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Introduction to South African Law

Fresh Perspectives
3rd Edition

Amanda Barratt, Helena van Coller, Shaun de Freitas, Avinash Govindjee, Philip F. Iya, Helen Kruuse, Lirieka Meintjes-van der Walt, Karmini Pillay, Monique du Preez, Priya P. Singh, Luzuko Tshingana

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About the authors

Amanda Barratt is acting Head of the Department of Private Law at the University of Cape Town (UCT) and coordinates and teaches the LLB course on Persons and the Family. She also teaches on the Law Faculty's Academic Development Programme, and on an LLM course on Intellectual Property and Development.

Helena van Coller is an associate professor in the Faculty of Law at Rhodes University where she teaches administrative law. Her other research interest focuses on issues related to the intersection between law and religion.

Shaun de Freitas is a professor in Public Law at the Faculty of Law, University of the Free State, with specialisation in the right to freedom of belief and conscience. De Freitas is also an adjunct professor at the University of Notre Dame Law School, Sydney, Australia.

Avinash Govindjee is a professor of Law and Executive Dean of the Faculty of Law, Nelson Mandela University, a consulting attorney to Cliffe Dekker Hofmeyr and a part-time senior commissioner of the Commission for Conciliation, Mediation and Arbitration.

Philip F. Iya is a professor of African and Comparative Law at the Indigenous Knowledge System (IKS) Centre in the Faculty of Natural and Agricultural Sciences of the North West University (NWU), Mafikeng Campus. Philip currently assists the Indigenous Knowledge System (IKS) Centre with the legal aspects of IKS while also coordinating the postgraduate studies and research at IKS Centre.

Helen Kruuse is a senior lecturer in the Faculty of Law at Rhodes University and an attorney of the High Court of South Africa. Her research relates to family law and legal ethics. She is also an editor of the South African Law Journal.

Lirieka Meintjes-van der Walt is an adjunct professor of Law at the University of Fort Hare where she is the Leader of the Law, Science and Justice Research Niche area. She has practised as an advocate at the Eastern Cape Bar and has published close to one hundred academic articles and book chapters.

Karmini Pillay is an academic at the School of Law, University of Witwatersrand, and a facilitator in the Labour Dispute Resolution Programme for the Commission for Conciliation, Mediation and Arbitration at the Mandela Institute.

Monique du Preez is an admitted attorney of the High Court of South Africa and employed as the Director, Knowledge Management at an international law firm, DLA Piper South Africa. She is also a senior lecturer at the University of Johannesburg where she lectures the module law of civil procedure.

Priya P. Singh is an admitted attorney and notary and is a lecturer in the School of Law at the University of KwaZulu-Natal, where she teaches the law of delict, the law of succession, maritime law and cyber law. Her doctoral research deals with the development needed by the South African law to cope with privacy infringements on social media networking sites.

Luzuko Tshingana is an admitted attorney of the High Court of South Africa and a law lecturer at the University of Fort Hare (UFH). He obtained his LLB at NMMU (as it then was) and LLM at University College London. He also lectured at Rhodes University before joining UFH.

The roots of our law

Section 1

Chapters in this section

- **Chapter 1** What is the law?
- **Chapter 2** History and development of South African law

You will learn about

- The characteristics of a good legal system
- The influence of Roman and Roman-Dutch law on South African law
- The influence of English law in our legal system

The nature and history of our law

From the beginning of time, when people began living together in groups, they needed rules to give them order and security. From ancient days, when respected members or elders of society came together to solve problems or settle disputes or to make rules and decisions, they would sit in a special or sacred place to do so. Often this was under a great tree like the baobab. Not only did many people get justice and protection under this tree, but the law itself came to be compared to a tree.

Just like a tree, the law has roots, a trunk, branches and flowers or fruit growing from these branches. Although all legal systems can be described in terms of a tree, what differentiates one system from another is what is contained in the roots, trunk, and the branches of the tree and the kinds of flower and fruit that grow from these branches. We often say that you will know a tree by its fruit. In our example, this is so, as the flowers and fruit are the product of the legal system. If a tree bears fruit that is bad, it is often because of some problem in its roots, trunk or branches.

In this book, we are going to take you through the beautiful and strong tree that is our law. In Section 1, we start by looking at the soil in which our law grew and at its roots. In Section 2, we explore the sources of law that are the trunk of the tree, and that give it support. Here, we also look at the roles that the court structure and legal profession play in supporting or holding up the tree of law. In Section 3, we look at the branches of law. In Section 4, we see how international law fits into our tree, and finally, in Section 5, we think about law into the 21st century.

Let us look more closely at Section 1. We start by discussing the characteristics and requirements of a good legal system in Chapter 1. In Chapter 2, we deal with the soil and roots of South African law. Our law is the product of more than 2 000 years of legal development starting in Roman times. We show how the seeds of Roman law came to be sown in Holland, and how the Roman-Dutch law came to be transplanted to South Africa. You will also discover how English law became part of our official written law and that when the first European legal system was established, the people living in South Africa already had their own unwritten law.

So the South African legal system as we know it today is a combination and development of all three of these systems. Think of our baobab tree again. It often looks as if it is made of many trunks entwined together, which indeed reflects the history and nature of our law.

Look at page 2 for a picture of our tree of law and the way that we are going to work through it in this book.

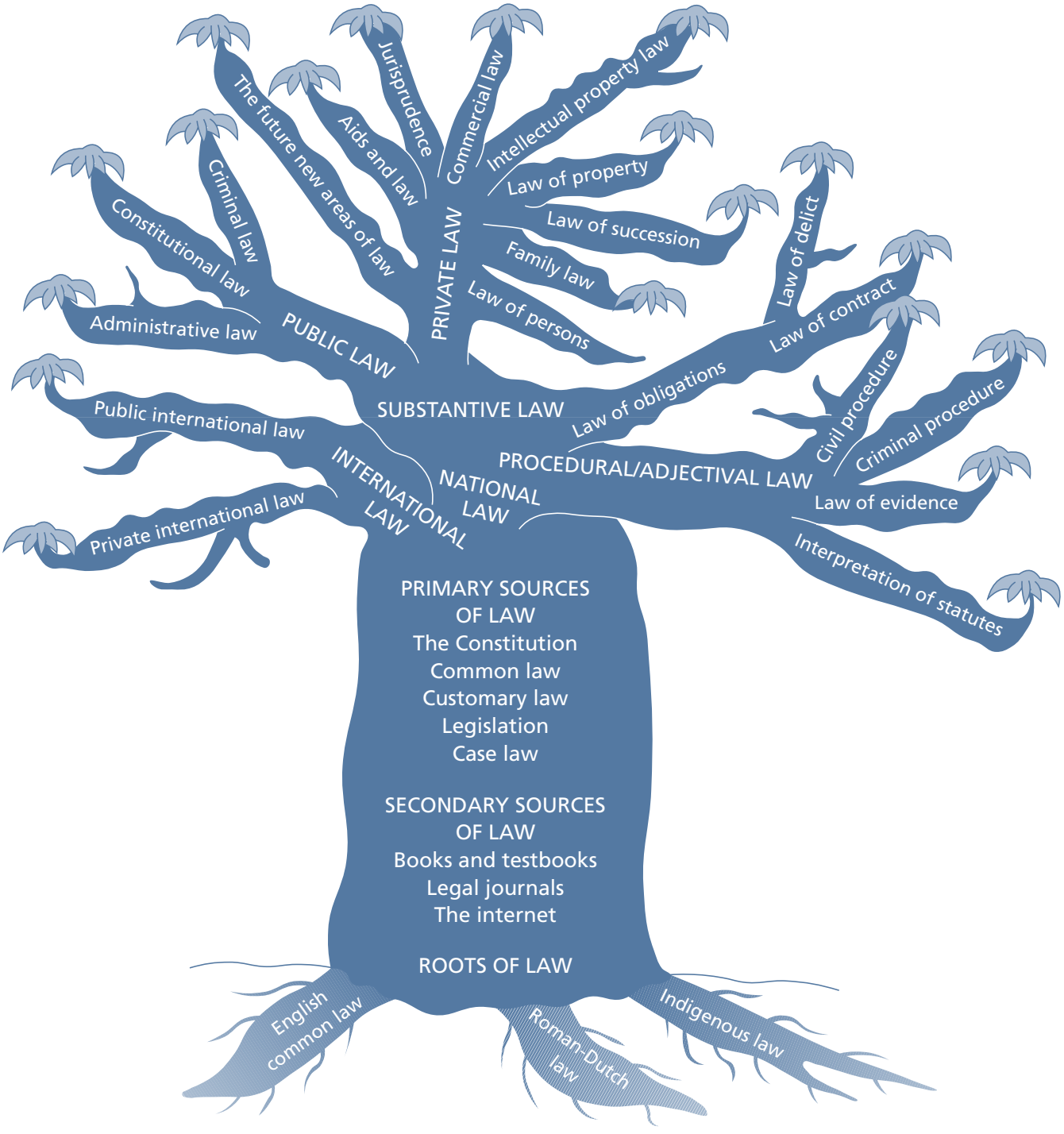

Figure 1.1 The tree of law

What is the law?

Chapter 1

The main ideas

- The law is made by the people, for the people
- Functions of the law
- How a legal system functions
- Factors that determine the effectiveness of the law
- The nature of law

The main skills

- Understand the functions of the law.
- Understand the pervasiveness of law in everyday life.
- Describe and contrast natural law and positivist theories.
- Understand the origins of and need for laws.
- Explain factors that could prevent effective dispute resolution.

Apply your mind

Imagine yourself stranded on a remote island with a group of 1 000 men, women and children. You know that you will all spend the rest of your lives on the island. Do you think the group would need to agree on a set of rules or laws? List the rules or laws that you would need to make in order to survive. Now imagine you are alone on the island. Would you still need rules or laws?

In this chapter, we look at what the law is and why it exists. We discuss how the legal system maintains and enforces the law to combine and balance two opposing ideas: freedom and order, so that society can run smoothly. We also consider two main theories on the nature of law.

Before you start

Imagine your lecturer asks you to play the following game in class. There is a prize for the winning team. Students remain seated as they are. All rows are not of equal length. The first student in every row is given a fifty cent coin. The lecturer tells you to start playing when he or she says 'Go.' The lecturer starts the game by saying 'Go.' The game has commenced. Do you know what to do? Why not? Is it because you have not been given instructions on the rules of the game? Vusi asks the lecturer what the rules of the game are. You are instructed that the fifty cent coin should be passed along each row and that the row who first manages to get a fifty cent coin to the end of the row will win. You start passing the coin along the row, but before the coin reaches the eighth student, the lecturer stops the game and now tells you that the coin should be passed over your left shoulders only. The game continues for a few seconds but is then stopped again by the lecturer who now informs you that the class forgot the rule that the coin should only be passed over right shoulders! Your row is penalised and given another fifty cent coin to pass as soon as the first reaches the end. The game commences again but is stopped this time because there are three blonde girls in two of the rows. These rows are no longer allowed to participate in the game. At last the game is concluded and the winning row gets to keep the fifty cent coin.

Discuss how the game made you feel. Was it unfair? Why? What could be done to make the game fair? Would clear and consistent rules, set out at the beginning, no changing of the rules, no discriminating or arbitrary rules and applying the rules equally have made the game fair? Why do you think this game was played during your first lecture on law?

Professor says — Laws, legislation and statutes

When we talk about a law, a statute, an Act or a piece of legislation, we are really talking about the same thing. All these words simply mean a rule, or a set of rules, made by an institution with the authority to make these rules. There are also certain laws that are unwritten, but which are accepted as part of the rules that organise a group of people.

