the date stamp by the clerk of the court;
- Name of the Court in which the summons is issued;
- Name of the Court 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/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 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 should be in the file;
- The person instituting a claim may not be a juristic person (such as companies, corporations or associations);
- The person instituting the claim is 18 years or older. If below 18 years, the details of the person who is assisting the child should be in the file;
- The claim is not against a national or provincial department of 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;⁵⁹

⁵⁹ Since the overwhelming majority of parties before a Small Claims Court are natural persons who are unrepresented, the issue of prescription is unlikely to be raised, however, specific attention is drawn to section 17(1) of the Prescription Act 68 of 1969 ("A court shall not of its own motion take notice of prescription").

- 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 each sitting of the court.

6. THE COMMISSIONER AS A PRESIDING OFFICER

- 6.1 The conduct of the proceedings lies in the hands of the Commissioner. In terms of the Act he/she has a large measure of discretion in conducting the hearing.
- 6.2 The case file containing witnesses' statements and other materials must be placed at the disposal of the Commissioner before the commencement of the proceedings.
- 6.3 The Commissioner's judicial dominance continues during the court proceedings.
- 6.4 He/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.
- 6.5 The litigants may determine which witnesses to call, but the Commissioner conducts the questioning.
- 6.6 The litigants may ask questions only with the 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 establish if an interpreter is required, so that the parties can fully understand 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/she assumes an active inquisitorial role and is responsible for supervising the presentation of the evidence necessary to resolve the dispute;
 - He/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, it would be most prudent that the Commissioner keep written notes of all the evidence. This would certainly assist in reminding the Commissioner of the facts and details of the matter in the event of a review many months later;
 - Although the proceedings are conducted inquisitorially, he/she 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/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

8.1 The clerk of the Small Claims Court will call the case and both parties will appear before the Commissioner.

8.2 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.

8.3 If both parties agree to a settlement in the presence of the Commissioner, he/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.

8.4 The Commissioner must ask the defendant if he/she admits the plaintiff's claim.

8.5 If the defendant admits the claim, the plaintiff is entitled to a judgment.

8.6 If the defendant does not admit the claim, the plaintiff must be allowed to present his/her case first.

8.7 All evidence has to be given under oath or affirmation. The Commissioner must swear in the witness(es). (Attention is also drawn to the fact that it is not the interpreter who swears in the witness.)

8.8 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.

8.9 The Commissioner must allow the interpreter sufficient time to interpret before proceeding with the next question.

8.10 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.

- 8.11 The Commissioner must likewise advise the defendant of the following:
- ✓ to present his/her 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 any facts.
- 8.12 The Commissioner may ask both parties questions to clarify any evidence that they have presented.

9. WITNESSES AND EVIDENCE FOR THE HEARING

- 9.1 Physical evidence such as receipts, written leases or other items to support a claim may be shown to the Commissioner.
- 9.2 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.
- 9.3 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.
- 9.4 If, for any reason, a party must retain the original documents, he/she must bring along certified photocopies thereof.
- 9.5 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.
- 9.6 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.
- 9.7 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.
- 9.8 Each party may, at the Commissioner's discretion, make a final statement to the Commissioner in summation of his/her position.

CHAPTER 10: EVALUATION OF EVIDENCE

1. GENERAL

- 1.1 The Commissioner's duty in a hearing is to adjudicate a dispute between parties who are unable to settle the dispute themselves. He/she gives judgment based on the evidence given by the parties at the time of the trial and in accordance with the applicable law.
- 1.2 His/her knowledge of the rules of the law of evidence and the law in general are the instruments which he/she applies to arrive at a decision. The Commissioner should evaluate only available evidence.
- 1.3 He/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/she is entitled to judgment, but must prove the amount due.

2. EVIDENCE ASSESSMENT BY COMMISSIONER

- 2.1 The evidence at the Commissioner's disposal mainly comprises of direct evidence and circumstantial evidence.
- 2.2 The process of reasoning which evidence 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.
- 2.3 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.
- 2.4 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.
- 2.5 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/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.
- 2.6 The Commissioner must be vigilant in the assessment and evaluation of evidence to eliminate any possible risk of making an erroneous judgment.
- 2.7 The plaintiff needs only to prove his/her case on a balance of probabilities.

