SU1 Substantive and Adjective Law

Classification
National classified into substantive and adjective law.
Adjective law covers law of evidence, civil procedure and criminal procedure

Differences and distinctions
Substantive law: the rules of substantive law define the rights and duties of persons in their ordinary relationship with each other.
Adjective law: Is accessory to substantive law ie. the existence of substantive law creates the need for the rules of procedure to enforce the substantive provisions.
therefore adjective law provides the procedures through which the courts may enforce compliance with the provisions of substantive law.

SU2 Enforcing the law

Intro
Civil proceedings, liability not guilt is established, "The defendant is liable for damages" is correct.

Function of the courts
is to resolve disputes between legal subjects or between legal subjects and the state.
Both civil and criminal proceedings may be described as formal systems of dispute resolution, enforced/sanctioned by the state.

Subject matter
of court proceedings can be civil or criminal nature
Civil proceedings relate to a dispute between legal subjects (one of which may be the state or an official of the state), described as a claim.
Criminal proceedings are between the state and an ordinary citizen. State acts through a prosecutor in the magistrates' courts or the state advocate in the High Courts (on behalf of the complainant.)
It is quite possible for a person to lay criminal charge and institute civil proceedings on the same cause of action (different areas of substantive law nased diferent procedures.)

Parties
State and the accused. The person who has suffered is the complainant, state prosecutes on behalf of the complainant. accused known as appellant when case goes on appeal at the instance of the convicted person.
The person who starts the proceedings by issuing a summons is known as the plaintiff, person against whom the summons is issues is called the defendant. If proceedings brought by application, known as applicant and the opposite pary is called respondent, person who lodges appeal is known as apellant and the other party is the respondent.

Objectives
THE object of civil proceedings is to establish the laibility of the defendant/respondent to compensate the plaintiff or to perform or not to preform certain acts in relation to the plaintiff/applicant.
In criminal proceedings the objective is to establish whether the accused is guilty of a crime, and if so to impose a penalty.

Compulsion
Civil proceedings are voluntary, aggrieved party not compelled to commence these proceedings. If defendant chooses not to defend or respond then judgment will be granted in his/her absценec (default judgment) - judgment without "e" is used in law to distinguish between a legal ruling and 'moral judgement'. Parties can reach an out of court settlement by negotiation. During pretrial stage court will not intereferere except upon application by one of the parties. During pre-trial parties, exchange pleadings, pleadings close and then parties prepare for trial. In civil proceedings parties are compelled to follow rules of court; which perscribe the minimum standards for the conduct of proceedings.
In criminal proceedings there is a very strong element of compulsion, the accused has to appear before the court to hear and defend the criminal charge.

**Onus of Proof**

Civil proceedings; balance of probability.

Criminal Proceedings; Beyond reasonable doubt.

**SU3 Inherent Jurisdiction**

Superior and lower courts

The superior courts are the Constitutional court, the High courts and the Supreme court of appeal. The subordinate courts, known as lower courts, include the magistrates court established in terms of the Magistrates court act 32 of 1944, small claims courts that have limited jurisdiction and are conducted according to simplified procedure to hear minor claims in terms of the small claims court act 61 of 1984. Customary courts other bodies vested with judicial powers, established by virtue of particular legislation for ex. childrens courts and liscencing bodies.

Meaning of inherent jurisdiction

Civil procedure as applied in superior courts does not depend solely of statutory provisions and the rules of court. "Inherent Jurisdiction" means that its jurisdiction is derived from common law and not from statue, one of the implications of a superior court exercising its jurisdiction is that it has a discretion in regard to its own procedure, in other words it may condone any procedural mistakes or determine any point of procedure.

Constitution confirms this common law power, s173 states "The Constitutional court, the Supreme Court of Appeal and the High Courts have the inherent power to protect and regulate their own process"

"Creates of Statute"

Lower Courts have no inherent jurisdiction, they derive their powers from the particular statute that created them consequently each enabling statute must be carefully interpreted in order to determine the scope of the jurisdiction so conferred.

**SU4 Sources of Procedural Law**

Intro:

Civil procedure of the High court does not consist solely of statutory provisions and rules of court. A substantial part of it consists of common-law rules.

Statutory law

Supreme Court Act 59 of 1959. (pertinent to the High Courts)

Magistrates’ Courts Act 32 of 1944

Small Claims Courts Act 61 of 1984

Rules of Court

Until 1965 each division of the then Supreme court had different rules of court. Uniform Rules of Court then took effect from 15 January 1965 (Supreme Court Act of 1959).

Magistrates’ Courts Act of 1944 similarly came into operation on 30 August 1968. The Rules board established 1985 was conferred with the powers to make rules for the various high courts and the Supreme Court of Appeal. Members of the rules board are appointed by the Minister of Justice for a period of five years and are eligible for reappointment; they are meant to make, amend or repeal rules for the efficient, expeditious and uniform administration of justice; competence to make rules for all these courts vests with the rules board.

s16 of the constitutional court complementary act 13 of 1995 provides that the president of the constitutional court in consultation with the chief justice may make rules relating to the manner in which that court may be engaged and for all matters relating to the proceedings of and before that court. The present rules of the Constitutional court came into operation on the 23 October 1998, the minister of justice may make rules that regulate the proceedings in small claims court.
Nature of the rules
Rules of the court have statutory force and are therefore binding on a court, since they are delegated legislation. The rules are not an end in themselves but rather a means to an end, purpose of the rules is to facilitate inexpensive and efficient litigation and not to obstruct the administration of justice, a court, subject to its competence to do so, may condone non-compliance with procedure that would lead to substantial injustice to a litigant. A Superior court may also exercise its inherent jurisdiction to grant relief in circumstances where the rules do not cover a particular matter, or where strict compliance with a rule would result in substantial prejudice to a litigant.

Method of reference
"Rule" (capital R) is a reference to the uniform rules of court. "rules" (lower case r) is a reference to the Mag court rules. The supreme court of appeal rules are referred to by means of an abbreviation “SCA Rule”.

Common Law
A considerable portion of civil procedure of the high court comprises of rules of common law, especially in the matter of provisional sentence and (namptissement), one finds the appropriate rules in the common law with the rules of the court themselves effecting only a small part of the (namptissement). Many of our rules of courts and statutes are based on English law.

SU5 Civil procedure in context

General perspective
Because its part of the system of Anglo-American civil procedure a dominant characteristic of South African civil procedure is that it adheres to the adverserial system of litigation. All South African courts, except small claims courts, apply adverserial principles and procedures. Continental civil procedure is inquisitorial (an enquiry controled by the judicial officer.) Its common in continental Europe, in the inquisitorial system the judicial officer, along with the parties are actively involved in the conduct of proceedings and in determining the facts of the case. The inquisitorial system relies more on statutory code than on precedent.

Anglo American civil procedure, is adverserial in nature, is generally adopted in common law countries, litigation is seen as private matter therefore relies on the legal representatives of parties to prosecute respective claims and offenses. Legal representatives are also responsible for gathering and presenting their evidence to a judicial officer at trial. The trial is marked by its orality, there are distinct pretrial and trial stages and the judicial officers play a passive role.

Adversarial procedure
~Intro
The adversarial nature of South African civil procedure is characterized by: Both litigants, indepently initiate and prosecute their respective claims or defences and investigate gather and present information that supports their claim to the court. The above brief description expresses 3 fundamental principles that underlie our system of civil procedure, bi-laterality, party prosecution, party representation.~Bilaterality
The principle of bilaterality, assumes that both litigants will have a fair and balanced opportunity to present claims or defences, inherent in this principle is the belief that the truth will emmerge if each party presents their own biased view of the issue. Litigants are therefore placed in an adverserial relationship with each other.~Party prosecution
Refers to the competence of a litigant to commence or defend proceedings and to move the case forward through all the stages. This principle reinforces the notion that litigation is a private matter, conducted without any interference with the court, except where its intervention is requested. This means that the person has a choice
whether or not to commence the proceedings and the defendant has the choice whether to consent to the judgment, defend the action, or ignore the summons and accept the default judgment. Both parties may also negotiate an out of court settlement. However, both litigants must conduct proceedings according to certain minimum standards prescribed by the rules of court. Party representation, refers to competence of litigants to investigate, formulate issues in dispute, present facts and prove these facts and raise a legal argument in support of these facts before a court. This supports the idea that litigants should be masters of their rights.

Role of the court
Role of the judicial officer is passive, except in small claims court. In that the judicial officer is restricted to evidence that litigants have chosen to present, the judicial officer is not responsible for ensuring that each litigants case is complete, reaches a decision based purely on what litigants present, may not participate in pre-trial stage- this may only occur when it is requested by one of the litigants. However principles of party procedure and representation do not have unqualified application, the judicial officer may direct the case within the confines of the issues presented by the parties during the trial stage. There is a growing tendency to promote judicial activism.

The legal profession
In principle every litigant is entitled to appear personally before the court, however because conduct of litigation is so specialized litigants instruct agents on their behalf, members of the legal profession. This occurs within the context of adversarial procedure, consequently legal representatives are duty bound to promote and protect clients' interests'.