1.1 The law is made by the people, for the people

As human communities developed, the need for rules of organised and predictable behaviour to guide the relationships between individuals became increasingly important. Behavioural rules of early social groups were based on local customs and spiritual beliefs and enforced by powerful individuals or groups. These rules were usually founded on common sense, and transmitted to new members of societies by word of mouth. As these customary rules were adopted over long periods of time, they became accepted as laws, and part of the proper functioning of the society.

As societies became increasingly complex, there was a greater need for more formal and complex behavioural rules or laws. It was common for the law to be applied and interpreted inconsistently. This development made it necessary for the legal rules of society to be formalised. This is how the process of legislation came about. The legal rules that were enacted were usually there to limit the behaviour of individuals where such behaviour infringed upon the freedom of others, or was offensive to the community at large. The legal rules of a society reflect the cultural beliefs and values of the dominant groups within the society. This would occur in a democracy. In the olden days when kings ruled on the basis that they inherited their titles, their laws would not necessarily reflect those of the majority of the people.

Professor says — Different legal rules in different countries

The administration of justice and the application of law are functions of the worldview of a community at a given time in a given place. Decisions about the laws made in one particular community would often contradict decisions in another community, even when circumstances are similar. Some countries may have laws that allow for the chopping off of hands for stealing or stoning women who are suspected of adulterous affairs.

Every society or country has laws to govern, or control the behaviour of its people. In a democracy such as South Africa, the people vote for candidates from a specific political party to represent them in the national, provincial and local governments. The party who receives the most votes determines who our elected representatives will be. It is their job to make laws. This is why one can say that in a democracy 'the law is made for the people by the people'.

The state and its lawmakers identify the society's individual, social, political, economic and other needs and problems. With the laws they make and implement, they aim to meet these needs and solve these problems. If the state and lawmakers are careful in identifying and resolving the society's needs and problems, their laws should improve the quality of life of everyone in the society. Societies continually develop and make industrial, commercial, technological and scientific progress. They need new laws to regulate, or control, these new developments and to address new problems and needs.

An **interest** can be any right of a community or individual, such as the right to personal property or the right to life.

Another way to understand the purpose of the law is that the law aims to preserve and develop the individual's and the community's **interests**.

The law exists to create order and harmony in the relationships between individuals (and even other things). In other words, the law has to balance the interests of the individual and the interests of society as organised in social **institutions** within the state, and even across state boundaries.

Government structures, family, sports clubs and the workplace are all **institutions**.

The law is made by the people for the people and must therefore be obeyed by the people. The law applies to everyone. No one is exempt from the law because he or she holds a position of power. Each individual should be equal before the law. In the history of the South African legal system, you will see that people have not always been treated as equals before the law. We will come back to this problem in Chapter 24. Although the South African legal system had all the qualities of a good legal system, its flaw was allowing discrimination. Some of its qualities as a legal system will be discussed below.

Activity 1.1

We say that the law applies to everyone. Do you think that this is always a reality? Give reasons for your answer.

1.2 Functions of the law

As we have said, the basic task of the law is to combine and balance the conflicting ideas of freedom and order. But how does the law achieve this? The law of a state has seven main functions:

1. setting pre-existing, impartial rules, based on criteria that can be used to judge and settle conflicts
2. protecting the rights and freedoms of the individual
3. facilitating, or making change possible
4. protecting society by serving as a framework defining orderly conduct
5. providing a mechanism to legitimise actions by the state
6. protecting and preserving the legal system
7. providing institutions and procedures to settle disputes.

1.2.1 Setting pre-existing, impartial rules, based on criteria that can be used to judge and settle conflicts

At the outset of this chapter, the game with the fifty cent coin illustrated the importance of good law to set pre-existing, impartial rules based on fair criteria by which behaviour can be judged in the process of dispute resolution.

1.2.2 Protecting the rights and freedoms of the individual

For any society to survive and be successful, it needs laws to govern human interactions. However, at some points in history, many states have used laws to ensure continued positions of power of a ruling party and thereby infringed on, or violated the rights and freedoms of certain groups or individuals.

Professor says — Apartheid and our past

The South African legal system enforced apartheid (separateness) from 1948 to 1994. The apartheid system legally classified people into racial groups and set out the rights of each group. This system was implemented and enforced by the law. The most important apartheid laws are listed here.

- The Population Registration Act 30 of 1950: this law required all citizens to be registered as black, white or coloured.
- The Group Areas Act 41 of 1950: according to this law, different population groups had to live in segregated areas. For example, an Indian person could not own land in an area that had been allocated to white people.
- The Extension of University Education Act 45 of 1959: although this Act creates the impression of making tertiary education more accessible to all citizens, the effect it had in practice was that the education of different population groups was segregated. There were separate ministers for Bantu (black), Indian and Coloured affairs. Only in exceptional circumstances were white universities able to accept black students.

Professor says (continued)

- The Black Homeland Citizenship Act 26 of 1970: according to this law, different indigenous groups were allocated separate **homelands**. For example, Mandisi, a Xhosa man, would live and work in Johannesburg, but he was only a citizen of his homeland (either the Transkei or Ciskei) and could not become a citizen of South Africa.

In South Africa today, individual rights and freedoms are entrenched, or rooted, in our Constitution. The Constitution is the **supreme law** of the country, and such infringements of basic rights and freedoms are unlikely to occur again if the Constitution is upheld. To remember South Africa's history, the preamble, or introduction, of the Constitution of the Republic of South Africa, 1996 states:

> "We, the people of South Africa,
> Recognise the injustices of our past;
> Honour those who suffered for justice and freedom in our land;
> Respect those who have worked to build and develop our country; and
> Believe that South Africa belongs to all who live in it, united in our diversity."

The **homelands** during the time of apartheid were Transkei, Bophuthatswana, Venda, Ciskei, Gazankulu, KaNgwane, KwaNdebele, KwaZulu, Lebowa and QwaQwa.

The Constitution is the **supreme law** because all laws have to be measured against the ideas and rules in the Constitution.

Activity 1.2

What do you think were the injustices of our past?

Chapter 2 of the Constitution, which is known as the Bill of Rights, has entrenched certain basic rights and freedoms. If you look at the **Bill of Rights**, you will see there are five categories of human rights, as listed below.

1. Personal liberty, or freedom, and equality: The rights in this category are found in the following **sections** of the Bill of Rights – ss 9, 10, 11, 12, 13, 14, 15 and 21.
2. Economic and social progress: You will find the rights in this category in ss 22, 24, 25, 26, 27, 28 and 29
3. The administration of justice: The rights from this category are in ss 12, 32, 33, 34, and 35.
4. Freedom of expression: The rights from this category are in ss 15, 16, 17, 30, 31 and 32.
5. Political freedom: These rights are described in ss 7, 19 and 20.

You will find the **Bill of Rights** at www.contitutionalcourt.org.za/site/home.htm

Acts are divided into **sections**. In this book, we will use the standard abbreviations for section (s) and sections (ss).

Activity 1.3

1. As you look at the sections of the Bill of Rights, make a list of the rights included in each of the five categories.
2. Look at s 36 of the Bill of Rights. This section deals with the limitation of the rights mentioned above. This means that these rights can be limited under certain circumstances. What are these circumstances? Do you agree with them?

1.2.3 Facilitating change

Our social, economic, political and environmental conditions are constantly changing. These changes are brought about by changes in our values, attitudes and needs, and advances in, for example, technology, science and medicine. The law has to adapt to accommodate these changes and the challenges they bring.

Professor says Living law

The law is constantly changing, as legislators enact, amend and repeal legislation or change regulations governing the implementation of legislation. The law also changes because of public pressure, or in reaction to new circumstances in society.

In the 20th century, issues associated with what was then new technology, such as wireless transmission of communication signals (television and radio), automobile transportation and air transportation, required the development of new laws and regulations to guide usage. In the 21st century, evolution of the biotechnology and information technology industries, dilemmas in healthcare (such as issues associated with HIV-AIDS, euthanasia and access to health services) and issues associated with personal privacy in the electronic age, all demonstrate the changing circumstances that force institutions to evolve in order to meet and reflect the needs and desires of society.

Over time it is necessary to amend or replace laws that are outdated, contradictory or where the reasons for the particular law have fallen away. Situations that give rise to the need for new laws, can also arise.

Read the newspaper report below.

Being harassed? New law can help

Johannesburg – No longer will you be able to send someone an anonymous SMS with sexual innuendo or constantly bully a classmate at school without facing legal consequences.

A new act to protect victims from stalking, sexual harassment, electronic abuse and school bullying has come into law.

The Protection from Harassment Act 17 of 2011 came into effect on Freedom Day. It is a law which enables all citizens to approach the courts for protection from harassment.

This includes letters, SMSes, email messages and Facebook posts.

The new legislation means people who feel they are being harassed can apply for a protection order at their local Magistrate's Court without any legal representative.

Courts can give an order which compels service providers to provide the addresses and identity of offenders.

Previously, only people involved in a domestic relationship could seek a protection order.

According to *Women 24*, who quoted attorney Louise Bick, the harassment can be direct or indirect, so following, spying on, pursuing or accosting someone is viewed as harassment.

It also includes loitering outside or near a building where a person works or lives.

Sexual harassment includes unwelcome behaviour, suggestions, messages or remarks of a sexual nature.

A child under the age of 18, or an adult on behalf of a child, may apply for a protection order. This can be done without the assistance of a child's parents.

A person can also apply for protection on behalf of someone else. This is to protect those with disabilities, says Bick.

Courts can grant interim protection orders and issue warrants of arrest.

If the protection order is not followed, the perpetrator can be fined or jailed for a maximum of five years.

Source: 'Being harassed? New law can help'. *The Star*, 30 April 2013. Accessed from the website, http://www.iol.co.za/news/crime-courts/being-harassed-new-law-can-help-1508522

1.2.4 Protecting society by serving as a framework defining orderly conduct

The law defines relationships and creates authority. The law is required to define the status, functions and powers of individuals and government, social and administrative **organs**.

Just as the body has **organs**, such as the heart and lungs, the government has organs or institutions, such as the police, to do its work.

Laws relating to issues such as marriage and other partnerships, **custody** of children and labour relations, are all examples of laws that regulate our social relations and behaviour. The law does not only regulate relationships between parents and children, but also between domestic partners. A business partnership, as well as the relationship between a company and its shareholders, must be regulated. The law also determines when a person can be held responsible for his or her crimes or place age restrictions on the performance of certain actions, for example when one qualifies for a driver's licence or when it is legal to use alcoholic beverages.

Custody of children is the protective care of children by a legal guardian.

This helps the state to maintain order. There are instances where there will be tension or conflict between laws that function as protection of the freedom of the individual and laws as a mechanism of control for the orderly functioning of the state. Of course you would have preferred to be driving legally from the age of fourteen, but the need for order and the protection of society have an interest in allowing only individuals who are eighteen years old and who are considered to be more responsible drivers, to qualify for a licence after testing. In time 16-year olds may be considered to be mature enough to be driving a motor car legally.

1.2.5 Providing a mechanism to legitimise actions by the state by enforcing accountable administrative action

The law must also order the ways in which the state should function. All states have legal organs and officials who make, administer, interpret and enforce the law. According to the Constitution, the state should strive to be open and should take responsibility for the actions of these organs.

The law defines what powers these organs and officials have, and what procedures they must follow in exercising these powers. The legal system attempts to control the misuse and abuse of these powers.

Public law and procedural law also play an important role in founding legitimacy for state actions and legal procedures.

1.2.6 Protecting and preserving the legal system

Once a legal system is in place, it is important to ensure that the system can use the law to protect itself from internal or external threats. As mentioned above, the Constitution is the supreme law of the land and regulates the entire legal system. The Constitution can only be changed by a two third majority of the National Assembly and six provinces in the National Council of Provinces. Respect for the law is guaranteed by *inter alia* making the following criminal acts:

- Contempt of court: A person is in contempt of court if he intentionally disobeys or disregards a court order, or is guilty of misconduct in a court.
- Perjury: This is the crime of making a false statement under oath.