3. BURDEN OF PROOF

- 3.1 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.
- 3.2 The law provides that a party seeking judgment must prove both liability and the amount (quantum) before a judgment is entered in his/her favour.
- 3.3 The plaintiff must prove through his/her evidence that the defendant has done something that makes him/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 it.
- 3.4 The plaintiff must also then prove the actual amount (quantum) of his/her claim - the value of which should not exceed the prescribed limit. If the plaintiff fails to prove the actual amount of his/her claim, but is able to prove a lesser amount, alternatively if the Commissioner is satisfied that a lesser amount has been proven, the Commissioner may enter judgment in the plaintiff's favour for such lesser amount. The same principle would apply in respect of counterclaims.

CHAPTER 11: 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.⁶⁰ 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.⁶¹

Specific attention is drawn to situations where a defendant bears a full onus, e.g. the defence of payment, and proves that defence. In such an instance there should be judgment for the defendant even though there is no counterclaim. Typically, the order would simply read "*Judgment is entered in favour of the defendant.*"

This is the more legally-correct terminology to use than recording the "Plaintiff's claim is dismissed", as the status of the latter terminology is equivalent to absolution from the instance, which may not have been the intention of the Commissioner.

- **Absolution from the Instance**

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

At the same time, Commissioners should be aware of the potential for abuse in the Small Claims Court of such a judgment and how such abuse is to be avoided. In other courts, a plaintiff faced with an order for absolution must first settle the defendant's costs before starting again. In the Small Claims Court a defendant cannot be awarded costs and thus plaintiffs can simply issue another summons under the pretext that they have "further evidence", when in fact they do not have such evidence. In such instances, Commissioners should inform the plaintiff that he/she should first obtain all relevant evidence and not approach the court in a piecemeal fashion.

- **Default Judgment**

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

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

⁶⁰ Section 45.

⁶¹ Ibid.

The defaulting defendant has ten days to pay the claim after the defendant has been informed of the default judgment. Attention is drawn to section 35(1)(b) which requires that both liability and quantum should be proved in default cases.

Commissioners ought to be aware that this is a significant departure from the procedure that they may be accustomed to in the Magistrate's Courts where plaintiffs would ordinarily "win" the liability portion by default, and would only be required to prove their quantum if their claim is illiquid. This means that in the Small Claims Court all plaintiffs who seek a default judgment must present their evidence under oath/affirmation, in justification of their cause of action and the amount of their claim.

- **Judgment in instances where the Plaintiff is Absent**

Where the plaintiff fails to appear in court, the Commissioner, upon application by the defendant either removes the matter from the roll, dismisses the plaintiff's claim and/or grants judgment in terms of the defendant's counterclaim. The plaintiff may re-institute the action where it was dismissed or apply for rescission 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 only costs order a Commissioner may award in favour of a successful plaintiff is the costs incurred in respect of the sheriff's service of the summons on the defendant.

- **Conditional Orders**

The Commissioner is obliged to enquire whether the debtor is able to comply with the order without delay. If the debtor indicates that he/she is not able to comply with the order without delay, the Commissioner will decide whether to hold a financial inquiry relating to the debtor's ability to pay in instalments or otherwise.

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 relating to the possible payment in instalments must be conducted *in camera* (or in chambers) and the following must be considered:⁶²

- 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 -

⁶² 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.

3. COURT BOOK

The current practice is that the Commissioner simply records the terms of the order on the file cover.

The Clerk must make a copy of the court file cover expressing the terms of the order and ensure that this is inserted in a **court book** wherein the outcome of proceedings are recorded. The court book assists the clerk when enquiries are made by the public or when, for one or other reason, the file has been misplaced.

4. RESERVED JUDGMENTS

The speedy resolution of disputes is one of the strengths of the Small Claims Court process.

Challenges have been experienced with Commissioners sometimes reserving judgments and then not delivering same as speedily as is required. It is therefore advised that reserved judgments should be delivered as soon as is practically possible, but no later than **two weeks** after the matter has been heard.