Critical appraisal
~Litigants
In theory both litigants have equal opportunity to present a case, however don't always have same financial resources, nor are the skills of legal council equally matched, rivarly caused by the competitive approach does not ensure that litigants will fully disclose facts, in psychological terms an adverserial approach to litigation does not reconcile the litigants but tends to exacerbate their differences and consequently heightens the conflict.

~Competative representation
Because of the technical nature of procedure, and competativeness of proceedings, lawyers must reinterpret litigants rights and interests into procedural terms, consequently the lawyers meet the demands of the system but very often do not represent litigants human needs. Divorce increases animosity.

~Public proceedings
Courts are public institutions because they have a public function, proceedings are conducted in open court, consequently private grievances and highly confidential commercial matters are made public.

~Delay
"Justice delayed is justice denied", delayed is caused by technical nature of procedure, formality of proceedings and competative tactics and strategies that are the inevitable result of adverserial litigation. This has serious personal and financial consequences for the litigants.

~Costs of litigation
Access to the courts is free, court administration and time is provided by the state at no cost, problem lies with transactional costs of litigation. owing to the complexity of legal issues representation by a lawyer is normally essential, lawyers charge a fee that is often beyond the means of an average citizen, the result of this is that recourse to the courts is restricted mainly to those who can afford it or who qualify for legal aid.

~Adjudicatory process
The judicial officer decides the matter impersonally. Attention focuses on the weight of evidence and merits of the legal arguments, because adjudication occurs in an adverserial setting, judgement is granted in favour of one of the litigants unless absolution of the instance is granted. The system does not permit a method of decision making that reconciles the litigants, which increases the tension between litigants, especially where they are bound to each other in long term relationships, the judgment of the court is enforced by execution procedures that are sanctioned by the state. Compliance with the judgement is ensured by means of coercion not by means of consent of the parties concerned.
Reforming civil procedure
The first way to reform civil procedure by means of continual revision of the rules of court, primary responsibility of the rules board. Another method; increase the jurisdictional limits of lower courts to give more people access to court at lower costs, another method is to exclude specific types of dispute from the court system, for example, the labour relations act 66 of 1995 which prescribes dispute resolution procedures and also establishes courts that deal only with labour matters. Establishing alternative fora; the small claims courts have been established as alternatives to litigating in the magistrates court, to extend access to justice in cases of small claims relating to consumer matters and minor disputes that are not worth the cost of litigating in a higher court. The final method encourages resolution of disputes outside of the court system through use of informal dispute resolution processes. This means that informal processes have been incorporated into the rules of court to encourage the settlement of disputes by means of arbitration or mediation so as to save costs avoid delays or make allowances for personal interests.

SU7 Small Claims Courts
Objectives and underlying principles
Regulated by the small claims court act 61 of 1984 they were introduced in order to achieve the following objectives. Making administration of justice more accessible, provide a forum for the settling of minor civil disputes, remove time consuming formalistic and expensive procedures, introduce informal and simplified procedures, further reduce the cost of litigation, by prohibiting legal representatives, establishing a consumer orientated court. The purpose of the act is to solve problems experienced by litigants in other existing courts, it extends the basis of every citizen’s right to have access to justice, this is facilitated by self representation, simplified pre-trial procedures and granting the commissioner an inquisitorial function. This does not give small claims courts an inferior status. They are part of the structures of the court system, recognised in terms of s166 (e) of the Constitution, their judgements are binding and execution of the judgment is enforced by the state. The shortcomings of the small claims court should be recognised, the very low jurisdictional limits restricts it to extremely minor claims, certain claims are totally excluded, only natural persons may appear, review of proceedings is permitted, but appeal is prohibited.

Differences: Small claims courts and other courts
Representation by member of a legal profession is disallowed, pre-trial proceedings are informal, the rules of evidence have been relaxed, the role of the judicial officer has been radically modified. Relationship between the litigants remains adversarial, in other courts, the judicial officer has a passive role

Establishment and nature
Minister of justice may by notice in the government gazette establish small claims courts in any district of a magistrates court S2 (small claims court act), the officer presiding is called the “commissioner for small claims” and is appointed by the minister ss8 and ss9 (1). Its not a court of record, ie. proceedings during a trial are not put into writing, one exception, the commissioner must record the judgment/order and sign it, s3(1-2), like all other courts the proceedings take place in open court except in extraordinary circumstances s4. Process of small claims courts is effective through the republic ss3(4).

Right of appearance
Only natural persons are allowed to commence an action, jurisdiction person may become a party to an action as a defendant s7(1), this restriction maintains small claims courts as consumer courts, which would otherwise be used by juristic persons to collect small debts, defeating the intention and purpose of the court. Litigants must appear in person and may not be represented by any other person during the trial s7(2) however, it is important to consider the provisions of s7(4) that a juristic person may be represented by its authorised officer or other officer, in practice this means that as a defendant in an action a juristic person could be represented by one of its in house attorneys, this would place the plaintiff at a disadvantage.

Jurisdiction
The area of jurisdiction of small claims court is that area or district in which it has been established s12.
s14 indicates the persons in respect of whom the small claims court will exercise its jurisdiction over. Jurisdiction in respect of its causes of action is regulated by s15. Which is same as s29 of the Mag court act. except that quantitative restrictions of all claims is R7000, s16 stipulates which cases the small claims court is authorised to hear, s17 to 24 deal with various instances related to jurisdiction namely incidental jurisdiction, abandonment, deduction of an admitted debt, splitting of claims, and cumulative jurisdiction. s22 specifically provides that the small claims court has no jurisdiction to hear a matter which otherwise exceeds their jurisdiction by virtue of consent of the parties.

Institution of actions
s29 of the Small claims court, in summary the pre-trial stage is conducted as follows, a letter of demand is delivered to the defendant, allowing 14 days from the date of receipt to satisfy s29(1)a. If the defendant does not satisfy the claim, summons must be issued out of the small claims court, s29(2). Before issuing the summons the clerk must set a time and a date for the hearing, which must be contained in the summons, s29(2) The summons is then served on the defendant, litigants themselves may effect the service, service by the deputy sheriff is optional, the letter of demand may be served in the same manner s29(2). No pleadings are required from the litigants however the defendant may at any time before the hearing, lodge a written statement describing the nature of his defensive as well as particular of the grounds on which it is based. A copy of the statement must be supplied to the plaintiff s29(3).

Procedure and Evidence
The rules of the law of evidence do not apply, the commissioner has discretion to establish any fact in a manner that is suitable under the given circumstances. s26(3) introduces the inquisitorial system and provides that a litigants may not question or cross examine any other litigant, but the commissioner must proceed inquisitorially to establish facts in this regard he or he may question any litigant or witness at any stage of the proceedings provided that the commissioner may in his or her discretion allow any litigant to put a question to any litigant or any witness. Evidence may be submitted in writing or oral evidence may be heard, s26(2), litigant may call one or more witnesses s21, however the right of a litigant to call a witness does not affect the commissioners power to decide that sufficient evidence has been adduced and that no further evidence may be lead.

Appeal and review
s45 states that a judgement or order is final and no appeal will lie against it, this is one of the major criticisms behind small claims courts, although appeal is not permitted, proceedings may be reviewed in terms of s46 but only on the following grounds: absence of jurisdiction, the commissioners interest in the action, or his bias, malice or corruption, or gross irregularity with regard to proceedings.

Inquiry into financial position
The act provides for speedy execution after judgement, the commissioner asks the judgment debtor whether they are able to comply with the judgment without delay, if the debtor indicates that they are unable to do so, the court may conduct an inquiry into the financial position of the debtor, after this inquiry the court may make an order to pay the judgement debt in installments, unlike in the magistrates court, the inquiry takes place immediately after judgment and not after the lapse of 10 days during which the judgment debt remains unsatisfied.

SU8 Meaning of jurisdiction
Relevance of juris for CP
No single court exists anywhere in SA which has juris as crt of 1st instance 2 hear all matters. Before an action is instituted it it essential to ascertain which court can hear the matter, there must be some link (nexus) between the court and the parties or the subject matter in addition such court must be able to give an effective judgment before it will hear a matter. Issues relating to jurisdiction must therefore always be considered before aspects of procedure. Once the correct court has been determined jurisdiction is no longer an issue since provided that a court has jurisdiction when an action commences it will not matter whether the original ground of jurisdiction has ceased to exist. If an action is instituted in a court which is not vested with jurisdiction such court will refuse to hear the matter and a fresh action will have to be
instituted in another court.

Concept of territoriality in constitutional terms South Africa is a unitary state, however the organisation of the superior courts is closer to that of a federation since various high courts exist each serving a specific geographical area, each of these courts is largely independent of the other high courts. This territorial independence of various high courts causes jurisdictional problems. In other unitary states jurisdictional issues usually deal with whether a superior or lower court may hear a matter or where different superior courts exist to hear different types of litigation, it must be decided whether the correct court has been chosen in light of the type of claim concerned in South Africa, each high court has original jurisdiction over all causes arising in its territorial area.