1.2.7 Providing institutions and procedures to settle disputes

Another important function of the law is to put in place institutions, people, procedures and processes to settle conflicts or disputes between individuals, between individuals and the state and between states.

1.3 How a legal system functions

As we discussed briefly, the law is driven by a legal system. It consists of the many people and institutions responsible for:

- law-making
- **legal interpretation**
- **adjudication**
- law enforcement
- legal administration
- giving legal advice and representation.

Legal interpretation means deciding the meaning of phrases, words and legal terms for legal purposes.

Judges and magistrates are responsible for **adjudicating**, or resolving disputes.

1.3.1 Law-making

The Constitution is the supreme law of the country and **binds** all legislative, executive and judicial organs of the state at all levels of government.

- The **legislative,** or law-making, **organs** are Parliament, the provincial legislatures and the municipal councils.

To **bind** means to compel a person or institution to follow a set of rules.

The **legislative organs** are also known as legislatures.

The Constitution specifies how the legislatures should conduct the law-making process. Parliament has the power to pass new laws, amend existing laws and **repeal** old laws on a national government level. Repealed laws are sometimes replaced with new laws. The provincial legislatures exercise the same power on a provincial level, and municipal councils on a local level.

To **repeal** a law means to cancel or revoke a law.

Schedules 4 and 5 to the Constitution list areas in which parliament and the provincial legislatures are competent, or able, to make laws. Schedule 4 lists those areas in which the two legislatures share the power to make laws (for example, agriculture, consumer protection, health, housing, public transport, and regional planning and development). Schedule 5 lists the areas in which the provincial legislatures make laws (for example, libraries, liquor licences and veterinary services). Part B of schedule 4 and part B of schedule 5 list the areas in which municipal councils make laws (for example, markets, noise pollution, traffic and sanitation services). The Constitutional Court has a testing right for legislation.

Schedules are annexures or additions, usually containing listed items, and are found in legislation for easy access.

1.3.2 Interpretation and adjudication

The courts and their judges and magistrates are responsible for adjudicating and interpreting the law.

In terms of section 165 of the Constitution, the judicial authority in South Africa is vested in, or placed in the hands of, the courts. The courts are independent; they are only subject to the Constitution and the law. Section 39(2) of the Constitution specifically grants law-making powers to every court

> "[w]hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

When adjudicating and interpreting the law, judges and magistrates should be independent of the state. They should not be influenced by their personal feelings or beliefs when they have to make decisions.

1.3.3 Law enforcement

The task of seeing that the law is enforced in the country lies with the South African Police and other law enforcement agencies, such as the Directorate for Priority Crime Investigations (DPIC) (known as the Hawks).

See the SAPS webpage at: https://www.saps.gov.za/dpci/index.php

Read the following newspaper report.

Gunmen involved in over 1 000 murders the focus of SA's 'biggest ever' firearms investigation

Cape Town – A gun smuggling investigation said to be the biggest in South Africa, which has been hampered by murders, an information leak and tensions among some of the Western Cape's top police officers, has been handed over to the Hawks and is back on track.

Investigators are now said to be focusing on, among other aspects, gunmen who carried out more than a thousand murders.

However, the investigation, which sources with knowledge of say is the biggest in the country and which they say was initially being handled by Gauteng and Western Cape organised crime policing units, still faces hurdles.

Several sources say during a period when the future of the probe was uncertain, some suspects were murdered and others fled.

Gunmen have therefore become the focus of the investigation, but tracking them could prove tricky as firearms pass many hands.

Over months, sources have said the investigation, which included probing how guns stolen from police were sold to gangsters, was set to

lead to high level arrests in at least three provinces.

Info leak and infighting

But the mammoth investigation into illegal gun networks, which started a few years ago, has been hindered by several events.

These include that:

- It emerged in May that a confidential investigation diary in the matter was leaked. News24 understands it was apparently to lawyer Noorudien Hassan before he was murdered in November 2016. News24 also understands that the leaked information, relating to the case and with details about an informant, was apparently found in Hassan's offices after he was killed. Hassan was part of a legal team representing an accused who allegedly sold guns to gangsters. No arrests were made for his killing.
- The Western Cape's Crime Intelligence division became embroiled in the court aspect of the matter, with a court ordering its head to see to it that the lawyer of an accused handed over leaked confidential documents to the State by June 9, 2017. It was not immediately clear if this happened.
- High-ranking Western Cape policeman Jeremy Vearey, who was instrumental in the investigation, in May told News24 that police and crime intelligence officers were conspiring with politicians and gangsters in an ongoing attempt to derail critical investigations. While Vearey did not detail which investigations, News24 understands the firearms matter is one of these.
- In June 2016 Vearey and another top policeman deeply involved in the guns investigation were suddenly shifted from their positions within the police.

These events are said to have derailed the investigation as a team probing the matter fragmented and focus was diverted.

Back on track

News24 understands, however, that the team has since reassembled with the sole task of probing the gun smuggling matter.

Members are also no longer stationed where they were before.

It is understood they were recently moved to work with the Hawks.

Western Cape Hawks spokesperson Captain Lloyd Ramovha confirmed this, telling News24 last week: "The matter is with us."

The court case aspect of the mammoth gun smuggling investigation is now also back in focus – the Western Cape's head detective has until the end of Monday, July 31, to hand over 3 028 dockets to the prosecution team in the matter.

This was ordered by the Western Cape High Court in May.

News24 understands the 3 028 dockets are linked to stolen guns and are for murders, attempted murders and illegal firearm possession.

National police spokesperson Brigadier Vishnu Naidoo said because the last date of compliance on the court order, being July 31, had not yet lapsed, he was not prepared to comment on whether the dockets had been provided to the prosecution.

"In view of the fact that the matter is still pending SAPS will not discuss the matter of compliance thereof in the public domain at this point in time," he said.

Guns to gangs court case

High profile arrests in the investigation so far include that of Rondebosch businessman Irshaad "Hunter" Laher, Vereeniging arms dealer Alan Raves, and ex-police colonel Chris Prinsloo, who has since been convicted.

They are linked to the alleged selling of firearms, meant to have been destroyed by police, to gangsters around the Western Cape.

In June 2016, Prinsloo was sentenced to 18 years behind bars after entering a plea and sentence agreement with the State.

Prinsloo was in charge of the police armoury and stole 2 400 guns over almost a decade.

These weapons had to be kept locked in sealed steel boxes at the confiscated firearms store in Silverton, Gauteng, before being destroyed.

According to an amended indictment, Laher allegedly offered Prinsloo R2m in exchange for stolen firearms and ammunition that were meant to be destroyed.

Raves, a Gauteng arms dealer, was arrested in Vereeniging in August 2015 and was charged in Bellville.

It is understood the State believes Raves started working with Prinsloo in 2007.

Laher and Raves, who missed previous court appearances due to health problems, are expected back in the Western Cape High Court in September.

'Sidelined'

Vearey and Major-General Peter Jacobs were previously instrumental in the investigation.

In June 2016, Vearey, who was deputy provincial commissioner for detective services, was suddenly shifted to a position he had previously filled – commander of the Cape Town cluster of police stations. Jacobs, who headed the province's crime intelligence unit, was appointed Wynberg cluster commander.

They have taken on police management in the Cape Town Labour Court over this.

1 066 murders and counting

Jacobs, in an affidavit in the labour court matter, said 888 of 2 000 firearms Prinsloo supplied, were forensically connected to 1 066 murders.

This was for the period between 2010 and May 31, 2016.

News24 understands that many firearms stolen from the police are yet to be located.

One source said it was believed 28s gang members in Cape Town were in possession of several of these.

Gang shootings have recently surged in several parts of Cape Town, including in gang hot spot, Bishop Lavis, about 18 km from the city centre and a 28s stronghold.

Source: 'Cape Gunmen involved in over 1 000 murders the focus of SA's 'biggest ever' firearms investigation' *News24*, 31 July 2017. Accessed from the website, http://www.news24.com/SouthAfrica/News/gunmen-involved-in-over-1-000-murders-the-focus-of-sas-biggest-ever-firearms-investigation-20170731

The law enforcement agencies can use the law to bring offenders to a court of law.

1.3.4 Legal administration

The Constitution determines how the government and government **administration** should operate. The Constitution also includes a Bill of Rights that all citizens and the state (including those in government and administration) must obey.

Administration refers to the organs and officials that run the national, provincial and local authorities.

1.3.5 Legal advice and representation

The legal system is organised around the legal profession, which consists of attorneys and advocates. The legal profession is responsible for giving legal advice to people who need it.

Many people in our society cannot afford legal services. South Africa has a system of legal aid. Legal aid refers to legal consultation or representation provided to financially needy clients at no charge or at **subsidised** rates. Legal aid clinics at universities play an important role in providing advice and legal assistance to the poor.

Subsidised means that the costs for legal services are partly supported by financial support of the state or other financial grants.

1.4 Factors that determine the effectiveness of the law

A number of factors determine how well particular laws achieve the objectives discussed above. These factors include:

- public awareness, understanding and acceptance of the law
- enforcement of the law
- consistency in the law
- clarity in the drafting of law
- changes and stability in the law.

1.4.1 Public awareness, understanding and acceptance of law

It is important for us, as a society, to understand how the law regulates certain aspects of our lives. We have to be aware of our rights and duties. Awareness campaigns such as *Arrive Alive*, which reminds motorists of their responsibilities when driving, can be seen as an example. Websites, such as **http://www.polity.org.za** and **http://www.gov.za**, provide accurate, up-to-date information about the law, government and legislation.

There is no doubt that to enjoy rights under the law one has to be aware, have knowledge of such rights and be aware of which institutions can be approached to enforce these rights. One cannot enjoy or enforce rights that one is not aware of. In January-February 2003 a survey was conducted to determine the level of public awareness and perceptions regarding the protection of constitutional rights in South Africa. Of those surveyed 46% knew about the Bill of Rights and the Constitution. This was lower than any in previous surveys.

You can read more about this survey and others in the Access to Justice and Promotion of Constitutional Rights (AJPCR) Programme Report 2011, http://fhr.org.za/files/2114/4249/0340/AJPCR_Baseline_Report_Final_1.pdf

In a follow-up survey conducted in Gauteng, Mpumalanga and the Northwest in 2016 62% of the 1200 respondents had heard of the Constitution and 60% of the Bill of Rights.

For the law to be effective, the majority of citizens should also accept the law. Law that negates, or takes away, the rights of citizens or gives little legal protection will not be accepted. In a democratic society such as ours, citizens will not vote for a government where such laws are found and in such an instance the governing party may not receive the majority vote in the next election.

1.4.2 Enforcement of the law

People can be informed about the law, understand it and give support to it, but law that is not enforced will not operate effectively. If people do not see the law being enforced in their interests and for their protection, there will be chaos. The following factors complicate law enforcement:

- It is difficult to effectively detect breaches of the law.
- Violations are not reported by the public.
- It is difficult to gather evidence of the crime.
- The sanctions or punishments that are imposed are inappropriate.
- The time between the dispute arising and the conclusion of the trial is too long.

Case study Ineffective law enforcement

Read the newspaper article below and answer the questions that follow.

Cape court strikes a blow for city's sex workers

Cape Town sex workers won a significant court victory this week when the Western Cape High Court interdicted the police from arresting them unless it was with the intent to prosecute.

Too many sex workers were arrested so that the police could 'harass, punish or intimidate' them, with at least one sex worker claiming: to have been arrested about 200 times in the past six years 'but never prosecuted', said The Sex Workers' Education and Advocacy Task Force (Sweat).

Judge Button Fourie said evidence also showed that the police generally did not even open case dockets for sex workers arrested.

Police dockets are normally handed to prosecutors to enable them to decide whether or not to prosecute.

Fourie said the purpose of an arrest was to bring someone before a court. If the police were to arrest a sex worker when they 'knew with a high degree of probability that no prosecution would follow' it would be an unlawful arrest.