CHAPTER 12: STEPS FOLLOWING JUDGMENT

1. ENQUIRY INTO FINANCIAL POSITION OF THE JUDGMENT DEBTOR

- 1.1 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.
- 1.2 The importance of the enquiry whether the debtor is able to pay without delay in terms of section 39 cannot be stressed enough. It is important that the provisions of section 39 be used as effectively as possible, in order to facilitate **voluntary payment** by judgment debtors without having to resort to converting the judgment into that of the Magistrate's Court, due to the obvious cost implications.
- 1.3 Where the court gives judgment for the payment of a sum of money, the party against whom the order was made (the judgment debtor) must pay the sum of money directly to the judgment creditor. If the judgment debtor wants to pay the judgment debt to the clerk of the court, he/she must be referred to the judgment creditor (refer to section 38 of the Act). Section 39(1) of the Act provides that when a court grants judgment for the payment of a sum of money, the court must enquire from the judgment debtor whether he/she is able to comply with the judgment. If he/she indicates that he/she is unable to do so, the court must conduct an inquiry *in camera* into his/her financial position and may order that the judgment debtor pay the judgment debt and costs in specified instalments or otherwise. An order so made may be wholly or partially suspended on such conditions as to security or otherwise as the court may determine.
- 1.4 If no order was issued by the court in terms of section 39(2) the judgment debtor may within 10 days after judgment for the payment of a sum of money, make a written offer to the judgment creditor to pay the judgment debt and costs in specified instalments or otherwise (refer to section 40 of the Act). If such an offer is accepted by the judgment creditor, the clerk of the court must, at the written request of the judgment creditor accompanied by the offer, order the judgment debtor to pay the judgment debt and costs in accordance with the offer. Such an order issued by the clerk of the court shall be deemed to be an order of the court in terms of section 39. Before the clerk of the court issues such an order, he/she must ensure that the court has not yet issued an order.

2. ENFORCING THE JUDGMENT

- 2.1 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.
- 2.2 The judgment creditor would then be advised to obtain a warrant of execution against any moveable property of the judgment debtor.
- 2.3 The clerk must assist the judgment creditor with the execution process.
- 2.4 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

- 3.1 The clerk should advise the plaintiff of the costs involved in executing a writ of execution.
- 3.2 The warrant is addressed to the Sheriff in whose area the execution is to be enforced.
- 3.3 The warrant is for the surrender of any movable property belonging to the judgment debtor, or for the ejection of the judgment debtor from the property.
- 3.4 Such process can only be withdrawn or suspended if the sheriff receives a notice from the judgment creditor.
- 3.5 Any alterations in the warrant of execution must be initialled by the clerk before it is issued.
- 3.6 The clerk must ensure that the correct judgment debtor is named in the warrant of execution, otherwise the warrant becomes invalid.
- 3.7 The clerk will only re-issue 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, he/she may pursue the matter to enforce the judgment. In that instance the processes to enforce and execute judgment as outlined above may apply.

CHAPTER 13: REVIEW

1. A judgment of the Small Claims Court cannot be appealed against, so no litigant can appeal against the judgment of the Commissioner.⁶³ However, the Commissioner's decision may be taken on review to the High Court on the following grounds: -
 - ✓ Absence of jurisdiction;
 - ✓ Interest in the case, bias, malice or corruption on the part of the Commissioner; or
 - ✓ Gross irregularity in the proceedings.
2. 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 the Small Claims 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.
3. 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.
4. The Clerk of the Small Claims Court is to be actively involved in the review process and liaises with all the parties. The Clerk receives the result of the outcome and notifies the Commissioner of the results.
5. The Commissioner may oppose the review especially if costs are sought against the Commissioner. Even if the State decides not to oppose the review, the Commissioner may decide to do so. It is, however, suggested that a Commissioner only considers doing so if a costs order is sought against him or her. Otherwise the Commissioner should simply file his or her reasons and/ or response to the review and state that he or she will abide by the reviewing High Court's decision.

⁶³ Section 45.

Steps to be taken by the clerk 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 at National Office. 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 the 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 14: MISCELLANEOUS

1. 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.
2. 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/her whilst carrying out his/her duties as a Commissioner, provided that he/she has not acted *mala fide* or maliciously.

Travelling expenses of Commissioners

1. When a Commissioner has to travel to a nearby town and requests payment of his/her travelling costs, the clerk of the court must deal with the application in writing for the payment of such travelling expenses via the court manager and the regional office.
2. 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 the State tariff (mention must be made of the engine volume and tariff in cent per kilometre).

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 Courts 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/her mind will render the proceedings reviewable.

Held, that there can be no criticism of the Commissioner where he/she has applied his/her 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/her than that he/she should properly apply his/her mind to the matter, which ought to result more often than not in the correct conclusion being reached. However, where he/she fails to properly apply his/her mind at all to one or more of the issues, he/she commits a gross irregularity, because then he/she has failed entirely to perform the function which then was required of him/her. The proceedings will then be reviewable.