Definition of jurisdiction
~As regards civil procedure
The definition of the term jurisdiction in context of civil procedure given in Halsbury laws of England “By jurisdiction is meant the authority which a court has to decide that are litigated before it or to take cognizance of matters presented in a formal way or decision”. In Ewing mcdonald and co Ltd. v M&M products, the court defined jurisdiction as follows “Jurisdiction... means power vested in a court to adjudicate upon, determine and dispose of a matter” In both definitions the following 2 requirements are emphasized,
1 The court must have authority to hear the matter
2 The court must have the power to enforce its judgment
The first, namely authority to hear a matter requires the presence of some link or nexus between the court and the parties or the cause of action (ratio jurisdictionis) the power to enforce a judgment is derived from the doctrine effectiveness.

SU9 The structure of the superior court system

The various courts
The Constitutional court, the highest court of appeal in Constitutional cases. Court of first instance in respect of certain constitutional issues. The supreme court of appeal, used to be known as the appellate division of of the supreme court. High courts; these comprise the former provincial and local divisions of the supreme court.

The function of the various courts
~The constitutional court
in Jo-burg the matter which comes before the constitutional court must be heard by at least 8 judges, its jurisdiction is set out in s167 (3)-(7) of the Constitution. It has 4 functions, Highest court of appeal in respect of Constitutional matters, s167(3), it is the only court, which may hear disputes between organs of state at a national or provincial level hear certain applications by the legislature, over the constitutionality of the parlimentary and provincial bills and acts, take decisions on whether parliament/president has failed to comply with a Constitutional duty and to certify provincial constitutions. As regards these matters the constitutional court has exclusive jurisdiction. This court may in exceptional circumstances grant anyone direct access if it is in the interest of justice to do so s167(6a). The final function of the constitutional court is to confirm orders made by other courts, in which parlimentary or provincial legislation is declared invalid, until the constitutional court confirms an order of invalidity, it has no force s167(5). Therefore it can function as a court of first instance or a court of appeal.
~Supreme court of appeal
Situated in Bloemfontein, functions only has court of appeal, it hears appeals from the various high courts. May hear appeals on constitutional and non-constitutional matters, it is the highest court of appeal in non-constitutional matters, and its decision is final. In constitutional matters a further appeal may lie to the Constitutional court.
~High courts
situatd in various major centres in South Africa, courts of first instance in litigation where the amount concerned or the nature of the claim is outside the jurisdiction of the magistrates courts. Also function as courts of appeal and review in respect of magistrates courts decisions. A full bench of the high court is also a court a appeal in respect of a decision of single judge of that court.A high court may hear any matter
that it is not prohibited from hearing by the constitution or any other legislation.

Jurisdiction of the various courts
~Constitutional court, is concerned only with constitutional matters, its jurisdiction is set out in s167 of the Constitution, s176(3)- Constitutional court hears only constitutional matter and also has the final say on whether a matter is Constitutional or not. s176(4)- sets out matters in which the constitutional court has exclusive jurisdiction, s176(5)- Authorises the supreme court of appeal and high courts to make decisions on the constitutionality of legislation, however this decision has no force until confirmed by the Constitutional court.
~the supreme court of appeal
jurisdiction is set out in s168(3) of the constitution, and s21(1) of the supreme court act, leave to approach this court is always required.
~High courts
Jurisdiction of these courts is set out in the following legislation; s169 of the constitution, s19(1a) of the supreme court act provides that every high court may adjudicate on any cause arising within its territorial area of jurisdiction, except where exclusive jurisdiction has been vested in another court of tribunal, also have jurisdiction of all persons residing in their territorial area. s173 of the constitution refers to the jurisdiction that derives from common law and from the unwritten powers that the court possesses to exercise its judicial functions, appeal jurisdiction in terms of s19(1i-ii) and 20(1) of the supreme court act, the result is that high courts are limited territorially only, within these limits, jurisdiction is exercised in accordance with common law principles except where statute provides otherwise.

SU10 Terminology

Latin terms
~Actor sequitur forum rei,
this roman law rule means a plaintiff must institute the action in the area which the defendant is domiciled, or in the area in which the defendant is domiciled or resident, such rule is merely one of the accepted rationes jurisdictioinis, if the actor sequitur forum rei rule is followed such a court is said to have jurisdiction ratione domicilii
~Dominus litis
More than one court may be able to exercise jurisdiction if various rationes jurisdictiones exist in respect of different court, in such instance, a plaintiff may as dominus litis (literally master of the suit) choose in which of these courts he wishes to institute the action.
~Incola and peregrenius
Both these terms come from roman law, originally peregrenius meant a foriegner and incola was a resident of a particular city or province of the empire, in South African law they have special meanings, 1) an incola is a person who is either domiciled or resident within a courts area of jurisdiction
2) an peregrenius is a person who neither domiciled nor resident within that courts area of jurisdiction these two terms apply to each high court as a seperate entity and not to south africa as a whole, citizenship is of a country is not relevent
3) when dealing with a peregrenius a distinction is drawn between a person who does not live within the jurisdictional area of a specific court but elsewhere in south africa, a local peregrenius and a person who lives outside south africa, a foriegn peregrenius
~Nexus
means link, in a jurisdictioional context it is the link or connection which gives a specific court jurisdiction over a particular person or cause of action
~Rationes jurisdictiones
jurisdictional connecting factors or rationes jurisdictiones, are links between the courts jurisdictional area and the defendant, the links accepted by our courts include domicile or residence of the defendant, commission of a delict, conclusion or breach of contract, submission in certain circumstances and the location of property where such property is the subject of the dispute.
~Ratione rei gestae
Under common law a court will be vested with jurisdiction in respect of monetary claims in the following instances,
1) if the contract was concluded or was to be performed or was breached within the courts area, any of
these grounds will be sufficient to vest jurisdiction, this is jurisdiction ratione contractus
2) If the delict on which the claim is based committed in a courts area, court has jurisitiction ratione delicti
commissi, collectively these two grounds are termed ratione rei gestae.

~Ratione domicilii
Under common law the court where the defendant is either domiciled or resident always has jurisdiction to
hear claim sounding in money,

~ratione rae sitae
relevant only in respect of property claims, under common law the court where the property is situated is
the only court which can hear claims relating to such property.

~Legal phrases
Attachment to found or confirm juristiction
the word attachment in a juristicional context refers to one of the grounds upon which a court justifies its
exercise of juristiction in respect of monetary claims, relevent only when dealing with juristiction in respect
of money claims where the defendant is a foreign peregrenius, note arrest to found or confirm juristiction
has been held unconstititutional, see bid industrial holdings (Pty)Ltd. v Strang. Claims sounding in money
used to describe an action based upon a claim which seeks either the payment of money or payment of
money as an alternative to some other order, if in doubt, consider the relief which a plaintiff seeks, if it is
payment of money the claim is one which sounds in money.

~Docterine of effectiveness
one of the common law principles on which the exercise of juristiction is based, a court will not exercise
jurisitction unless it is able to give an effective judgment ie. unless compliance with the judgment can be
expected where the defendant resides in south africa, compliance can be enforced by execution or
contempt proceedings. This docterine must not be seen in isolation and is frequently not followed
because of other considerations.

~Domocile
Is acquired by lawful presence at a particular place with the intention of settling there, for an indefinate
period, if the defendant is domiciled in the courts area, the court has jurisitction even if the defendant is
not present in person in the area at that time. Reside, reside has never been satisfactorily been defined
by our courts or legistl
ation, amounts to more than mere physical presence while been less than
domicile, must be some element of intention to prolong the stay beyond the limit of a mere casual or
temporary visit. In case of Beedle and Co v Bowley residence was defined as "his home, his place of
obode, the place where he generally sleeps, after the work of the day is done" in ex parte minister of
nature of affairs, the following principles were laid down 1) Distinction should be drawn between place of
residence and domicilium 2) person have more than one place of residence, so he or she should be sued
in the area of the court in which they are residing at the time of service of summons 3) a person does not
reside in a place which he or she visits only temporarily.

SU11 General overview of Jurisdictional principles

Types of claims
Different juristicional principles apply in respect of each type of claim

Relationship between common law principles and legislation
s19(1)a of the supreme court act has been interpreted as providing the common law still applies unless
specifically altered by legistlation, when determining juristiction in high courts.

Claims sounding in money
Traditionally the comon law principle that applied was that actor sequitor forum rei, even in roman times
this principle is not always followed, the principle of ratione rei gestae and the problems of litigating
abroad have resulted in the situation where courts other than the court where the defendant is domociled
may also exercise juristiction.

Claims relating to property
Here the principle that forum rei sitae is the only court with juristiction has remained relatively unchanged.

Matrimonial actions
In terms of common law principles, it was where parties were domiciled, this principle has now been altered by statute.

Constitutional matters
s167(3) of the constitution defines a constitutional matter as including any issue involving the interpretation protection or enforcement of the constitution.