The police had not 'seriously disputed' sex workers in Cape Town were 'rounded up, arrested, detained and, virtually without fail, thereafter discharged without being prosecuted for any offence'.

Fourie agreed with Sweat's argument that the police were targeting the public manifestations of sex work and not its illegality.

'The arrests of sex workers therefore amount to a form of social control. This clearly infringes on the sex workers' rights to dignity and freedom,' he said.

Fourie was also not convinced by the arguments by the police that officers wished that sex workers were prosecuted, but that this was outside of their control because the decision to prosecute or not was made by the public prosecutors.

'Even if the arresting officers wished to have the sex workers prosecuted, they knew with a high degree of probability that it would not happen,' he said.

Fourie said that it was already well established in law that a person should not be arrested for an ulterior purpose. He therefore would not grant a declaratory order to that effect.

Source: 'Cape court strikes a blow for city`s sex workers'. *Business Day*, 24 April 2009. Accessed from the website, http://www.lrc.org.za/lrc-in-the-news/934-sweat-#1

Case study (continued) Ineffective law enforcement

1. Why was the police prevented (interdicted) from arresting the sex workers?
2. Why are people usually arrested?
3. Which rights of the sex workers were infringed?
4. Why was the arrest under the circumstances ineffective law enforcement?

1.4.3 Clarity in drafting the law

Imagine your university has a rule: No animals on campus. The rule seems clear, but there have been certain disputes about the interpretation of the rule.

Remember the following:

1. To interpret a rule or law is to apply it to a new situation.
2. The interpreter looks at the written words of the rule or law and decides how to apply it to that particular situation.
3. The interpreter looks at the wording of the rule.
4. The purpose and effect of the rule is usually taken into consideration.

You are asked to interpret the rule in the following situations:

- Lauren brings her dog to lectures.
- The Department of Veterinary Science keeps pigs for research purposes.
- During graduation celebrations the crowd is controlled by police officers on horseback.
- Lungisi keeps a fish in his residence room.
- The secretary of the Department of Public Law has a pet miniature dog in her coat all day.
- The Department of Ethno-Musicology slaughters a goat for the opening of their new building.
- Sasha, a visually impaired student, comes to university accompanied by her guide dog.

In coming to your decision, try to be fair to the university and the individuals or those affected by the rule. Was it easy to come to a decision?

If the law is not drafted in a clear and **unambiguous** way, it cannot be used or applied effectively and people affected by that law will find it difficult to regulate their conduct accordingly. As you continue with your legal studies, you will find that laws which have too many exceptions or loopholes or are too complex for people to understand, will be less effective in their day-to-day effect and operation.

When something is **unambiguous**, there can be no confusion about what it means.

Lawmakers are faced with two conflicting principles. The first is to draft or write the legislation simply enough to be understood by the majority of people. The other is to provide for all the situations where the law may be applicable.

1.4.4 Consistency in the law

Given the huge number of laws, lawmakers are faced with the additional problem of ensuring that laws:

- do not contradict each other
- do not affect the efficient operation of other laws
- maintain a connection between how serious a breach of law is and the sanction (penalty) that is imposed for that breach.

If laws are inconsistent, they will be less effective, because the community and courts will have to resolve the conflict between two or more laws.

1.4.5 Changes and stability in the law

In a country such as South Africa, which is still going through a process of transformation, there is bound to be tension between stability and change. There is tension between the need for law to be stable,

and the requirement that law should also be responsive to new demands and different legal questions. On the one hand a certain level of stability is required for the sake of certainty while on the other hand the law needs to keep up with current needs. To ensure that law is kept up to date, all legal systems must have an effective method of changing and amending laws. The Law Reform Commission in South Africa plays an important role in this regard. Law that is changed many times within a short period of time can affect the citizens' confidence and knowledge negatively.

Read the following newspaper report.

Row as ConCourt legalises adultery

Johannesburg – For many years, if you cheated on your spouse in South Africa, you could end up being sued by the innocent partner. Not anymore.

The Constitutional Court ruled on Friday that adultery was no longer part of South African law.

The judges ruled unanimously that a wronged spouse could no longer sue for damages, reasoning that marriage was based on the concept of two willing parties and it did not seem appropriate in this day and age to have the law intervene in personal affairs.

The court said you could not attach a monetary value to marital fidelity and the third party involved in the infidelity could not be sued for damages.

In a unanimous judgment written by Judge Mbuyiseli Madlanga, the highest court in the land said it "recognised that, when developing the common law, courts must have regard to societal values which are based on constitutional norms. The central question in this case, then, was whether society would still regard it as legally unacceptable for a third party to commit adultery with someone's spouse."

The judgment found that the global trend was moving towards the abolition of civil claims based on adultery.

"Even in South Africa, it is clear that attitudes towards the legal sanction of adultery have been softening.

"Marriages are founded on love and respect, which are not legal rules, and are the responsibility of the spouses themselves.

"In the present case, the breakdown of the marriage was as a result of a failure by the spouses themselves to sustain their marriage and thus it would be inappropriate for the courts to intervene.

"In contrast, maintaining the claim in our law would infringe on various rights of adulterous spouses and the third parties, including the rights to dignity and privacy. Accordingly, adultery should no longer be punished through a civil damages claim against a third party," the judgment said.

A concurring judgment by Chief Justice Mogoeng Mogoeng and Justice Edwin Cameron (concurring) emphasised that marriage hinged on the commitment by the parties to sustain it, rather than the continued existence of a claim for damages for adultery by an 'innocent spouse'.

When a similar announcement was made in South Korea, the share price surged in the country's biggest condom maker, Unidus.

Author and professional marriage counsellor Dr Buti Makwakwa said the precedent set by the Constitutional Court was a can of worms, opened to destabilise the sanctity of a marital union.

"The court is permitting adultery to be fashionable outside the ambit of our justice system. The court no longer has jurisdiction pertaining to perpetrators who forcefully and intentionally aim at breaking marriages," said Makwakwa.

"We need to stand as a radical army of God in enforcing marriage to reflect the sacredness of the holy matrimonial union as God intended it to be in the garden of Eden."

Former Cosatu secretary-general Zwelinzima Vavi, who was involved in an extramarital affair with a junior staff member, is allegedly being threatened by Jacqueline Phooko and her husband, who want R2 million for their silence.

Vavi has laid charges of extortion against Phooko, who he claimed was his lover.

Phooko's husband, who was the innocent spouse, demanded the money as compensation.

The late South African boxing world champion, Baby Jake Matlala, was in a similar situation and allegedly paid nearly R1m to the husband of a mistress.

Source: 'Row as ConCourt legalises adultery.' *Sunday Independent*, 21 June 2015. Accessed from the website, http://www.iol.co.za/news/crime-courts/row-as-concourt-legalises-adultery-1874113

1.5 The nature of law

You have learned that in a democracy rules of law are made by the people, for the people to balance the need for freedom with the need for order. We also looked at the law's functions and the factors that may impact upon its effectiveness. All of this may seem quite reasonable and logical and you should be able to enumerate and explain each point covered.

However, there is still one huge question about the nature of law. How you answer this question will influence your answers to questions such as: Are unjust laws laws at all? Can one disobey unjust laws? Can someone who obeys unjust and immoral laws be excused for atrocious and wicked deeds committed in the name of the law? Is the ultimate authority behind the law the fact that it is posited or laid down in legislation by rulers or does the legal and moral authority of the law come from other values or norms that are universal?

If you believe the latter you will be a supporter of natural law and if you argue for the former you will be a supporter of positivism. Natural law and positivism are important **ideologies** that form the foundation of the law. Courts and academics often use these ideologies to determine the rightness or wrongness of issues related to the law. However, the ideas that make up the ideologies of natural law and positivism are complex. Throughout history, many people have had different opinions on the status of natural law and positive law.

An **ideology** is a system of ideas or theories that form the basis of political theory.

1.5.1 What is natural law?

Natural law theory has had widespread support throughout the history of law. Supporters of the natural law theory have regarded natural law as **fundamental** and better than any other theory of law. Some people have seen natural law as being made up of universal and eternal norms, or acceptable standards of behaviour, that arise from humankind's **reason**. This is why natural law is also called normative law. Other people have thought that natural law comes from a God figure.

Fundamental refers to a principle of law that serves as the basis of an idea or system.

We can learn about natural law by using our intellect or **reason**.

According to supporters of natural law:

- there are unchanging principles of law that define what is right, just, and good (these principles should govern our actions)
- if we use our reason, we will discover these principles of law, since the principles are accessible to everyone
- principles of natural law apply to everyone, for all time and in all circumstances, and
- man-made laws (for example, those made by the state) are just and authoritative only if they are in accordance with the principles of natural law.

Being honest, keeping promises, honouring your parents, being faithful to your life partner and caring for the young, weak and old are all examples of behaviour that develop from natural law. The human rights protected in the Bill of Rights reflect the basic, universal and eternal norms of natural law.

Natural law acts as a guide when the written law is not clear on a specific issue. Let us take another example. A doctor is experimenting with a deadly virus. Through no fault of the doctor, the virus begins to spread. The only way to prevent the spread of the virus is to seal the room and, in effect, leave the doctor to die. Is it fair to say that the person who seals the room must be convicted of murder? Followers of natural law theory would argue against the conviction of murder, because valid exceptions may be made. Why? According to natural law, someone may be killed to save the lives of many human beings. In other words, natural law is applied to fill the gaps in the written law.

In many cases, natural law has been used to criticise and address gross human rights **violations**. Let us look at two examples in the case study below – one from Germany and the other from our own country – where it can be argued that the norms of natural law were not followed. Once you have read through the case study, answer the questions that follow.

Human rights **violations** are deliberate attacks on the human rights of people, such as their right to life.

Case study — Natural law and crimes against humanity

The Nuremberg trials were held in Germany just after the end of World War II. The Nuremberg trials investigated and prosecuted those in the German military who were responsible for violating basic human rights.

During World War II, the Germans implemented a deliberate policy to kill Jews. A policy of deliberately killing a particular nationality or racial, religious or cultural group is known as genocide. You could argue that the German generals responsible for the genocide were following the law of Germany. In other words, they could not be guilty of a crime if an act was in line with the law of their country. This argument belongs to positive law theory. However, according to natural law theory, the laws of a nation are not superior to the norms of natural law.

Even if the law does not state that genocide is a crime and should be punished, the act of genocide is a crime that carries a harsh punishment. In other words, natural law theory states that there are universal norms that people have, not only a **moral duty**, but also a legal duty to obey.

Our own Truth and Reconciliation Commission (TRC) reflects a natural law approach. The TRC was established in 1996 to investigate apartheid human rights violations. Although some individuals brought before the TRC had acted within the law of the South African government, the TRC found that they committed serious human rights violations.

1. Prepare a paper for the class on other examples in recent history where you feel that natural law norms have been ignored.
2. Do you think people can differ on the norms of natural law? Discuss this in class.

1.5.2 What is positive law?

The natural law theory sees law and morality as the same. If circumstances are such that a **moral duty** exists, then that moral duty should be enforced by law.

Unlike supporters of natural law, positivists rely on the written law as the only authority. For example, if a law does not hold, or say, that dealing in drugs is a crime, no one can be found guilty if they sell drugs. Positivists also state that, in a legal dispute, it does not matter if a certain act is right or wrong. The issue in a legal dispute is whether the law says that a certain act is right or wrong. In other words, legal authority must come from written law and not from other sources, such as religion, morality, philosophy or science.

Supporters of natural law would say that dealing in drugs, which has a serious effect on the drug abuser and society in general, is a crime, because our reason tells us that it is wrong. Since the beginning of time, the law has always been there for the protection of the individual. Positivists would say that dealing in drugs is a crime because the law says so. Humans make the law; therefore it has not existed since the beginning of time. Positivists would add that the content of the law can change over time. In other words, what is right today may not be right in ten years' time. Positivists would also say that under Brazilian law, for example, an action may be illegal. However, the same action may not be illegal in Australia. The positivists also view the law as a product of the state.