3. **SMIT v SELEKA EN ANDERE 1989(4) SA 157 (0) - Adjudication of cases**

Proceedings - Legislature intending in section 26 and 27(2) of the Act to give Commissioners a fairly free hand in order to effect to 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, 1983.

Held, that the Commissioner's aforementioned conduct amounted to an irregularity as intended in section 46(c) of the Small Claims Court Act, that the judgment should be set aside and that the cases be remitted back 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, 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 the 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/her 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 the proceedings conducted by him/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 the Small Claims Court Commissioner had jurisdiction to deal with the counterclaim and to 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 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 Courts Act, 1944 is that the part of the claim which is not granted must be subtracted from that part of the claim which was waived, and that, if, for example, a plaintiff's damages should be R2 000 and 15% thereof is to be granted, the full R300 must be granted, and that the R1 000 which was waived, must be subtracted from R1 799 which was not recovered. This means that if plaintiff's damage amounts to R2 000, she should recover the full amount of R300.

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

Held, that the magistrate's finding with regard to negligence should be upheld. *Held*, further that the damages amounted to R2 000 and accordingly the plaintiff was entitled to R300.

8. ESTHER CRISH v THE COMMISSIONER SMALL CLAIMS COURT - BUTTERWORTH & OTHERS [2007] ZAEHC 114

The applicant sought 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 was 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.

CHANGE IN RATE OF INTEREST UNDER PRESCRIBED RATE OF INTEREST ACT AND APPLICABLE CASE LAW:

- 15.5% AS FROM 1 OCTOBER 1993
- 9% AS FROM 1 AUGUST 2014
- 9.75% AS FROM 8 JANUARY 2016
- 10.25% AS FROM 1 MARCH 2016
- 10.50% AS FROM 1 MAY 2016
- 10.25% AS FROM 1 SEPTEMBER 2017
- 10% AS FROM 1 MAY 2018
- 10.25% AS FROM 1 JANUARY 2019
- 10% AS FROM 1 SEPTEMBER 2019

PRESCRIBED RATE OF INTEREST DATE AND RATE CHANGES

DATE	1 October 1993 to 31 July 2014	1 August 2014 to 7 January 2016	8 January 2016 to 29 February 2016	1 March 2016 to 30 April 2016	1 May 2016 to date 31 August 2017	1 September 2017 to 30 April 2018	1 May 2018 to 31 December 2018	1 January 2019 to 31 August 2019	1 September 2019
RATE	15.5%	9%	9.75%	10.25%	10.5%	10.25%	10%	10.25%	10%

- Section 2 of the Prescribed Rate of Interest Act, 55 of 1975 stipulates that a “judgment debt” for purposes of this Act means a sum of money due in terms of a judgment or an order and that therefore in the ordinary course the interest is payable from date of judgment.
- Where judgment was therefore granted after the 1st of August 2014 when the interest rate was reduced to 9% per annum or after 8 January 2016 when the interest rate was increased to 9.75% or after 1 March 2016 when the interest rate was increased to 10.25% , or after 1 May 2016 when the interest rate was increased to 10.5%, any judgment would have to stipulate that interest applies as prescribed from the date of judgment to date of payment. This will also apply to the amount of costs for which judgment was granted. The plaintiff is *ex lege* automatically entitled to this interest from date of judgment even if it is not reflected as part of the judgment on the file cover.
- Section 1(1) of the Prescribed Rate of Interest Act, 1975 stipulates that any debt for a liquidated amount bears interest in terms of this Act at the rate prescribed, where the interest is not governed by another Act or an agreement between the parties at the rate prescribed at the time that such interest begins to run.
- In *Davehill (Pty) Ltd and Others v Community Development Board 1988 (1) SA 290 (A)* it was held that the Minister may, from time to time, prescribe different rates of interest but that it had no effect

on the rate applicable to interest which had already begun to run and section 1 does not provide for the rate to vary from time to time in accordance with adjustments made to the prescribed rate by the Minister. The rate prescribed under section 2 at the time when interest begins to run is fixed at such rate and cannot be varied or lowered even after the adjustments made to the prescribed rate by the Minister.