SU12 General principles of Jurisdiction, claims sounding in money

General principles
Eessential question when determining jurisdiction in respect of monetary claims is: where does the defendant live?, different rules of whether the defendant lives inside South Africa or outside the country. You must bear in mind that the courts where the defendant is resident or where the cause of action arose will all have jurisdiction to hear the action and no other requirement needs to be met, also remember s28(1) provides that no defendant that is an incola may be attachment for jurisdictional purposes. Where the defendant is domiciled outside of South Africa, two courts will have jurisdiction, court of domicile, court where action arose, however both courts will only have jurisdiction if attachment takes place within the borders of South Africa.

SU13 Where is the defendant an incola of some South African court

Where the defendant of the court concerned, this ground of jurisdiction is known as ratione domicilii, is based on the Roman law maxim actor sequitur forum rei, a court has jurisdiction over a defendant who is an incola of its area at the time when the action is instituted, the problem encountered with this jurisdictional connecting factor is a procedural one, the rule states, that the defendant must be domiciled in the area at the time the action is instituted, Pollak states that the action is instituted when the summons is issued and served, this was confirmed in Mills v Starwell finance (pty)Ltd. From a jurisdictional point of view the defendant need not be physically present in the courts area of jurisdiction when the action is instituted, a person may be domiciled at a place where he is not currently resident and such a court will still have ratione domicilii. If a defendant is domiciled in the area of one court and resident in the area of another, both courts may exercise jurisdiction on this ground.

Where the defendant is a peregrinus of the court concerned, but an incola of another court in South Africa

When a defendant is a local peregrinus of the relevant court, they will only have jurisdiction if the course of action arose within its jurisdictional area. This ground derivates from Roman law principles and is known as ratione rei gestae, it is essential that the defendant is a local not foreign peregrinus. When does a course action arise within a courts jurisdictional area? All claims which are instituted are based on some cause of action, a cause of action usually arises from a contract (ex contractu), or a delict (ex delictu) a court will be vested with jurisdiction because the cause of action arose within its jurisdictional area in the following instances: 1. Where the contract is the subject of the litigation was concluded or breached within the courts area, or where performance of the contract was intended to be effected within the courts area. The court is then said to be vested with jurisdiction ratione contractus. 2. Where the delict on which the claim is based is committed within a courts area, the court then has ratione delictu commissi.

It is not possible for jurisdiction to be confirmed or extended by attached of the defendant in contrast to the distinction of foreign peregrini defendants because s28(1) prohibits attachment of persons domiciled or resident anywhere in South Africa. This has broaded the basis of jurisdiction in that attachment has been rendered unnecessary and jurisdiction can be assumed on the ground of the cause of action. On the other hand, the power of the court to exercise jurisdiction has been diminished because attachment is prohibited and therefore a court cannot exercise jurisdiction on the ground of attachment ad fundandam jurisdictionem, that is attachment alone will not vest a court with jurisdiction.

SU14 Where the defendant is a peregrinus of all South African courts
Where the defendant is a foreign peregrenius and the plaintiff is an incola of the court concerned, the court will assume jurisdiction if the plaintiff is an incola of the court and if attachment of the defendants property has taken place, this is known as attachment ad fernandum jurisitictionem. The order for attachment founds jurisdiction, it is not neccessary that the cause of action should have arisen within the courts area of jurisitction, attachment ad fernandum jurisitictionem alone founds jurisdiction, this principle is based upon considerations which evolved through a series of court decisions, attachment ad fernandum jurisitictionem is not permissionable if the plaintiff is a peregrenius, courts will not adjudicate an action between peregrenii unless there is a suffiecent nexus with the area of the court, thus in the case of attachment ad fernandum jurisitictionem, the plaintiff must be incola of the court aswell.

To summrize attachment to found jurisitction the defendant is a peregrenius of the whole republic, attachment of the defedants proeprty has taken place, the plaintiff is an incola of the court concerned

Where the defedant is a foreign peregrenius and the cause of action arose within the area of the court concerned, where the defedant is a peregrenius of the whole republic a court will be competent if, one the cause of action arose within its area, and two, the attachment of the defendants property has taken place within south africa, this is known as attachment ad confirmandam jurisitictionem ie. the attachment confirms the partial jurisitction which a court has by reason of the fact that the cause of action arose within its area. Where a court exercise jurisitction based on attachment ad confirmandam jurisitictionem, the nature of the proceedings is irrelevent provided that money is claimed, the most common grounds are ratione contractus and ratione delicti, it makes no difference to the above rules whether the plaintiff is an inola or peregrenius of the court

Attachment under the provisions of s19(1)c of the supereme court act 59 of 1959
s19(1)c provides that attachment to found or confirm jurisitction may take place anywhere in the Republic.

Procedural issues concerning attachment
Attachment of the defendants property proceeds the commencement of the main action, ie. before main action an application on notice of motion is brought requesting the attachment of defedants property, onus is on the applicant to show that they have a cause of action because it is a seperate order it is decided seperately and so the court will not go into the merits of the main action, if attachment is ordered the defendants property will be subjec to attachment until judgment has been given in the main action unless such a defendant furnishes security

SU15 When submission will vest a court with juristiction

Intro
Submission to juristiction although one of the general principles of our law is relevent only where montary claims are concerned. In roman dutch law and roman law, and limited form of submission was available to parties. In South African case law, submission developed until it was viewed as a further ground on which a court could exercise its juristiction, there is dispute concerning the circumstances in which submission will be sufficient to vest a court with juristiction, position is still not entirely clear.

Person who may submitt to juristiction
~where the defendent is an incola of the court
submission to juristiction by an incola defendent will never occur since the court already is vested with juristiction ratione domicilii

~Where the defendant is the peregrenius of the court concerned but an incola of some other south african court, previously assumed that such defendants could submit to the juristiction of the court other than the court where the cause of action arose, however, in veneta mineraria spa v carilina collieries (pty)Ltd. Court held that despite submission one of the traditional grounds of juristiction still had to be present, the defendent in this matter was a local peregrenius and the court refused to accept that submission vested it with juristiction. Since the cause of action had not arisen within its area of juristiction. It therefore appears that a local peregrenius cannot submit to juristiction but that the action must be instituted in the court within whose area the cause of action arose.

~Where the defedent is a peregrenius of south africa and the plaintiff the incola of the court concerned,
until recently it was accepted that a foreign peregrenius could submit to the jurisdiction of the incola plaintiff's court, however in the veneta case the court stated that in addition to submission one of the traditional grounds of jurisdiction also had to be present, the subsequent case of briscoe v marais it was held that this meant that submission could not take place unless the cause of action arose within the courts jurisdictional area irrespective of whether the plaintiff was a incola or a peregrenius, the current position is thus: that a peregrenius defendant cannot avoid an attachment to found jurisdiction by submitting to court jurisdiction.

~Where the defendant is a peregrenius of south africa and the plaintiff is a local or foreign peregrenius For a court to have jurisdiction in respect of such parties the cause of action must have arisen within its area and attachment to confirm jurisdiction must have taken place, if a foreign defendant submits to a courts jurisdiction in such circumstances and does so prior to the attachment order being made submission will render attachment unnecessary. In the light of recent case law, it appears that this is the only instance in which submission can take place, in addition rather than being an independent ground in which jurisdiction can be exercised, submission is merely a substitute for confirmation by attachment.

When does submission occur
Can occur either by way of mutual consent of both parties, or as a result of a defendants unilateral action. mutual consent is usually embodied in a contract, or other documentary proof. However submission by a defendant can take place in a number of ways, if a dispute arises about whether the actions of the defendant are consistent with a submission, the onus rests on the plaintiff to prove that the defendants behaviour has given rise to a clear inference that they have submitted to the jurisdiction of the court. It has been held that a filing of a plea request for security or a request for postponed will be deemed to be a submission. A further question is whether a peregrenius defendant can submit to the jurisdiction of the court after attachment has occurred so as to obtain their the release of their property. In Betten Court v Kom it was held that submission after attachment is too late and cannot be set aside by the court, irrespective of whether this submission took place unilateraly or by mutual consent the court concerned will not accept that it is vested with jurisdiction unless the cause of action has arisen in the area of the court concerned.

**SU16 Jurisdiction in respect of claims relating to property**

General principles, a claim relating to property is one in which the court is asked to make an order which directly affects the specifically identifiable property, general common law principle is that the forum rei sitae has jurisdiction to hear such claims.

Where the object of relief is immovable property
the court in whose territorial area the immovable thing is situated has exclusive jurisdiction in actions

1) to determine the title to immovable property
2) transfer of immovable property
3) partition of immovable property
4) Where a real right is in dispute
5) Where possession of immovable property is claimed
6) Where recission of a contract for the transfer of immovable property is claimed
Is does not matter if the defendant is a incola or peregrenius

Where the object of relief is movable property
the court in whose territorial area in movable property is situated has jurisdiction in any action to determine

1) the title of such propert
2) for delivery of movable property
3) where a real right in respect of such property is at issue
whether the jurisdiction of the forum rei sitae is open to debate, forum domicilii of a person should also be able to exercise jurisdiction, it is irrelevent if a defendant is a peregrenius or an incola.