Professor says — Ignoring natural law

During the time of apartheid, the state passed many laws that we can say ignored natural law norms. Judges were expected to interpret legislation in a strictly positivist way. This meant that they were bound by the law – unfair as it often was – contained in the legislation. In Chapter 24 the legal system of South Africa is used as a point of departure to discuss some of the most important theories of law.

1.5.3 Learn to think critically about natural law and positive law theories

Natural law and positive law provide us with important insights into the law. As you progress with your legal studies, you will continually need to ask these questions:

- Must we (always) follow the law as it is written?
- Must we apply natural law to assist where the written law is vague?
- Must the law be in line with fundamental natural law principles?
- What are these natural law principles?

What do you think?

Now that you have worked through this chapter, what do you consider to be the most important functions of the law? Give reasons for your answer.

Chapter summary

In this chapter, we learned the following about the law:

- A state creates laws to maintain order in society.
- Legal rules are made by the people, for the people.
- Legal rules develop and change in response to individual, social and economic problems and society's needs.
- The purpose of the law is to preserve and develop the individual's and the community's interests.
- The law provides a framework for orderly conduct.
- The law orders the way in which the state must function.
- The law serves to protect and preserve the legal system.
- The legal system provides institutions and procedures to settle disputes.
- The law balances the rights and freedoms of individuals.
- The law regulates the way we live together.
- The law facilitates change.
- The law defines relationships and creates authority.
- The law provides for and controls accountable administrative action.

We have learned the following about the legal system:

- The law is driven by a legal system.
- The Constitution is the supreme law of the country and binds all legislative, executive and judicial organs of the state at all levels of government.
- The courts are responsible for interpreting and adjudicating the law.
- The legal system provides ways to enforce the law.
- The Constitution determines how the legal administration should be run.
- The legal system also gives everyone equal access to justice.

We also learned that the objectives of a legal system include:

- for individuals to know and to have access to the law
- efficient and affordable dispute resolution
- consistency
- fair hearings
- rights of appeal
- order and harmony in society.

We saw that the law can only be effective if there are:

- public awareness, understanding and acceptance of the law
- enforcement of the law
- consistency in the law
- clarity in drafting of the law
- changes and stability in the law.

Natural law and positive law are two important theories that influence our thinking on the nature of law:

- Natural law is based on universal and eternal norms. We use our reason to discover these norms, or they are given to us by a God figure.
- Natural law helps us to fill the gaps in written law.
- According to natural law theory, the laws of a nation are not superior to the norms of natural law.
- Positive law is different from natural law.
- Positive law theory relies on the written law as authority and separates law from norms.
- Both positivism and natural law theory have their disadvantages, but they give us important insights into the nature of law.

Review your understanding

1. "Laws are the result of the activity of people." Make a list of laws that illustrate this statement.
2. One of the most important functions of the law is to facilitate dispute resolution, or to help people settle their disputes. Mention the factors that would prevent the legal system from carrying out this task efficiently.
3. Imagine that you are an unemployed single mother. Three weeks ago, you were involved in a taxi accident. As a result, you have permanently lost the use of your legs. You want to sue the taxi driver and the other driver involved in the accident, but you cannot afford to pay a lawyer to help you.
   What can you do? You might find www.legal-aid.co.za a good starting point.
4. You are a supporter of the theory of natural law. Read the following set of facts, then decide whether you agree with the traffic official's decision. Give reasons for your answer.
5. Mr Peterson parks his car in a one-hour parking zone. A notice clearly states that anyone who parks his car for more than an hour will be fined R200. After fifty minutes, Mr Peterson arrives at his car, only to find that municipal workers have parked him in to repair a hole in the road. He cannot remove his car from the parking zone. After two hours, a traffic official notices that Mr Peterson's car has been parked for more than an hour in the parking zone. She issues a fine of R200.
   Mr Peterson tries to explain that he could not remove his car, because the municipal workers had parked him in. The traffic official replies that she is only doing her job; she has no other choice but to apply the law.
6. Collect articles from newspapers, magazines and the internet that illustrate a specific function of the law, or why a given law is not working effectively. Choose two articles that you think best illustrate the issue concerned. Write a brief report to explain the area of the law concerned, the issue involved and why it is a good example of the issue.
7. Prepare a paper for the class on other examples in recent history where you feel that natural law norms have been ignored.
8. One day on First Street, Juju Vilakazi, who was seven, was riding his bicycle. He almost got hit by a car. The car was going very fast and did not have a chance to stop. Juju got out of the way just in time. He was lucky. The people who lived on First Street knew that there was a problem. They didn't want any children on bikes to be hit by cars. Here are three rules the people thought of making to make things safer:
   - All bike riders must wear party hats.
   - Only children named Mary, John or Sizwe may ride bikes on First Street.
   - No cars may drive on First Street.

   Which of the rules do you think we should use? Give reasons why you think a specific rule is good or why it is bad. If you think a specific rule is bad, create rules that would solve the problem.

Further reading

Constitutional Court website, http://www.constitutionalcourt.org.za
(This site gives information regarding the history and functioning of the Constitutional Court as well as Constitutional Court judgments.)

Legal Aid Board website, htpp://www.legal-aid.co.za
(Visit this site for your general interest.)

Legal Resources Centre website, http://www.lrc.org.za
(The LRC promotes human rights and socio-economic development in South Africa.)

Polity website, http://www.polity.org.za
(This site provides general information on the functioning of government.)

South African Government Online website, http://www.gov.za
(You can find important government documents and legislation here.)

South African Law Reform Commission website, http://www.justice.gov.za/salrc
(This site tells you about the latest law reform projects that the commission is working on.)

Chapter 2

History and development of South African law

The main ideas

- The development of South African law
- Roman law
- Western European *ius commune*
- Roman-Dutch law
- Law in the Cape from 1652
- Law beyond the Cape Colony
- Creating a South African common law

The main skills

- Explain legal traditions.
- Explain a hybrid legal system.
- Define Western European *ius commune*, Roman-Dutch law and English law.
- Research a Roman edict.
- Explain codification.
- Understand the function of the *Corpus Iuris Civilis.*
- Understand the principles of personality and territoriality.
- Explain the influence of Roman law principles.
- List the contributions of glossators and commentators in the development of Western European *ius commune.*
- Describe the nature of Roman-Dutch law.
- Draw a mind map of historical sources of the South African legal system.

Apply your mind

In *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC), the Constitutional Court ruled that same-sex marriages should be legally recognised. This was not possible in terms of the Marriage Act 25 of 1961. What Act has since been passed to recognise such marriages and what do you think this change tells us about the nature of South African law?

In this chapter, we explore the history and development of South African law. The law does not stand still. A country's legal system develops over many years and, in some cases, it is the product of another legal system. We discuss why an African country such as South Africa uses a European legal system.

Before you start

We start the chapter with an overview of the history of Roman law. We will show how Roman law became the foundation of the Western European ***ius commune***. Holland made use of Western European *ius commune* and the combination of Roman law, Germanic custom and Dutch statutory law became known as Roman-Dutch law. Roman-Dutch law came to the Cape of Good Hope with Jan van Riebeeck and the Dutch settlers. We discuss the development of the law in the Cape Colony. After 1806, British occupation became the colonial power in the Cape Colony and English law exerted a considerable influence on the development of South African law. We close the chapter with a discussion on the relevance of Roman-Dutch law in South Africa today.

Ius commune is Latin for common law.

2.1 The development of South African common law

The South African common law is a product of European colonialism. The first Europeans to settle in South Africa came to the county as employees of a commercial company. This was a Dutch trading company called the ***Verenigde Oostindische Compagnie*** (VOC). The VOC established a trading station at the Cape of Good Hope in 1652. The company and the Cape settlement were governed by the law of Holland, which was a province of the **United Netherlands**. At the time, the Dutch legal system was known as Roman-Dutch law. This was a legal system based in part on rules of Roman law that the Dutch had adapted and merged with other legal systems, including Germanic customary law. South African law was later influenced by a second colonial invasion: the British defeated the Dutch in 1806 and occupied the Cape as the new colonial power. After the English took control of the Cape, principles of English law began to influence South African common law.

In English, the **Verenigde Oostindische Compagnie** is referred to as the Dutch East India Company.

Until 1795, Holland was part of the Republic of the Seven **United Netherlands**. After the French took over, it was called Batavia. In 1813, the Dutch regained independence and it was called the Kingdom of the Netherlands.

2.1.1 A hybrid legal system

South African common law is often described as a hybrid (or mixed) legal system. This is because it contains elements from both of the major European legal traditions. We inherited part of our law from the Dutch, who used a system based on Roman law. European systems that are based on Roman law are part of the **civil law** tradition. We also inherited law from the English. English law forms the basis of the **common law tradition**. In addition to these developments, we must bear in mind that South Africa has a **plural legal system**. Legal pluralism arises when there are many valid legal systems operating in the same country. In South Africa, the **customary law** of the indigenous inhabitants continued to exist alongside the hybrid common law legal system that was developing in South Africa.

The term **civil law** means the legal systems used in continental Europe that contain elements of Roman law. By contrast, the legal systems in England and Wales, Canada, the United States of America and Australia all follow the **common law tradition**.

The civil law tradition that South African law inherited from the Dutch was part of the Western European *ius commune*. The Western European *ius commune* was based mainly on Roman law, merged with elements of European customary law and the canon law of the Church. Most countries in Western Europe used this legal system from about the 14th century onwards. Roman-Dutch law was part of this tradition. This is the legal system that the Dutch settlers brought to the Cape in the 17th century.

In a **plural legal system**, more than one system of valid law operates in the same jurisdiction. In South Africa, European-based common law and indigenous **customary law** are equal in status as valid legal systems.

Roman law was less influential in England. English law is not based primarily on Roman law in the same way as the law in continental Europe. English common law was based on English **customs** together with the decisions of the courts in specific cases. The rules that developed from court decisions were known as judge-made laws. This principle of law based on a judge's decision is called judicial precedent. English common law is mainly the product of case law.

A **custom** is a practice of a certain group of people. Customs may take the form of written or unwritten rules.

Note that English common law is not a primary source of South African law in the same way as Roman-Dutch law. We inherited Roman-Dutch law as a primary legal system when the Dutch settled at the Cape. We can still refer to Roman-Dutch law as a primary source of law when deciding disputes in modern South Africa. We cannot rely on English common law in the same way. We can only apply individual principles that we inherited from English law. For example, we inherited the legal institution of the trust from English law and can use particular English law principles in this context. We only make use of the particular principles that we have inherited from English law, not the whole system.

2.1.2 An uncodified legal system

South Africa has an uncodified legal system. That means the laws that make up the South African legal system are not contained in a single collection of laws, or a legal **code**. Lawyers use many different legal **sources** to find the rules that apply to a particular case.

A legal **code** is a very long document or set of documents setting out all of the rules that apply to a particular area of law.

The different places where you can look up parts of the South African law are called **sources** of law.

The primary sources of South African law are listed below.

- Statutory law is made up of the Acts of the national and provincial legislatures, and government regulations. These laws are called **legislation**. Legislation can be found in statute books, websites, and the **Government Gazette**.
- Common law is law of non-statutory origin. In other words, South African common law does not come from laws passed by Parliament or provincial legislatures. It is based on Roman-Dutch law, the writings of Dutch legal scholars in the 17th and 18th centuries, and certain English legal principles.
- Judicial precedents. The practice of using judicial precedents was inherited from English law. A ruling of a South African court may set a precedent for similar future cases in other South African courts.
- Customary laws are indigenous, or local, laws practised by different indigenous communities. Customary law is part of the South African legal system. South Africa has a plural legal system, because there are two legal systems in operation.