- Where judgment was therefore granted before the 1st of August 2014, the 8th of January 2016, the 1st of March 2016 or the 1st of May 2016 when the interest rate was changed, any judgment would have to stipulate that interest applies to the debt at the prescribed rate per annum from the date of judgment to date of payment and the rate is not lowered because of the interest rate reduction on the 1st of August 2014, or the increase on the 8th of January 2016, or the 1st of March 2016 or the 1st of May 2016, but stays at the earlier rate per annum until execution is finalized and the judgment debt is paid up.
- Where judgment is granted after the 1st of August 2014, the 8th of January 2016, the 1st of March 2016 or the 1st of May 2016 and a proper cause of action is made out on the papers before court indicating on which day interest began to run and the date was before the 1st of August 2014 or the 8th of January 2016 or the 1st of March 2016 or the 1st of May 2016, interest would be granted at a rate earlier prescribed per annum and would stay at that rate per annum until execution is finalized and the judgment debt is paid up. This will not necessary apply to the cost order made by the court.
- Where a proper cause of action is made out on the papers before court on which day interest began to run and the date was after the 1st of August 2014 or the 8th of January 2016 or the 1st of March 2016 or the 1st of May 2016 interest would be granted at the prescribed rate per annum applicable at that stage and would stay at that rate per annum until execution is finalized and the judgment debt is paid up.
- Section 2A applies only to unliquidated amounts or debts flowing for example from damages claims and stipulates how the interest is to be calculated in respect of an unliquidated amount/debt. Here the party requesting interest must make out, on the papers before court, a proper cause of action as to the date on which payment of the debt is claimed and that interest shall run in terms of section 2A(2)(a) from the date on which payment of the debt is claimed by the service on the debtor of a letter of demand or summons, whichever date is the earlier. If this date is before the 1st of August 2014 or the 8th of January 2016 or the 1st of March 2016 or the 1st of May 2016 interest will run at the earlier prescribed rate per annum until the date of final payment of the debt and will not reduce or increase to the new prescribed rate per annum despite the rate change even if execution happens after the 1st of August 2014 or the 8th of January 2016 or the 1st of March 2016 or the 1st of May 2016. If this date is after the 1st of August 2014 or the 8th of January 2016 or the 1st of March 2016 or the 1st of May 2016 interest will run at the new prescribed rate per annum until the date of final payment of the debt.

APPLICABLE CASE LAW:

1. *DAVEHILL (PTY) LTD AND OTHERS v COMMUNITY DEVELOPMENT BOARD 1988 (1) SA 290 (A)*

The issue between the parties was the rate at which *mora* interest due to the appellants was to be calculated. It was common cause that the Prescribed Rate of Interest Act 55 of 1975 applied to *mora* interest, and that its provisions, in particular s 1(1) and (2), governed the applicable rate.

The Court held that the rate prescribed under ss (2) at the time when interest begins to run governed the calculation of interest on interest (ss (2) provided that the Minister of Justice could, from time to time, prescribe a rate of interest for the purposes of ss (1)). The rate was fixed at that time and remained constant - ss (1) did not provide for the rate to vary from time to time in accordance with adjustments made to the prescribed rate by the Minister of Justice in terms of ss (2).

The fact that the Minister may, from time to time, prescribe different rates of interest therefore had no effect on the rate applicable to interest which had already begun to run.

The only exception to the above method of calculation was where 'a court of law, on the grounds of special circumstances relating to that debt, orders otherwise'.

The Court therefore held that appellants' reliance upon this consideration as a special circumstance was without substance. The Court finally held that as the prescribed rate of interest applicable on 12 January 1985, the date on which *mora* interest began to run on the outstanding statutory interest, was 11 % per annum, *mora* interest accordingly fell to be awarded at that rate.

2. THE MV SEA JOY v THE MV SEA JOY 1998 (1) SA 487 (C)

A new section, s 2A, was introduced into the Prescribed Rate of Interest Act, 1975 (the Act) on 5 April 1997. In terms of that section interest on every unliquidated debt as determined, inter alia, by a court may be awarded from the date on which payment is claimed by service on the debtor of a demand or summons, whichever is the earlier.

Until 5 April 1997 interest on unliquidated damages would not ordinarily have been granted by a South African court until it was liquidated by agreement or judgment. It was argued by the defendant that since the plaintiff's cause of action had arisen in September 1992, long before the amendment was effected, and since the parties had reached agreement on the quantum of the plaintiff's damages only on 24 April 1997, any interest awarded should run from the latter date.