**SU17 Matrimonial jurisdiction**
General principles
Unlike the position regarding monetary claims, the jurisdictional principles that govern issues of status are not based on the concept of effectiveness but the degree of recognition which will be given to the judgment of courts in other countries, a money judgment is seldom enforced outside the country where it was granted in contrast a judgment which changes status often requires international recognition. The basic common law principle regarding divorce is that the court of common domicile of the parties has jurisdiction, this makes sense as the court where the parties had their home is the court which has the greatest interest in their status and future arrangements. Private international law determines this to be the most appropriate court, although in the past the common domicile rule was generally appropriate it caused it severe hardship to the wife. First the the "common domicile" was viewed as that of the husband, secondly in South Africa the structure of the High Courts meant that a party who wished to obtain a divorce was not able to rely on a country wide jurisdiction but had to prove jurisdiction within the area of a particular court, the result was that a deserted wife often found it difficult or impossible to introduce divorce proceedings, this lead to the introduction of a series of legislative changes culminating in the changes to the divorce act and the introduction of the domicile act 3 of 1992.

The concepts of domicile and residence in the context of divorce jurisdiction, in terms of common law a woman automatically adopted and followed the domicile of her husband throughout the substance of her marriage she therefore lost the domicile which had prior to the marriage and forfeited her competence to acquire a domicile of choice, the wife's domicile of dependence was abolished by the provisions of the domicile act, and independent domicile for married woman is now conferred under section 1(1) of the act. The divorce act 70 of 1979 Established both domicile and residence as separate grounds for the exercise of divorce jurisdiction. Accordingly the current legislative position is that the domicile or ordinary residence of either spouse in the area of the particular high court is enough to confer jurisdiction. The word "domicile" when used in the context of divorce jurisdiction must be interpreted in accordance with s1(1) of the domicile act and not as its common law definition. The phrase "ordinarily resident" is not defined in the act, it is therefore necessary to refer to judicial interpretation, the then appellant division described it as "His usual or principle residents... his real home" Cohen v CIR. Ordinary residence does not require the party to be continually present in the area.

Current legislation regulating divorce jurisdiction
The divorce act determines whether a particular high court has jurisdiction, the most important principle is that a court may exercise jurisdiction on the basis of the independant domicile or residence of either the husband or the wife. Alternatively court may exercise jurisdiction if both or either of the parties are ordinarily resident in this area on the date on which the action is instituted, and have been ordinarily resident in the republic for a period of not less than 1 year, immediately prior to the institution of the action s2(1)b. A court may exercise jurisdiction if only one of the parties is domiciled or resident in its area or jurisdiction, this has a number of implications. 1 Domicile resident of one spouse is sufficient to confer the competence to exercise divorce jurisdiction over the other spouse 2. The domicile residence of one spouse is sufficient to confer the jurisdiction even if the other spouse is domiciled or resident outside the republic. The time with must elapse before domicile or residence has been established is unclear, s2(1)a provides if either of the parties are within the area of the court, such a court will be competent irrespective of the period of domicile. This contrasts with the provisions of s2(1)b which require a period of residence of a year within the republic. s2(2) provides that a court which has jurisdiction to adjudicate a claim for divorce in terms of s2(1) also has jurisdiction in respect of a claim in reconvention or an application in the divorce action concerning s2(3) deals with choice of law, it determines that, a court must apply its own law when adjudicating a divorce action.

Jurisdiction in respect of nullity and annulment
Both the annulment and declaration of nullity of marriages fall outside the scope of the definition of divorce action in the divorce act. Our law distinguishes between void and voidable marriages, an action for the declaration of nullity does not alter the status of the parties, because in reality it merely of a declaratory nature, because no valid marriage in fact existed, parties are merely seeking legal confirmation of this fact. In accordance with our common law, the following courts have jurisdiction: The Forum loci celebrationis, the court where the marriage was entered into, the court where the plaintiff or
the defendant is domiciled at the time the nullity proceedings are instituted. In an action for the annullment or dissolution of a marriage which is not void but voidable, status does change, until such time as the marriage is set aside, it is in all respects a valid marriage. As soon as it is set aside the status of the parties changes and the parties are placed in a position which they were at the time of the marriage was entered into, since the provisions of the divorce act do not apply to actions to set aside voidable marriages the common law is applied; originally only the court of common domicile at the time of the institution of the action had jurisdiction, however, the domicile act of 1992 now provides that the woman can acquire her own domicile of choice during the marriage it can therefore be argued that her current position is that the domicile of either spouse can be sufficient for jurisdiction.

**SU18 Constitutional jurisdiction**

Jurisdiction of the constitutional court

Jurisdiction of the constitutional court hears only constitutional matters, constitutional matter is defined as "Any issue involving the interpretation protection or enforcement of the constitution" this court has the final decision, on whether or not the matter is a constitutional one, so will itself determine what matters it is prepared to hear. As regards other matters it exercises concurrent jurisdiction with the high courts, the matters in respect of which it has exclusive jurisdiction are listed in s167(4) include disputes between organs of state, the constitutionality of parliamentary or provincial bills and certification of provincial constitutions. Unlike the position under the interim constitution, no longer has exclusive jurisdiction to determine whether an act of parliament is invalid and a high or supreme court may also make such a finding, it remains necessary however for the constitutional court to confirm such a finding before the order has any force. It is possible in exceptional circumstances to approach the constitutional court directly the constitutional court must give leave for an approach and the applicant must show that it is in the interest of justice that the court be approached direct.

Jurisdiction of the supreme court of appeal

This court may decide appeals on any matter, if an appeal deals with both constitutional and non-constitutional issues, appeal must be noted first to the supreme court of appeal, jurisdiction of the high courts and the supreme court of appeal may grant temporary relief in order to assist the party requiring relief until such time as the constitutional court has confirmed the final order.

Constitutional jurisdiction of the magistrates court

s170 of the constitution does not confer any constitutional jurisdiction but provides that other legislation may confer jurisdictional on these courts, provided that is does not confer jurisdiction to determine the validity of "Any legislation or any conduct of the president" s110(2) of the Mag court act, provides that if it is alleged during proceedings that any law or conduct of the president is invalid, the court must continue the proceedings on the assumption that it is valid, any constitutional issue may then be raised on appeal in the high court.

**SU19 Jurisdiction in the magistrates court general introduction**

Distinction between jurisdiction in the high courts and jurisdiction in the magistrates courts

~High courts inherent jurisdiction
result of inherent jurisdiction is high court may hear any matter which it could hear at common law unless expressly excluded by statute
~Magistrates courts creates of statute
This means that not only have they been created by statute but also that they can only do what some statute permits them to do. Because magistrates court may exercise statutory jurisdiction common law principles applied when determining jurisdiction in the high courts are not relevant.

Limitations on jurisdiction of magistrates courts

~High courts:
geographical limitation, the only general limitation placed on the exercise of jurisdiction in the high court is geographical
~Magistrates court
Nature and amount of of claim + geographical limitation. Magistrates court is limited by considerations regarding the nature of the claim, the amount of the claim and the geographical considerations.

Provisions regarding jurisdiction
~Primary provisions
s46 and s29 of the Magistrates court act s46 deals with the type of claim which no magistrates court what so ever may hear, s29 then sets out the maximum amount which may be claimed in a magistrates court action. Once it has been determined that a magistrates court may hear the action, the correct magistrates court must be identified, here, s28 is of most importance, it deals with jurisdiction in respect of persons.
~Other provisions dealing with jurisdiction
The following sections deal with the question of whether any magistrates court is competent to hear the action, s30 which provides that magistrates courts may grant interdicts, s31 and s32 which deal with forms of interdicts peculiar to the magistrates court. s37 which provides that, to determine a matter which a magistrates court may hear, the court may decide on matters outside its jurisdiction. s50 deals with how a defendant can transfer a matter to the high court. s110, deals with the question of whether a magistrates court can pronounce on the validity of any form of legislation. the following questions concern instances which fall outside the jurisdictional limit of magistrates courts section 38 or 39 which set out how to reduce the amount claimed so that it falls within the limit, s40 which provides that one claim cannot be split into different small claims to make it fall inside the financial limit. s43 which is the opposite of s40 deals with how to institute an action where more than one amount is claimed but each claim is less than the limit of the magistrates court. s45 sets out how the parties can consent to the jurisdiction of the magistrates court if the amount claimed is higher than the limit. s47 deals with situations where a counter claim which falls outside the jurisdictional limit is filled in response to a claim.

SU20 Limitations on the nature of the claim

General
Magistrates courts are not permitted to hear all kinds of actions. They are restricted as regards the nature of the cause of action. The parties to an action cannot by consent confer jurisdiction on the court.