The **Government Gazette** is the official publication of the government. It publishes new policies, **legislation** and notices to the public.

Activity 2.1

Answer the following questions.

1. Which legal traditions contributed to South Africa's legal system?
2. What is a hybrid legal system? Explain why South Africa has a hybrid legal system.
3. What do you understand under South African common law?
4. Give a definition for the following: Western European ius commune, Roman-Dutch law and English law.

2.2 Roman law

The history of the Romans extends over more than 1 000 years, from 753 **BC** to **AD** 476. During that time, Rome grew from a small city state to an enormous empire that ruled the shores of the Mediterranean Sea, North Africa, and large parts of Europe. The city of Rome was established in 753 BC.

You may prefer to use BCE (before the common era) and CE (the common era) instead of **BC** (before Christ) and **AD** (anno Domini, or in the year of our Lord).

Figure 2.1 Map of the Roman Empire in AD 12

Roman law grew out of the customs of the Romans. Rome began as a tiny settlement. Early Roman law was suitable in a context of a relatively small population where many people knew each other and were aware of one another's activities. Over the centuries, however, the settlement grew from a small city-state into an enormous empire. As the Roman Empire grew, the legal system changed. Rules that had been appropriate for a small group of people in one city were not sophisticated enough to deal with the demands of empire and the problems that arose when the Romans needed to control populations in many parts of the world. During the reign of the emperor Diocletian (AD 284 to 305), the Roman Empire became too big to govern effectively. Diocletian divided the empire into two parts, east and west, in an attempt to improve the administration of the empire. The **Western Roman Empire** collapsed in AD 476.

We will learn more about the collapse or fall of the **Western Roman Empire** later in this chapter.

Historians divide the development of the Roman Empire into five periods:

1. the period of the kings (753 BC to 510 BC)
2. the Roman Republic (510 BC to 27 BC)
3. the Principate (27 BC to AD 284)
4. the Dominate (AD 284 to AD 476)
5. the Corpus *Iuris Civilis* (AD 528 to AD 534).

We will now discuss each period in more detail.

2.2.1 The period of the kings

From 753 BC to 510 BC, an elected king ruled Rome. During this period, the law was formalistic. It was based on the use of formulas. This means that people (for example, plaintiffs in legal cases) had to follow certain precise and scripted procedures if they wished to enforce particular rights. The plaintiffs had to recite exact legal wording, or formulae, to bring a claim against someone. Here is an example of a **Roman formula**: '*Quanti ea erit, tantam pecuniam, iudex Numerium Negidium Aulo Agerio condemnato, is non paret, absolve*.'

Roman formula translated: 'Judge, condemn *Numerius Negidius* to *Aulus Agerius* for the value of the object; if it appears to be incorrect, acquit him.'

2.2.2 The Roman Republic

The kings ruled Rome for more than two hundred years. By 510 BC, however, the Romans decided that they no longer wished to be governed by kings. They complained that the kings abused their power. The last king was expelled in 510 BC. After this, Rome became a **republic**. The Roman Republic lasted for 500 years from (510 BC to 27 BC). In theory, the people of Rome now had more of a voice in important political decisions. They participated in annual elections for their leaders. During the time of the Roman Republic, two consuls ruled Rome. The consuls were the heads of state. The Romans decided to have two consuls (instead of only one) and to hold annual elections for this office so that they could try to prevent the abuse of power. Rome was extremely bureaucratic and there were many subordinate officials who assisted with governing the Roman Republic.

A **republic** is a system in which the people or their elected representatives govern the country.

Magistrates were responsible for the day-to-day administration of the republic. An important magistrate was the **praetor**. The praetors were responsible for the administration of justice. The praetor had the power to decide which rules should be used in legal disputes. In the course of their duties the praetors developed the law substantially. They introduced many new formulae through their **edicts**. During this period, Rome became less agrarian and more urbanised. Trade became an important part of the Roman economy. The praetors introduced new rules to govern proceedings related to the marketplace.

Magistrates were elected government officials – two were elected and each held office for one year.

The power of the **praetor** included the right to regulate legal proceedings and decide on the rules to resolve the dispute.

In the first two centuries of the Roman Republic, Rome established control over most of Italy. This expansion did not require drastic legal change or development. Rome still operated primarily as a city-state and could function with fairly minimal changes to the traditional customary law used by the people of that region. From about 260 BC, however,

An **edict** is an order proclaimed by authority.

the Roman Republic began to expand rapidly. Rome became involved in wars outside of Italy. First, Rome fought a series of wars with Carthage in northern Africa. After Rome's success in these wars, the Roman Republic conquered and took control of territories as far away as Britain, Syria, Spain, Greece, Egypt, and France. This expansion required legal development to accommodate the new challenges of the emerging empire.

In the Roman Republic, citizens used civil law or the ***ius civile*** to resolve disputes. This was the rigid and formalistic law based on traditional Roman custom. Only Roman citizens could use the *ius civile*. As the Roman Empire expanded, the Romans increasingly recognised and used the ***ius gentium***. The *ius gentium* was the law deemed to apply to everyone. The *ius gentium* was not formalistic; it tended to be more practical and reasonable than the traditional *ius civile*.

The law created through the praetors' edicts was called the ***ius honorarium***. This was not part of the *ius civile*. Indeed, the praetors' edicts were often influenced by the *ius gentium*. The praetors' new laws were intended to modernise Roman law in a way that facilitated transactions in a large empire.

The ***ius civile*** or civil law was the law that applies to Roman citizens.

The ***ius gentium*** literally means the law of nations. In Roman law, this referred to rules and legal principles that the Romans believed applied universally to all groups of people.

The ***ius honorarium*** was the law created through the praetors' edicts.

Professor says — Compare the *ius civile* and the *ius gentium*

We can see the difference between the old fashioned *ius civile* (that applied only to Roman citizens) and the *ius gentium* (that applied to everyone) by looking at the example of transfer of ownership. In terms of the *ius civile*, it was only possible to transfer ownership of important assets like land, slaves, or oxen by using a very formal legal procedure called the *mancipatio*. The *mancipatio* was a very old institution. It was already described in the Twelve Tables: The person who would give up ownership and the person who wished to become the owner had to gather in the presence of five witnesses (who had to be Roman citizens above the age of puberty). There was also someone called the *libripens*, who had the job of holding a scale. The price to be paid for the oxen took the form of copper, which would be weighed on the scale. Ownership was transferred through a ritual in terms of which the person who wished to become the owner took hold of the oxen and recited specific (almost 'magic') words in which he declared that the oxen were now his and that he bought them with the copper he had brought. Then the would-be owner had to touch the scale with the copper. In contrast to this, the ius gentium recognised a far more practical way in which ownership could be transferred: all that was required was that the thing had to be physically delivered from the current owner to the new owners. This was called *traditio* (delivery). Roman citizens began to realise that ordinary *traditio* was a far more practical way to transfer ownership. They began to use the *traditio* method that was part of the *ius gentium* instead of the cumbersome *mancipatio* procedures from the Twelve Tables.

Roman law was first codified during the time of the Roman Republic. Codifying the law means to collect and organise laws into a written code. The first Roman codification was the **Code of the Twelve Tables** in 450 BC. This code is regarded as the start of the Roman legal system: for the first time, the laws were written down and made available to everyone. Written codes promote legal certainty because everyone can see what the laws are. Before the Twelve Tables, law had been administered by the priests. Now, however, people could start studying law as something completely different from religion. A new profession began to emerge: the jurists. A jurist is a person who has a thorough understanding of the law. The jurists studied the Code of the Twelve Tables. They were responsible for **interpreting** the Code and for adapting it where necessary to suit changes in society and in the economy. The jurists performed a number of tasks:

- They were law teachers.

From this time, Roman law was written down, and this **Code of Twelve Tables** was used to study and develop Roman law.

To **interpret** the law is to try to understand the purpose of a particular law and to explain the meaning of a law.

- They drew up pleadings for people who wished to litigate in court.
- They provided legal advice.
- They published their scholarship.
- The jurists tended to be very practical: they used cases to illustrate the operation of rules and legal principles.

2.2.3 The Principate

Augustus became the first emperor of Rome in 27 BC. This was at the end of a violent power struggle and devastating civil wars involving Pompey and Caesar. Augustus wanted to bring peace after more than half a century of turmoil. He promised to re-establish the old Roman Republic and restore the more democratic republican institutions such as the popular assembly of the people and the Senate. Many of the old republican institutions were revived – at least in in theory. In practice, however, the republican institutions had very little lawmaking power. Instead, Augustus appropriated considerable political authority to himself. The emperor was now the highest political official in the Roman Empire and was known as the **princeps**. The period when the Roman Empire was governed by the emperors is known as the Principate. This period lasted from 27 BC to AD 284.

The Latin word **princeps** means 'the first'.

During this period, the lawmaking power of the praetors and other magistrates was considerably reduced. Instead, the princeps himself acquired the primary lawmaking power. In this regard, the princeps relied on the advice and technical assistance of jurists. In about 130 AD, the Emperor Hadrian engaged the jurist Salvius Iulianus to codify the existing edicts of the praetors. This codification was called the ***edictum perpetuum***. Henceforth, the praetors were obliged to abide by the *edictum perpetuum* and could no longer institute new edicts.

Edictum perpetuum literally means 'the perpetual edict'.

The period of the Principate was the classical period of Roman law. During this period, Roman law reached its highest standard of perfection. This was due to the influence of the jurists, who took on the task of developing and improving the law: they adapted the law to suit the needs of the period. They made attempts to organise the law into a logical system. The emperor granted the jurists *ius respondendi*, or the right to give legally **binding** opinions. The jurists' advice and writings to clients became the foundation of Roman law.

If an opinion was legally **binding**, magistrates had to enforce the opinions in the courts.

Towards the end of the Principate, the emperor became more directly involved in the lawmaking process. He instituted legal reform, or change, by enacting **legislation**. Soon, the jurists were forced to spend their time interpreting legislation instead of developing the law.

In legal language, to enact **legislation** means to pass laws.

To **compensate** someone means to repay the person for a service.

Professor says — The Roman advocate

It is interesting to note that Roman advocates were not necessarily trained Roman jurists. A Roman advocate was a professional pleader who appeared before the court on behalf of his clients. Roman advocates were not allowed to be paid in money for their services, but it was acceptable to **compensate** advocates in the form of gifts. The back of an advocate's gown had a small pouch in which grateful clients could place their gifts. Even today, the gowns of advocates differ from those of attorneys.

2.2.4 The Dominate

During the Dominate period, Rome became a military dictatorship. This began in AD 284, when the Emperor Diocletian (AD 284 to AD 305) replaced the Principate with a form of absolute monarchy called the **Dominate**. This was a very unsettled period in Roman history. The Roman Empire was challenged by barbarian invasions, **civil war** and economic crises. The legal system suffered. The emperor became a dictator. The emperors

The word '**Dominate'** comes from the Latin word '*dominus*', meaning lord or master.

Civil war is a war between people of the same country.

created an enormous body of new laws in the form of ***leges*** ('laws') and ***constitutiones*** ('regulations'). It is interesting to note that the new laws were called *leges* or *constitutiones*, instead of *ius* as in the old classical law. But while there was an enormous quantity of law, it was of poor quality. The contribution of the jurists declined. The emperor employed jurists in an attempt to codify or organise the law, but the jurists of the Dominate period did not have the intellectual sophistication of the jurists of the classical period. Towards the end of the Dominate period, the military dictatorship started to pass laws that limited or restricted the contributions of the jurists.

The word '***leges***' means laws in Latin.

The word '***constitutiones***' means regulations in Latin.

Diocletian recognised that the Roman Empire could not be governed by a single emperor. Rome faced both external military threats and internal political and economic challenges. In an attempt to save the Roman Empire, Diocletian divided it into two parts: east and west. The city of Constantinople became the capital of the Eastern Empire while Rome remained the capital of the Western Empire.