Held, that it would not offend against the presumption against retrospectivity to apply the provisions of the 1997 amendment in this instance. Even though a cause of action might have arisen prior to the amendment, it would only be when the unliquidated debt was determined by agreement between the parties (as in this instance) or by a Court of law, an arbitrator or arbitration tribunal that, in terms of the Act, the creditor would be able to recover interest on his/her previously unliquidated claim. (At 507G/H and 507A--C.)

Held, further, that it would not be just and equitable to hold the defendant liable to pay interest on a claim whose quantum it could not reasonably be expected to have assessed, although summons had been served on 8 September 1992 when the defendant had been arrested, that summons contained only the bare bones of the quantum of the plaintiff's claim. It was only in its particulars of claim of 27 August 1993 that the plaintiff had set out its damages 'in such manner as will enable the defendant reasonably to assess the quantum thereof' (Rule 18(10) of the Uniform Rules of Court). (At 507H--508B.)

Held, accordingly, that in the exercise of the discretion conferred by s 2A(5) of the Act interest running from 27 August 1993 should be awarded to the plaintiff. (At 508E.)

Held, further, as to the rate at which the interest should be calculated, that, although it had been held that the rate prescribed under s 1(2) of the Act at the time when interest began to run fixed the rate at which interest should be calculated over the entire period, and that the provisions of s 1(2) were peremptory, that would not be the case where the interest in question was on an unliquidated debt awarded under s 2A, in terms of which the Court had a discretion as to 'the rate at which interest shall accrue'. (At 508F--H.)

The dictum in *Davehill (Pty) Ltd and Others v Community Development Board 1988 (1) SA 290 (A) at 300I--301F* qualified. Held, accordingly, given that the prescribed rate of interest on 27 September 1993 had been 18,5% but had dropped to 15,5% a month later and had remained constant thereafter, that interest should be fixed at the lower level. (At 508H--I.)

Also see:

- *Thoroughbred Breeders' Association v Price Waterhouse 2001 (4) SA 551 (SCA)*
- *Kudu Granite Operations (PTY) LTD v Caterna LTD 2003 (5) SA 193 (SCA)*
- *Du Plooy v Venter Joubert Inc 2013 2 SA 522 NCK*
- *Woji v The Minister of Police [2014] ZASCA 108*

SOURCES OF REFERENCE

1. Legislation

- 1.1 Small Claims Courts 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 (out of print)
- 2.3. Bredenkamp, I M: *The Small Claims Court* (1986) (out of print)
- 2.4. Jones and Buckle: *Civil Practise of the Magistrate's Courts in South Africa: Volume 1* Eighth Edition
- 2.5. "Paying a Small Claims Court debt in instalments." DR, September 2012: 34-36 [2012] DEREBUS 19
- 2.6. *Small Claims Courts: Frequently Asked Questions*, Cape Bar (<https://capebar.co.za/capebar/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

FORMS and ANNEXURES:

See the forms as contained on www.justice.gov.za

PRO-FORMA ORDERS IN THE SMALL CLAIMS COURT⁶⁴

Money judgment

By far the most common judgment for the plaintiff, whether by default or at the end of a trial, is a straight-forward money judgment and it will usually consist of three elements, i.e. judgment amount, interest and costs.

Default judgment/judgment for the plaintiff for:

1. Payment of the sum of R [state amount].
2. Interest thereon at the rate of [state rate]% a year from [state date] until date of payment.
3. Costs in the sum of R[insert amount - presently only sheriff's fees]

Signature**Date****Print name of Commissioner**

⁶⁴ These examples are intended only to provide a basic guide to what are minimum requirements.

Judgment for specific performance

Far less common will be orders for specific performance, e.g.

1. The defendant is ordered to deliver the [e.g motor vehicle with registration no. xxx, television set with serial no. xxx to the plaintiff forthwith [or by a specified date].
2. The defendant is ordered to pay costs in the sum of [insert amount - presently only sheriff's fees].

Signature

Date

Print name of Commissioner

Ejection from commercial premises

1. The defendant is to be ejected from the commercial premises described as [insert full and correct description] forthwith [or by a specified date].
2. The defendant is ordered to pay costs in the sum of [insert amount].

Signature**Date****Print name of Commissioner**

In cases of orders for specific performance, it is important to describe the property, movable or immovable, involved as accurately as possible in order to enable the sheriff to execute a warrant correctly. In the case of commercial premises the correct and full address should appear on the order and in the case of movables, a registration number or serial number should be used. If those are not available, the Commissioner should consider how the relevant property can be uniquely described on a warrant.