Section 46(1): Matrimonial matters
s46(1) provides firstly that a magistrate’s court cannot grant a divorce. The section states, a magistrates court will not have jurisdiction in matters in which the “separation ... of goods of married persons ...” is sought, in other words, the joint estate.

s16(1) of the Matrimonial property act gives the magistrates courts jurisdiction to make an order granting a spouse the necessary consent to perform a legal act in respect of which the consent of the other spouse is also necessary, and is being unreasonably withheld. Once again the court must have jurisdiction in terms of s29 of the Mag court act.

Section 46(2)(a): validity of wills
Magistrates courts do not have jurisdiction to hear disputes regarding the validity of wills or how they should be interpreted, they do have jurisdiction to hear an action resulting from the provisions of a will, for example payment of an amount bequeathed in a will. There must be a genuine dispute about the validity or interpretation of the will.

Section 46(2)(b): Status as regards mental capacity
not empowered to declare a person insane, or to declare a person incapable of managing his or her own affairs. into s33 a magistrates is authorised to appoint a curator ad litem for a person who has already been declared insane or incapable of managing his or her own affairs.

Section 26(2)(c): Specific performance
s26(2)(c) prevents magistrates courts from making such orders (specific performance is that of specific performance of a contractual obligation)
1) Was the phrase “specific performance” limited to performance in terms of a contract or performance in general?
2) Could payment of money in terms of a contractual debt (ad pecuniam solvendam) ever amount to specific performance, or was specific performance limited to performance of a particular action (ad factum praestandum)?

The first question was decided in Masisel v Camberleigh Court (Pty)Ltd 1953, the court held that the words were limited to the traditional meaning of specific performance in terms of a contract (and could not be widened to include any order to perform a particular action eg. an interdict).

The second question was finally decided in Tucker's Land and development corporation stated a claim sounding in money, whether the debt arose from a contract or not, could never be a claim for specific performance.

It must be borne in mind however that the courts (including the high courts) are reluctant to grant orders for specific performance, especially where:

- specific performance is impossible or contra bonos mores
- the court will have difficulty in enforcing the order
- damages provide an adequate and convenient remedy
- the same result could be achieved by means of an interdict

Note s30 gives the court the power to grant interdicts, and this may appear to contradict s46(2)(c), as s30 is not qualified by s46(2)(c).

Section 46(2)(c)(i): "rendering of an account"

In Victor products (SA) Ltd v Lateulere Manufacturing Ltd 1975, "the right at common law to claim a statement of account is, of course, recognised in our law, provided the allegations in support thereof make it clear that the said claim is founded upon a fiduciary relationship between the parties or upon some statute or contract which has imposed upon the party sued, the duty to give an account".

Only when one party is in a position of trust, or when it is provided by statute, that the "rendering of an account" can be requested.

Section 26(2)(d): perpetual silence

A decree of perpetual silence is a court order instructing someone who has threatened to institute litigation to do so within a set period, or the person is barred from ever instituting action on those facts. In Garber NO v Witwatersrand Jewish Old Age Home 1985 consider the following facts:

- the nature and subject-matter of the claim
- prejudice to the parties
- balance of convenience
- the period of delay since the threat of litigation had commenced
- whether the threats of litigation constituted a disturbance of the applicants rights.

SU21 s29 limitations on the amount of the claim

Magistrates court act 32 of 1944* print and read

General

In this study unit we discuss the financial limitations placed on the magistrates court, which mean that even if a plaintiff has an action which a magistrates court may hear he cannot institute that in a magistrates court if the amount claims exceeding the financial limits imposed by s29.

The provisions of s29

Section 29(1): Subject to the provisions of this act

This refers to other sections of the act dealing with jurisdiction, remember s45 which sets out how to consent to a claim which exceeds the limits of s29

Section 29(1): ...causes of action... action...

In section 29 we refer to cause of action and action the word action must be interpreted broadly and not restricted to mean proceedings instituted by way of summons only. The word refers to all proceedings in
the mag courts and includes all applications and all proceedings in terms of s30.

~Section29(1)a: ...delivery or transfer of any property...
"value" in this section is actually market value of the property. The plaintiff need not state what the value of the property is, the defendant must allege that the jurisdictional limit is exceeded.

~Section29(1)b: ...actions of ejectedment... where the right of occupation is in dispute between the parties...
Action for eviction is not a claim for specific performance, its difficult to lay down general rules to determine whether "right of occupation exceeds R100,000 in clear value to the occupier" but note the following:

1 rental for the premises is not always correct criterion for calculating value.

2 capital value of the premises is not necessarily an indication of the value of the value of occupation.

3 Where premises are occupied for residential purposes the right of occupation is probably equal to the rental of similar premises calculated over the same time period of occupation.

4 If premises are being occupied for business purposes, the value of the right of occupation is probably equal to either:
a) cost of renting other premises on which the occupier can expect to make the same profit
b) the amount of profit which the occupier is reasonably expected to make on the premises in dispute

~Section 29(1)c actions for the determination of the right of way notwithstanding the provisions of s46
Provisions of s46 are excluded here, so it is irrelevant where the right of way is in order for specific performance, also not necessary to determine value of right of way, as no limit is placed on the value thereof, so magistrates courts may create or confirm any right of way irrespective of its value to the parties.

~Section 29(1)d ...Liquid document or mortgage bond...
Liquid document is a document in which a debtor admits that he is liable for a fixed/ascertainable sum of money, note that a financial limitation relates to the amount that may be claimed in a summons, not amount of liquid document or bond

~Section 29(1)e ...credit agreement as defined in s1 of credit agreements act 75 of 1980...
Credit agreement is an agreement for installment sale/lease transaction, found when purchaser cannot pay the full amount but receives the goods and pays the amount due in payments over a period of time, plaintiff in such an action may seek either recovery of property he sold, or payment of money owing in terms of the agreement if he seeks recovery, the value of the property at the time of the claim does not exceed the financial limit, if the plaintiff's claim is for one or more of the outstanding payments each one must not exceed the financial limit although, the total amount may exceed the limit.

~Section 29(1)f ...actions in terms of s16(1) of the Matrimonial property act 88 of 1984...
Section 16(1) of this act provides where a spouse refuses to or cannot give consent to transactions which require the consent of both parties either spouse may approach the magistrates court for assistance, court is approached by way of application and may authorise the transaction, in all those instances the matrimonial property act provides that court (high court) this exception was presumably introduced to enable the spouse requiring consent to avoid the cost of launching an application in the high court

~Section 29(1)fA Actions including an application for liquidation in terms of the closed corporations act 69 of 1984
This is the only insolvency application that a magistrates court may hear.

~Section 29(1)g ...Actions other than those already mentioned...
This is relevant when claims in the alternative are adopted, neither the value of the claim nor of the
alternative claim may exceed the financial limitation.

~Section 29(2) ..."Action" includes the claim in reconvention
A claim in reconvention is a counter claim which the defendant may institute against the plaintiff when he or she defends the plaintiff's claim.

SU22 Jurisdiction in respect of persons

General
s28 answers the question; "in which magistrate's court should this action be instituted?". The section deals with the link that should exist between the jurisdictional area of a specific magistrate's court and the person in respect of whom the court's jurisdiction is being exercised. The importance of litigating in the correct magistrate's court cannot be overemphasized. If in the wrong court the action should be instituted de novo in another magisterial district, which will waste the client's money (for which the legal practitioner will probably be liable for).

Some nexus or link must exist between the jurisdictional area of the court and the defendant, cause of action or property concerned. The jurisdiction in respect of persons is more limited because it is statutorily prescribed. Note that s28 begins with the words "relating to persons ..", "persons" means defendant only and can be a juristic person.
s28 plainly intended to alter the common law in that the persons over whom the court is conferred jurisdiction are limited to only the persons referred to in this section and no other, except where a defendant appears before the mag court and takes no objection to the jurisdiction [section 28(1)(f)], to that extent and that extent alone has the legislature preserved the common law.

One must remember the magistrates court may be given jurisdiction by some other act also (intro of s28)
The provisions of s28
~s28(1)(a): Any person who resides, carries on business or is employed within the district
-carryes on business
the question whether a person carries on business within a court's area of jurisdiction is one of fact, the phrase conotes regularity, note that the business carried on must be one's own, an artificial person carries on business in the place where its head office is situated.
A large company may be sued where its local head office is situated.
-is employed
a degree of permanent employment is required, a defendant who usually works in an office district but who sent to another district to finalise a matter there which will only take a few days does not become subject to jurisdiction of the court where he is temporarily located.
-time at which position is determined
in Mills v strawell finance the date of service of the summons and not its date of issue is the determining factor in establishing whether a defendant was "employed within the district" of the mag court concerned.
~s28(1)(b): any partnership... within the district
partnership is not a juristic entity, if sued in terms of common law, all partners have to be sued jointly, this was inconvenient so s28(1)(b) was introduced, it provides that a partnership can be sued in any area where it has business premises or where anyone of the partners preside, a notice in terms of rule 54 is usually served together with the summons, the notice requires the partnership to state who all the partners were at the time the cause of action arose.
~s28(1)(c): any person... in respect of any proceedings incidental to any action...
In respect of any counter claim, a plaintiff in a high court action is therefore always subject to the jurisdiction of that court if a defendant institutes a counter claim. At common law plaintiff is deemed to submit himself to jurisdiction of any court where he or she institutes action in respect of a counter claim, the common law does not apply in respect of the jurisdiction of magistrates courts, and so this assumption was not valid for magistrates courts. Different kinds of proceedings are incidental to the main action, interlocutory and preliminary applications are two examples of the legislature introduced by s28(1)(c), many but not all counter claims are incidental to the main action, in other words arise out of the same facts as the main action, so it is possible that a defendant will not be able to file a counter claim in answer to an action instituted against him or her in a magistrates court. If the court does not have jurisdiction to hear the counter claim but the plaintiff does not object to the jurisdiction of the court, the court will have...
Jurisdiction in terms of s28(1)(f).