The Western Empire did not survive for long. In 409, the last Roman soldiers were withdrawn from Britain. After this, the Roman civilisation in Britain collapsed. In AD 410, the **Visigoths** captured the city of Rome. They set fire to the city, stole its treasures and slaughtered its people. The last emperor of the Western Roman Empire was expelled by the barbarians in AD 476. After this, the Western Roman Empire was divided into a number of Germanic kingdoms.

The **Visigoths** were a Germanic tribe.

The Eastern Roman Empire, however, thrived. The Eastern Empire was known as the Byzantine Empire and it survived for a further 1 000 years, until it fell to the Turks of the Ottoman Empire in 1453.

2.2.5 Justinian's codifications: the Corpus Iuris Civilis

Justinian (AD 527 to AD 565) was one of the most famous of the Roman emperors in the east. Justinian tried to rebuild Rome's prestige and influence. He was particularly interested in restoring Roman law to its former sophistication. In AD 528, Justinian appointed a commission to codify **imperial** legislation. The task appeared overwhelming. There was an enormous quantity of laws that had been passed by various emperors over the centuries. The law was completely disorganised. It had no logical structure or arrangement. Laws seem to contradict each other or were impossible to find in all the chaos of the legal sources. Justinian instructed the commission to make sense of it all. They were to organise the laws by compiling a comprehensive code of all imperial law. They were also instructed to reform the laws where this was necessary to avoid contradictions between laws. The code drawn up on Justinian's instructions became known as the ***Corpus Iuris Civilis*** (which means 'the body of the civil law').

The word '**imperial**' is used to describe matters relating to an empire.

Corpus Iuris Civilis means the body of civil law; in this case, Roman law. The different parts of the *Corpus Iuris Civilis* were published under this name.

The *Corpus Iuris Civilis* followed almost 1 000 years after the Code of the Twelve Tables. The Code of the Twelve Tables marks the beginning of Roman law, while the *Corpus Iuris Civilis* marks the end of the Roman law period.

The *Corpus Iuris Civilis* consisted of the following parts:

- The Digest (*Digesta/Pandectae*) was a codification of the classical Roman law principles contained in the work of the jurists. The codifiers adapted classical Roman law, where necessary, so that the law could be used in Justinian's empire.
- The **Institutes** (*Institutiones*) was a student textbook based on the work of a former jurist, Gaius. The Institutes is a complete written explanation of Roman law.
- The Code (*Codex*) was a codification of imperial legislation.
- The Novels (*Novellae*) was a collection of legislation enacted after the publication of the Codex.

An **institute** is a legal word for a summary of laws.

The *Corpus Iuris Civilis* is a good source for the principles of classical Roman law. The Digest and the Institutes are codifications of classical Roman law. The Code and the Novels are codifications of imperial legislation.

The *Corpus Iuris Civilis* ensured the survival of the influence of Roman law, long after the fall of the Roman Empire. It influenced legal development in many parts of the European continent from the 11th century onwards.

Activity 2.2

Answer the following questions.

1. In a table, compare and contrast the political structure of the Roman Republic with the Republic of South Africa.
2. Research a Roman edict that still applies in South African law today. Present your findings to a small group.
3. Explain what is meant by a codification.
4. Explain why a codified system is more accessible than an uncodified system.
5. How did the practice of electing two consuls ensure that the heads of the Roman Republic did not abuse their powers?
6. List the advantages of a codified legal system.
7. Draw a mind map to describe the *Corpus Iuris Civilis*.
8. How did the *Corpus Iuris Civilis* ensure the survival of Roman law?

2.3 Western European *ius commune*

The development of Roman law ended with the *Corpus Iuris Civilis*. However, Roman law survived through the Middle Ages and into the period of history known as the Renaissance. In this section of the chapter, we will focus on legal developments in Europe. We will look at why Roman law survived and why it was given a new lease on life. We will examine the transformation of Roman law into **Western European *ius commune***. We will also meet the scholars responsible for this transformation.

Western European *ius commune* is a combination of Roman law, Germanic customary law, feudal law and canon law.

2.3.1 The survival of Roman law in the early Middle Ages

The period from the fall of the Western Roman Empire in AD 476 to about AD 1 000 is known as the **early Middle Ages**. After the fall or the Western Roman Empire in AD 476, the Empire's institutions disappeared. There was no longer an enormous administrative structure governing Western Europe. It was now more difficult for different parts of Europe and the world to interact with each other. Trade and economic activity declined.

The **early Middle Ages** are marked by a shortage of written records. This is why it is sometimes referred to as the Dark Ages.

Traces of Roman law survived in places, but in a rather superficial form. This simplified law was good enough to cope with the reasonably simple requirements of life during this period. The only significant institution that used Roman law was the Church. The Church adapted Roman law principles to suit its needs. Through this process, elements of Roman law were incorporated into the **canon** law.

Canon law is the law of the Church.

2.3.2 Germanic law

During the Middle Ages, most of Europe was populated by Germanic tribes. The Germanic tribes had lived in Europe for centuries. Germanic tribes were divided into *clans*, which consisted of ten to twenty families. A king would rule a number of clans. After the fall of the Western Roman Empire in AD 476, Europe became divided into a number of Germanic kingdoms, which consisted of the various clans ruled by their kings.

The Germanic tribes had been exposed to Roman law during the period of the Roman Empire. In their day-to-day life, however, the Germanic tribes used their own customary law, which was based on unwritten customs. The combined customs of a tribe functioned as their legal system. The Germanic tribes had a very simple lifestyle, and they did not need a complicated set of laws. To a large extent, Germanic customary law replaced Roman law in Europe.

The Germanic tribes applied law according to the **personality principle** rather than the **territoriality principle**. In other words, law was applied according to tribe membership. In **Frankia**, for example, when two **Franks** entered into a legal transaction, Frankish law applied, but when two Romans entered into a legal transaction, a form of Roman law applied. Thus the form of law that applied to a transaction depended on the tribe to which the people belonged, not the place where the transaction took place. The fact that the Franks controlled the territory of Frankia did not mean that everyone had to use Frankish law.

When law is applied according to the **personality principle**, the law of the particular person is applied.

When law is applied according to the **territoriality principle**, the law of a particular territory is applied to everyone who happens to be in that place.

Frankia was the kingdom of the Franks. The **Franks** were a Germanic tribe who lived in the territory near the Paris of today.

2.3.3 Roman law

The personality principle ensured the survival of Roman law. Former Roman citizens were allowed to continue living according to the principles of Roman law. They did not use the sophisticated rules of the *Corpus Iuris Civilis*. They used a simplified system of Roman law. This was enough for the form of life practised until the 12th century. As the 12th century progressed however, political and economic developments began to require a more sophisticated legal system. Roman law provided an example of a sophisticated legal system that could be useful in these circumstances.

2.3.4 Feudalism and feudal law

During the middle ages, Europe was divided into a number of small states that were under the control of the Germanic tribes. Each state had its own legal system. The social, economic, and political system in Europe during the middle ages is called **feudalism**. In the feudal system, vassals, or people of lower standing, pledged their loyalty to someone of higher social standing. The vassals promised to fight for their superior, or lord, when called upon. In exchange, the lord granted a fief, or a piece of land, and promised his protection. Thus society was founded on a web of military and social obligation.

Feudalism was a social system of legal and military obligation among the warrior nobility of Europe during the Middle Ages.

There were some important changes to the law during the feudal era. Feudal courts in each territory were responsible for applying the law. These courts used the territoriality principle instead of the personality principle. In terms of the territoriality principle, tribal membership did not determine which laws were applicable. Rather, laws were applied according to where people lived. For example, Frankish law applied to everyone in the territory of the Frankish king, regardless of which tribe they belonged to.

Diversification means that the laws of the different states varied substantially.

Application of the territorial principle in feudal courts all over Europe led to the **diversification** of laws. Each state had its own courts and developed its own legal rules. This diversification caused some problems, particularly in the context of trade between the various feudal states. The growth of trade created a need for a more sophisticated legal system that could be applied throughout Western Europe.

A **successor** is someone who takes up a certain position, such as emperor, in place of the previous person in that position.

Professor says — The Holy Roman Empire

The **successor** of the Roman Emperor in the west was the Holy Roman Emperor. The Roman church continued to live according to Roman law. In AD 800, Pope Leo III tried to revive the Western Roman Empire by crowning the Frankish King Charlemagne (Charles the Great), the emperor of the Holy Roman Empire. The member states of the Holy Roman Empire included a number of small states situated in central Europe and Italy. The rulers of these member states elected the Holy Roman Emperor. In practice, the emperor controlled only a small territory. The various European kings, such as the kings of England, Scotland and France were politically independent. The title of Holy Roman Emperor was therefore mostly symbolic: it did not confer practical political power over Europe.

2.3.5 Canon law

The Roman Emperor Constantine legalised Christianity in the 4th century. After this, the Roman emperors relied increasingly on the Church to govern parts of the empire. In this context, the Church applied Roman law. After the Western Empire fell in AD 476, the Church managed to retain control of certain territories, such as Utrecht in the Netherlands.

We can compare the medieval Church to a state. The Church was not only a spiritual or religious institution; it was also an extremely important political institution. The Church had its own courts, which could apply the law in a number of territorial jurisdictions, or places. The Church had jurisdiction, or legal authority, in matters related to faith, church rituals, sin, marriage, wills, or **testaments**, contracts and certain crimes including sexual misbehaviour, **perjury** and **heresy**.

Testaments are legal documents in which people give instructions about what should happen with their property in the event of their death.

Perjury means telling lies in court while under oath.

Heresy means disagreeing with the beliefs of the church.

The Church used a legal system that was based in part on Roman law. However, the Church changed the Roman principles where this was necessary to ensure that Church law conformed to the principles found in the Bible. The system of law that the Church developed was called canon law. Canon law began with canons, or rules, that the Apostles had set out.

Canon law sources included:

- the Bible
- the Corpus Iuris Civilis
- the customary law of the Church
- the canons of the Church councils
- **decretals** of the popes.

Decretals are letters by the pope that give decisions about questions on canon law.

In the period after the Middle Ages, **secular** states ruled by kings and other political authorities tried to exert their **authority** over the Church. The secular authorities also wanted to exert their power over the people of the world so that people's primary **allegiance** would be to the state rather than the Church. In the end, the battle between the Church and the state for control of the world was won by the state. Nonetheless, canon law had already influenced European legal thought. We can still see traces of the canon law in modern law: for example, the requirement of good faith in contracts is inherited from the canon law. So were many of the formalities required for the conclusion of a valid civil marriage.

Secular means not religious.

Authority in this context means the power to control or judge the actions of others.

Allegiance means loyalty.

2.3.6 The lex mercatoria

The law *lex mercatoria*, or law of merchants, made an important contribution to the development of Western European *ius commune*. Over the centuries, merchants had developed a set of rules that were suitable for their commercial dealings with each other. This special system developed so that merchants could resolve disputes quickly without having to go through the slow process of the ordinary law courts. The marketplace laws developed by the merchants were based on their own customs, and were shaped to meet their specific needs in the marketplace. Merchants traded throughout Europe and used the same set of rules for their commercial dealings wherever they went. This standard system used by merchants all across Europe strongly influenced the growth of a legal system common to Western Europe: the *ius commune*.

Activity 2.3

Explain the development of Western European *ius commune* by referring to:

1. the contribution made by the church
2. feudalism
3. Roman law.

2.3.7 The Renaissance

The period after the Middle Ages, from the 14th to the 16th century, is known as the **Renaissance**. During this time, Western Europe experienced an economic and cultural revival. The period is known for the development of new techniques in art, poetry and architecture. Scholars became particularly interested in the literature, scholarship and knowledge of the ancient world, particularly ancient Greece and Rome. This included an increased interest in the study of Roman law. The invention of the printing press in the 15th century led to the spread of knowledge: new ideas and discoveries could be publicised and shared throughout Europe.