Order for deferred payment

In terms of section 39 of the Act, when a money judgment is granted, which will be the most frequent judgment for a plaintiff, the Commissioner is obliged to enquire from the defendant, now the judgment debtor, whether the judgment debt can be paid without delay and if the defendant indicates an inability to do so, a financial enquiry is obligatory. Such enquiries frequently result in an order that the judgment debt is paid in instalments and the following is an example of such an order:

1. The judgment debtor (defendant) is ordered to pay the judgment debt, including interest and costs, to the judgment creditor (plaintiff) in monthly instalments of not less than R [insert amount] each, provided that the final instalment may be less than such instalment.
2. The first such instalment is to be paid on or before [date] and the following instalments are to be paid on or before the [first, seventh etc] day of each succeeding month.
3. In the event of any one instalment not being paid timeously, the full balance then outstanding will become immediately payable and the plaintiff may proceed with the execution process against the defendant.

Signature

Date

Print name of Commissioner

Orders dismissing an action

Where the evidence leaves the court undecided, the appropriate judgment is absolution from the instance and it is appropriate to state this specifically, e.g.

1. Absolution from the instance.
2. Costs for the defendant in the sum of Rxxx [where the defendant may have incurred sheriff's fees].

Signature**Date****Print name of Commissioner**

Where a defendant has actually proved a defence in respect of which the defendant bore the onus e.g. that of payment, the order should be:

1. Judgment for the defendant.
2. Costs for the defendant in the sum of Rxxx [where the defendant may have incurred sheriff's fees].

Signature**Date****Print name of Commissioner**

Counterclaims

Where the plaintiff's claim fails and the defendant succeeds in proving a counterclaim (also referred to as a claim in reconvention) then the order will usually be:

1. The plaintiff's claim is dismissed.
2. Judgment in reconvention for the defendant for:
 - (a) Payment of the sum of R [state amount].
 - (b) Interest thereon at the rate of [state rate]% a year from [state date] until date of payment.
 - (c) Costs in the sum of R[insert amount - presently only sheriff's fees].

Signature**Date****Print name of Commissioner**

Bear in mind that the financial enquiry requirement will also apply to a judgment in reconvention.

Review reasons

It is important to indicate that reasons are submitted merely to assist the reviewing High Court in its finding.

- A brief description of the parties and of the nature of the case should be given. This is the most crucial part of the review because it forms the basis of the court's decision.
- Commence by setting out the undisputed facts and then proceed to make findings on the disputed factual issues.
- To make a particular finding of fact, the Commissioner does not have to be completely convinced of the correctness of a finding. Proof upon a preponderance of probability is what is required.

Reasons for judgment follow four stages

- **A summary of the evidence**
 - Summarize the witness evidence as well as any documentary proof. Refer to corroborating evidence but don't repeat verbatim.
- **An assessment of the evidence**
 - Note contradictions especially where the contradictions relate directly to the issues in the case. Distinguish between a deliberate lie or honest mistake by a witness.
 - Do any witnesses have a vested interest in the outcome of the case?
 - Where permissible consider well-founded attacks upon the general character and credibility of a witness.
 - Failure to call an essential witness or to submit available documentary evidence may be held against a party.
- **Evaluation of conflicting versions**
 - Probabilities of conflicting versions should be compared.
 - Usually both the credibility of the witness and the probabilities of the case should be considered together.
 - Where the probabilities are so evenly balanced that no positive finding can be made on the evidence, the case may have to be decided on the onus of proof and whether it was discharged or not.
- **An assessment of the legal position**
 - Determine the law relevant to the issues.
 - Identify the underlying principle and apply the law to the facts.
 - Formulate your finding clearly and give full reasons for your predilection.
 - Must sometimes pass a value judgment.

Review Reasons: Example

IN THE SMALL CLAIMS COURT FOR THE DISTRICT OF _____ HELD AT _____

Small Claims Case Number _____/____

High Court Case Number _____/____

In the matter between:

_____ Applicant

and

Small Claims Court Commissioner

First Respondent

Second Respondent

REVIEW REASONS

Dated at _____ on this the _____ of _____ 20____

Commissioner

- CC - Clerk of the Small Claims Court
- Applicant's Attorneys
- Respondents
- Advisory Board