~s28(1)(d): ...cause of action arose wholly within the district

Jurisdiction is determined by where the cause of action arose, not where the defendant is found, common law jurisdiction may be exercised ratione rei gestae in the high courts. However in the high courts the cause of action need only have arisen partially for a court to be vested with jurisdiction, in the mag courts the act provides the cause of action must arise wholly in the relevant area before a court will be vested with jurisdiction. Wholly in the context of the act means: describe in Abrahamse & sons v SARH as the "entire set of facts which give rise to an enforceable claim and includes every fact which is material to be proved to entitle a plaintiff to succeed in his claim, it includes all the plaintiff must set out in his declaration in order to disclose a cause of action" the facto probanda must all have occurred within the jurisdictional area of the court concerned but not the facta probuntia. note the following rules 6(5)(f) provides that should the plaintiff sue in terms of capacity conferred by s28(1)(d) the summons must state that the cause of action arose wholly within the district to this subjection cannot be used to establish jurisdiction in respect of claims based on credit agreements in such instances jurisdiction must be founded on one of the other sub sections of s28, the only instance in which jurisdiction may be established in terms of 28(1)(d) is in respect of claims based on credit agreements, is when the credit receiver no longer resides in the republic.

~s28(1)(e): any party to interpleader proceedings...

interpleader is a form of procedure by which a person in possession of property which is not their own and which is claimed from them by 2 or more other persons is able to call upon the rival claimants to such property to appear before the court in order that the right to such property be determined. This procedure is followed where the sheriff of the mag court has attached property and more than one person claims a right to the property.

~s28(1)(f): any defendant who appears and makes no objection this is a restatement of common law, ito s28(1)(f) we are dealing with the failure to object to the courts jurisdiction.

~s28(1)(g) any person who owns immovable property

the effect of this section is to extend jurisdiction to persons who own immovable property within the area of the court, but who are otherwise not subject to the courts jurisdiction in terms of any other provision of s28(1). The action must be in respect of that particular property or it must be in respect of a mortgage bond registered over such property, it must be stated in the summons that the property concerned is situated within the district rule 6(5)(g).

~s28(2) The state as defendant

the words person and defendant also include the state, minister of law of order v Patterson had to decide which mag court was competent to entertain an action against the state, Pretoria is regarded as "the seat of government of the Republic" thus the "place of business" of the state ito s28(1) is Pretoria.

The provisions of s30bis

Whether this implies that a person who is domiciled in south africa but currently resident here may be subject to arrest or attachment in the mag court has not been decided yet. This section must be interpreted in the light of the equivalent common law position in the high courts, therefore if a plaintiff wishes to arrest someone or attach his property in order to found jurisdiction, the plaintiff must be resident in the district of the mag court concerned, similarly if a person wishes the court to grant arrest or attachment in order to confirm jurisdiction the whole cause of action must have arisen in the courts jurisdictional district ito s28(1)(d).

The procedure for obtaining an order for an arrest or attachment mag court rule57 gives detailed instructions, the application make ex parte, once the arrest or attachment has been ordered, the respondent is given an opportunity to approach the court to discharge or alter the order the rule also provides that the court may require the applicant to give security for any damages that may be caused to the respondent by the order if it later appears that the order should have not been granted.

SU23 Other provisions that determine whether a magistrates court may exercise jurisdiction

General
Following sections all deal with question of whether any magistrates court is competent to hear an action and make the required order. s30 provides a magistrates court may grant interdicts, s31 and s32 forms of interdicts. s37determine a matter which a magistrates court may hear and decide on matters outside its jurisdiction. s50 deals with how a defendant can transfer matters to the high court.

Provisions of s30 interdicts
~Intro
Section30 provides that magistrates courts have jurisdiction of various kinds of orders which are otherwise excluded in terms of s46(2)c, in terms of s30, may grant interdicts, attachment orders, mandamentum van spolie and arrests tanquam suspectus defuga
～Interdicts
An order that someone must not perform an act is a prohibitory interdict, that someone must perform an act is a mandatory interdict, a final interdict is an order that remains permanently valid, temporary interdicts are granted either for a particular period of time or as an interim measure. It is clear that a mandatory interdict could be viewed as a form of specific performance prohibited by s46(2)c however in Bardenhorst v Theophanous 1988 it was held that the magistrates courts may nevertheless grant mandatory interdicts provided that it does not amount to "orders ad factum praestandum in terms of a contractual obligation", it is difficult to determine the financial value which must be placed on an interdict, it seems that if nothing appears to the contrary in the pleadings or in evidence or if the defendant does not dispute the plaintiffs obligation that the matter falls within the limits set by s29 the court will have jurisdiction, however if the plaintiff decides to institute action in the high court this court will not penalise a plaintiff by making an order for costs in the lower magistrates court scale or grant costs on the high court scale.
～Mandatum van spolie
Is a form of interdict known as a restitutionary interdict because it forces someone to return property that they have taken from another unlawfully, a person applying for the order need not be the owner of the property or even be in lawful possession of the property. The object of Mandamentum is to prevent people from taking the law into their own hands, therefore the court does not go into the merits until a person whose possession was disturbed regains possession, for this form of order appears to contravene s46(2)c, however the order is not open "in terms of a contractual obligation" held that mandatum does not contravene the provisions because s46 is not concerned with "extraordinary remedies of a temporary nature" Zinman v Miller. The value of the property will determine whether the magistrates court is prohibited by s29.
～Arrests "tanquam suspectus defugo"
When a debtor owes money to a creditor, creditor cannot enforce payment until there is a judgment against the debtor therefore a debtor sometimes tries to leave South Africa before a judgment has been given, the arrest tanquam suspectus defugo was available at common law, but has been included in both the uniform rules of the high court and in the magistrates court act and rules. In terms of this procedure, the debtor who tries to leave can be arrested and compelled to give security for the expected judgment in the case, this is a two fold advantage, the debtor pays an amount so that the creditor is reasonable certain of recovering the debt, or the debtor remains under arrest until judgment.
～Attachments
In actions where the payment of money or relief in regard to property is sought, it is possible to attach property of the defendant to obtain security, attachment of property in terms of s30 is not always available, a person applying with an attachment, must show that it is likely that the respondent will dispose of property or abscond with his assets, attachments are also granted when a person fails to keep up payments on a credit agreement and the creditor wants to protect his position by attaching the goods which he sold to the debtor to safeguard them.

The provisions of s31 and s32: rent interdicts
～Intro
When a lessor falls behind on his rental, the landlord requires a tacit hypothec over household effects (In vecta et illata) which are on the property for which the rent is owed, the moment household effects are removed tacit hypothec falls away, the landlord must therefore ensure that the household goods remain on the premises in order to maintain the hypothec, this is done by obtaining a special form of interdict, an attachment order which prohibits the removal of goods from the leased premises.
The automatic rent interdict
This provides that when a summons is issued for arrear rental, the plaintiff may include in the summons, a notice prohibiting anyone from removing household effects from the leased premises until an order dealing with such goods has been made by the court, the notice in the summons servers automatically as an interdict, forbidding anyone with knowledge of the interdict to remove the goods, this interdict was created by s31, the lessee or anyone else effected by the notice, may apply to the court to have it set aside.

Attachment of property and security of rent
The automatic rent interdict created by s31 is effective only against person who have knowledge of it, to protect household goods against any removal, s32 provides for attachment order to secure the goods effectively, s32 provides that the court may authorise the sheriff to attach enough of the movable property on the premises to satisfy the amount owed as rental. s32 supplementary to s31, the landlord must apply to court and in their supporting avirdavit state the following, the amount of rent due, that the rent has been demanding in writing for at least 7 days or if this is not so, that they believe that the lessee is about to remove the property on the premises to avoid paying rent, the landlord must provide security for all costs damages and expenses which may be a result of this order, should it later be set aside.

Provisions of s37 incidental jurisdiction.
Sometimes a question arrises during the proceedings of the magistrates court which falls outside its jurisdiction, s37 provides that while the magistrates court cannot make an order on matters outside its jurisdiction it may make a finding on such matters. The test to decide whether a court may decide a matter in terms of s37 is to look at the relief, if the relief falls within the jurisdictional limits it may grant that relief even if it has to consider and make a finding on matters outside its jurisdiction. s37(1) deals with one specific matter where the limits of s29 are exceeded, in this instanc it will make no difference if the total account is in excess of the jurisdictional limit proveded that the plaintiffs claim falls within the limit. s37(2) deals with matters inwhich the court has no juristiction in terms of s46 or s29, here a court may enquire into the ownership of fixed property, in order to determine a claim for rates or consider the validity of a divorce agreement to make a maintance order.

the provisions of s50: removal to the high court
sometimes despite that the matter falls within the jurisdictional limits, a party feels that a matter is too complex for them to wish it to be heard by a magistrates court, the plaintiff is always free to institute action in the high court, nothing to prevent a plaintiff from doing so, the defendant does not have this choice, they are served with a summons from the court chosen by the plaintiff. s50 gives defedant oppertunity to have the matter moved to the high court if they are not satisfied with having it heard by the lower court. If the defedant wishes to exercise this option, application must be made to the court where summons has been issued, the defendant must state that, 1 the amount of the claim exceeds R3000, 2 the applicant objects to the matter being heard by any magistrates court, notice of intention to the bring the application has been given to the plaintiff and other defendants 4 the applicant will furnish such sucurity as the court determines, for payment of the amount claimed and costs. If the applicant complies with these requirements the case must be stayed in the magistrates court, plaintiff may then elect to have the matter transfered to the relevent high court or decide to issue a fresh summons in the high court, the only check on a defedants freedom to move to a high court is the costs order which the high court may make if the plaintiff is eventually successful the court may grant him high court costs and attorney and client scale which is considerably higher than the party-party costs.

SU24 Provisions affecting all claims which fall outside the juristictional limits

General
s38 and s39 deal with how to reduce a claim so it falls within the limit of the mag court, s35 sets out how parties can consent to the juristiction of the mag court despite the fact that the amount claimed is higher than the limit or the court does not have jurisdictioin in terms of s28, s40 which provides that one claim cannot be split into many smaller claim to bring it within the financial limits s43, the opposite of s40 which deals with how to institue an action where more than one amount is claimed which in total exceeds the juristictional limit, although each amount is less than the limit. s47 which deals with a situation in which a counter claim which falls outside the juristiction of the mag courts is filed in response to a plaintiffs claim,
insitituted in the mag court.

The provisions of s38: abandoment of part of claim
~The effect of the provisions of s38, plaintiff may often have a claim that is higher than the jurisdictional limit imposed by s29 but wishes to institute action in a mag court s38 provides that in order to fall within the jurisdictional limit of the mag court's a plaintiff may abandon a part of the claim if it exceeds this limit so as to fall within the jurisdiction of the court. Details of any abandoment must be set out in the summons of subsequent document if abandonment occurs later in the proceedings, the court will consider and make a finding on the full amount due before abadonment. but can only order payment of the maximum amount permitted by s29, if the court finds that the amount due exceeds its limit but is not the full amount claimed the amount that the plaintiff was unable to prove is deducted first from the amount that was abandoned, in effect a plaintiff who abandons a portion will recieve the amount proved or the maximum that the court can grant which ever is the lessor amount
~Procedure
the abandonment; rule 6(3)(b) of s38 must appear in the summons. after service of summons the plaintiff may abandon his/her claim by amending the particulars of claim in accordance with the procedure perscribed in s55A and s55.

The provisions of s39: deduction of an admitted debt
~The effect of the provisions of s39
Defendant merely issues claim in reconvention which is a seperate document together with his or her plea, should the defendant succeed in proving the counter claim, the amount proved is deducted from the amount proved by the plaintiff, plaintiff can admit the debt due to the defendant and deduct this amount from the amount claimed in the summons. If the plaintiff wishes to claim more than the jurisdictional limit of the court, s39 creates a possibility for the plaintiff to allow debt to the defendant to be subtracted in order to fall under the limit. The effect of s39, the plaintiff will be awarded the amount proved in court less the amount admitted.
~Procedure
Particulars of the deduction must be mentioned in the summons although the deduction may be made at a later stage, but before judgment by amending the summons in accordance with s55A and s55.
~Comparision between s38 and s39
in appropriate circumstances a plaintiff may use both sections together to bring a claim within the jurisdiction of a court by deducting whatever amount they owed to the defendant and then abordoning any remaining amount which exceeds the juristiction of the court.

The provisions of s45: Consent
~the effect of the provisions s45,
s45 gives the paries, oppertunity to consent that a mag court despite the fact, that such a court does not have jurisdiction in terms of either s28 or 29, parties cannot consent to a courts hearing a matter that is excluded from jurisdiction s46, both parties must consent to the jurisdiction, s45(1) deals with 3 possiblities.
-Juristiction in terms of s28 but not in terms of s29:
written consent may be given at any time, consent must be in writting
-no jurisdiction in terms of s28 and no juristction in terms of s29
in this case, the consent must be given "specifically with reference to particular proceedings already instiututed or about to be instituted in such a court".

For some time view was also held that s45(1) did not apply to cases but the court had juristiction in terms of s29 but not in terms of s28, expressly rejected that consent must be "specifically with reference to particular proceedings, already instiututed or about to be instiututed in such court, s45(2) deals contractual agreements to institute action, it was held in Truck & Carco (Pty)Ltd v Ewart that this prohibition only relates to consent given when the court has no juristiction in terms of s28, is not relevent whent he court has juristiction over the parties in terms of s28, but lacks financial juristiction over them ito s29. Clause in contract that reads as follows will be valid "provided the plaintiff insitutes an action in a mag court, which has juristiction ito s28 "the parties agree that any action which might result from this contract will be instiuteted in a mag court and the parties hereby agree to have the juristiction of the same courts, this
clause is valid because consent has merely been given to the jurisdiction of a mag court not of a
jurisdiction of a particular mag court.
~Procedure
consent has to be in writing by all the parties involved, written proof that the parties have consented to
the jurisdiction of the particular court neither does s45 require that the written consent be signed by the
parties, unless the onus is on the plaintiff to prove that the defendants consent has been obtained.

The provisions of s43
~Cumulative jurisdiction
where more than one claim, each based on a different cause of action, is contained in one summons the
court has the same jurisdiction in respect of each claim that it would of had if separate actions had been
instituted regarding each claim, although the total amount of the two claims exceeds the courts jurisdiction
in terms of s29, claims that are mentioned here must exist between the same parties, s43(1) expressly
requires that the two or more claims be founded on different causes of action, for instance, claim one
amount for hospital expenses incurred during treatment and in a separate claim seek an amount for loss
of amenities of life if the total amount of the claims exceeds jurisdiction. s43(2) provides exception to the
restriction imposed by s43(1), a plaintiff can in the same summons in which confirmation of an interdict is
sort, claim damages fromt he defendant on the grounds of his or her unlawful occupation of the plaintiffs
land either though both claims result from the same cause of action, even though the total value of the
subject matter of the dispute and of the amount claimed in damages exceeds the jurisdiction of the mag
court.

The provisions of s40 the splitting of claims
s40 is the counterpart of s43, embodied in one summons must be based on different causes of action, this section prevents one cause
of action which could possibly result in more than one claim which together would exceed the courts
jurisdiction from being split in such a way that separate claims can be brought in separate actions each of
which falls within the courts jurisdiction "substantive claim" refered to in section40 indicates a claim arising
from a single cause of action "every fact which it would be neccessary to prove if traversed in order to
support his right to the judgment of the court. It does not comprise of every piece of evidence which is
neccessary to prove each fact, but every fact which it is neccessary to be proved". this definition is also
used to determine if contrary to s40 a splitting of claims has taken place. Upon failure of the defendant to
pay the goods sold the plaintiff instituted actions to recover the purchase price of the delivered goods in
respect of the seperate sales, the defedants plea was that the seperate actions by the plaintiff amounted
to a splitting of claims contrary to s40, in order to circumvent the limitations of the financial jurisdiction, on
appeal, the court ruled in favour of the plaintiff, according to the court: the plaintiff's claim was based on
seperate causes of action, each sale was entered into on different occasions and the points at issue in
each sale were different, Mohamed and son v Mohamed supra (above) may be sumarised as follows:
There is no splitting of claims where the claims are based on different causes of action, claims which are
not distinct and seperate, and which arise out of one and the same cause of action must be sued for as
one claim in one action and must not be split in order to succeed with the defence based on s40, the
defendant had to prove apart from the splitting of claims, that the objective of the plaintiff was to recover
an amount owing to him in more than one action.

Provisions of s47 Counter claims exceeding jurisdiction
a defedant may have a counter claim which exceeds the financial jurisdiction of mag courts, the defendant
has 2 alternatives: they may abandon part of the claim or created by s47 allows the defedant to apply to
have the counterclaim decided by a higher court before the plaintiffs claim is heard by a mag court,
defedant must then institute action within the period of which the plaintiffs claim was stayed, the plaintiff
may in these circumstances institute his or her original mag court claim as a counter claim to the
defedants high court proceedings.