The French word '**renaissance**' means rebirth.

The Germanic customary laws that had been used in Europe during the Middle Ages were not comprehensive or sophisticated enough to deal with the rapid growth and development characteristic of the Renaissance. The diversification of laws and legal systems as used in different places proved inadequate as trade and communication increased between different parts of Europe. Roman law was a written system of laws, so it was the ideal solution to this problem: people all over Europe could have access to the same printed texts. As people began to use rules found in the *Corpus Iuris Civilis*, rules of Roman law were gradually merged, or combined, with rules from the Germanic legal systems to form the Western European *ius commune*.

2.3.8 The influence of the schools

One of the reasons that Roman law could be put to use when required during the Renaissance is that scholars had continued to study the system during the early Middle Ages. From about the 11th century onwards, scholars at the best schools and universities in Europe began to study the Corpus Iuris Civilis. These groups of legal scholars included:

- the **glossators**, who were scholars of the 11th and 12th century legal schools in Italy and France
- the *ultramontani*, who were 13th century French jurists who used the *Corpus Iuris Civilis* to find answers to practical legal problems
- the commentators, who were 13th century legal scientists who extensively interpreted the *Corpus Iuris Civilis*.

The word '**gloss**' means to explain, interpret or comment on a piece of writing.

The survival of Roman law through the Middle Ages can be attributed to the legal scholars who studied the *Corpus Iuris Civilis* from late 11th century onwards. The University of Bologna already had a famous law school by the 12th century. One of its most famous teachers was Irnerius, who studied the *Corpus Iuris Civilis.* Irnerius is sometimes called 'The Father of the Glossators'. He founded the School of Glossators, who studied old Roman law. Under Irnerius, canon and **civil law** became popular subjects of study. Orleans in France was also famous for its school of civil law during the 12th century. The study of the principles of old Roman law formed the basis of university research. Students in Bologna and Orleans returned to their native countries and started to use the principles of Roman law. In this way, Roman law principles started to spread to various parts of Europe, including Germany, France, Spain, Italy and the Netherlands.

In this context, **civil law** refers to Roman law contained in the *Corpus Iuris Civilis*.

Professor says — Reception and infiltration

Western European *ius commune* developed out of Roman law contained in the *Corpus Iuris Civilis*. It steadily replaced the local customary laws and was accepted as common law in all the countries of Europe, excluding England and Scandinavia. This movement is known as reception. The reception took different forms and occurred at different times in each country.

The acceptance of certain parts of legal systems is called infiltration. For example, only certain parts of English law were included in the Cape Colony's legal system.

The glossators

A gloss means a translation or explanation of a piece of writing. The glossators studied the *Corpus Iuris Civilis* and wrote commentaries explaining the words and phrases. They wrote their comments or explanations in the margins next to the original text (or sometimes squeezed between the lines of the original text). These comments are called glossae (which is the Latin plural for glosses).

Irnerius was a very influential Italian jurist. He began the Glossator movement. Irnerius taught at the University of Bologna during the 12th century, where he and his students studied the newly recovered *Corpus Iuris Civilis*. Vacarius (1120–1200) was an important glossator who travelled to England and helped to found the law school at Oxford. Vacarius compiled a nine volume work called the *liber pauperum*, which contained extracts from the Codex and the Digest and was intended for use by poor students. The last of the famous glossators was Accursius, who collected together all the previous glosses, chose the best of them, filled important gaps, and published the result as the *Glossa Ordinaria*. The *Glossa Ordinaria* became an important source, which influenced later editions of the *Corpus Iuris Civilis*.

The glossators established several law schools in various parts of Europe including Italy, France and Germany. They taught Roman law to their students. When students later returned to their own countries, they were able to refer to and apply principles of Roman law in cases where local laws failed to resolve legal problems. Through this process, Roman law filtered into the different legal systems in Europe.

Roman law might have disappeared from the western world without the glossators. The glossators rediscovered the *Corpus Iuris Civilis* and made it accessible to other schools. The glossators established law as a scientific academic discipline and promoted the concept that justice should be administered by trained legal experts.

The glossator movement also had its weaknesses, however. On the whole, the glossators tended to be rather uncritical of the *Corpus Iuris Civilis*. The *Corpus Iuris Civilis* is contradictory in places, but the glossators were reluctant to admit that the *Corpus Iuris Civilis* had flaws. Instead, they tried to explain and reconcile the contradictions in the Code. The glossators thought that the *Corpus Iuris Civilis* could be applied to all situations and in all cases and that there was no need to look at alternative legal systems. They ignored the existing Germanic customary law in favour of the *Corpus Iuris Civilis*. They also ignored the simplified Roman law that had survived in practice into the Middle Ages.

The *Corpus Iuris Civilis* was a reflection of the principles of classical Roman law, so the glossators applied a purer form of Roman law. In the process, however, the glossators ignored 600 years of legal development.

The ultramontani

The ***ultramontani*** also studied the *Corpus Iuris Civilis*, but their approach was in many ways precisely the opposite of the glossators. The glossators regarded the text as though it were 'the law' that they needed to discover. The *ultramontani* regarded the text of the *Corpus Iuris Civilis* as a source book of material for debate. Instead of using the Corpus Iuris Civilis as a source of law, the *ultramontani* used the text as a source of fascinating intellectual problems for discussion and debate. In some ways, however, the *ultramontani* were more practical than the glossators. The *ultramontani* considered how the Code could be used to resolve current problems. They examined how the *Corpus Iuris Civilis* might resolve legal disputes in practice and what its strengths and weaknesses might be when applied to real life problems.

In Latin, ***ultramontani*** means people living on the other side of the mountain. In this case, on the other side of the Alps. The ultramontani were based at the French law school at Orléans. The glossators of the period were based at Italian law schools.

The work of the *ultramontani* prepared the way for the commentators to establish the Western European *ius commune*, with the *Corpus Iuris Civilis* as its foundation.

The commentators

The commentators were the successors to the glossators. The movement started in Italy in the 14th century. The commentators did not only write commentaries on the *Corpus Iuris Civilis* itself (as the

glossators had done). Instead, the commentators provided commentary on previous glosses. In this regard, they were very reliant on the ***Glossa Ordinaria***, the combined work of the glossators that had been compiled by Accursius in the 13th century. The commentators had a more practical approach to the law than that of the glossators. In this way, they followed the approach of the *ultramontani*. Like the *ultramontani*, the commentators were interested in interpreting, explaining, and developing the law so that it was useful for resolving practical disputes. The commentators studied many sources of law: Germanic customary law, canon law, feudal law and the *lex mercatoria*. Where these sources contradicted each other or conflicted with rules set out in the *Glossa Ordinaria*, the commentators attempted to reconcile this conflict. In this way, the commentators assisted in the development of a legal system that relied on all these sources: the *Corpus Iuris Civilis* (as glossed in the *Glossa Ordinaria*), canon law, Germanic customary law and the *lex mercatoria*. The medieval Italian law created in this way, had an enormous influence on the common law (or *ius commune*) that evolved in Western Europe in the period leading up to the Renaissance.

The commentators' work was said to be '**glossare glossarum glossas'**, or 'glossing the glosses of the glossators'.

Activity 2.4

Answer the following questions:

1. Explain the difference between the personality principle and the territoriality principle. Which principle is applied in South Africa? Give reasons for your answer.
2. What is feudalism? What are the advantages of such a system?
3. How did Roman law principles infiltrate the different legal systems in Western Europe?
4. Describe the contributions of the glossators and commentators in the development of Western European *ius commune*.
5. Why did scholars like the glossators and commentators prefer to use Roman law as a basis for their work?
6. Imagine that you have just completed your studies under the commentators in Italy. You are appointed as a judge in the province of Holland. Which legal system will you apply: the unwritten customary laws of Holland, or Roman law? How will you prove the existence of an unwritten customary law?

2.4 Roman-Dutch law

Roman-Dutch law is the **common law** of South Africa. Roman-Dutch law is an uncodified legal system based on the Western European *ius commune*. The most important sources of Roman-Dutch law are the works of the Dutch legal scholars of the 17th and 18th centuries. These scholars are sometimes referred to as the old authorities or the **institutional writers**.

Common law means law that does not emanate from a statute, but is based on non-statutory sources such as custom and court decisions.

2.4.1 The legal system in the Netherlands

The phrase Roman-Dutch law summarises the nature of this legal system: it is a combination of Dutch law and Roman law. The Dutch were a Germanic tribe that lived in the Low Countries and practised Dutch law. Elements of Roman law infiltrated into the Dutch legal system in many ways, although the timing and manner of infiltration differed between the Dutch regions. During the period of 'early reception' from the 13th to 16th centuries, southern districts like Flanders were heavily influenced by developments in France. Legal officials were trained at universities that studied the glossators' interpretations of Roman law. In northern regions like Friesland, elements of Roman law were received through the canon law, which was itself very reliant on principles of Roman law. In Holland and Zeeland, reception of Roman law principles occurred through cases decided in the Hof van Holland (the high court of Holland) as well as through the influence of the merchant class in major Dutch towns. Holland and Zeeland were developing into important centres of trade during this period.

Institute is a legal word for an intensive discussion of laws. The **institutional writers** of Holland intensively discussed the principles of Roman-Dutch law in their works.

By the end of the 16th century, there had been some reception of Roman law throughout the **Low Countries**. However, the penetration of Roman law was uneven. Everywhere, Roman law principles had been modified and modernised using principles from Dutch customary law, but these changes were not systematic or uniform. By the end of the 16th century, it would be accurate to describe the various legal systems in use throughout the Low Countries as rather diverse.

The **Low Countries** are those coastal regions of North West Europe that today consist of the modern states of Belgium, Luxemburg and the Netherlands.

The Republic of the Seven United Netherlands was founded in 1581. Holland (one of the seven provinces of the Netherlands) was the cultural, political and economic centre of the Netherlands. Holland played an important role in the **States-General**. The States-General was the governing body of the Republic of the Seven United Netherlands, and it represented all the provinces. However, the States-General had limited powers. The controlling bodies of the different provinces held the real power. The States-General was responsible for foreign policy, financial matters and the defence of the republic. The provinces were in charge of all other matters. Holland, for example, had its own legal system and **judicial structures**.

The **States-General** is similar to the parliament of South Africa. The parliament of the Netherlands is still called the States-General.

Compare this with South Africa. We have nine provinces that all use the same legal system and **judicial structures**.

During the 17th and 18th centuries, legal scholars and jurists of the Netherlands studied and published works about the Roman-Dutch law. The first systematic treatise on Roman Dutch law was Hugo De Groot's *Inleidinge tot de Hollandsche Rechtsgeleerdheid* (Introduction to Dutch Jurisprudence) that was published in 1631. De Groot's Inleidinge provides a systematic outline of a legal system based primarily on Roman law principles as adapted to the needs of the time under the influence of principles of Germanic customary law and the law of the merchants. This work was very important for the subsequent refinement and development of Roman-Dutch law both in practice in the courts and in the works of the other institutional writers. During the 17th and 18th centuries, several writers and jurists wrote other sophisticated and systematic accounts of Roman-Dutch law. This was the legal system that was imported to the Cape when Jan van Riebeeck and other employees of the VOC were sent here in 1652. Roman-Dutch common law took root in the Cape and is still the common law of South Africa today. However, Roman-Dutch common law was no longer the legal system of Holland after 1809, as a result of the Napoleonic wars.

The ***Code Civil***, also called the *Code Napoléon*, was the French legal code. The Dutch code that followed the Code Civil nearly thirty years later (in 1838) was in many respects a translation of the Code Civil.

In 1795, Napoléon Bonaparte invaded the Netherlands. The French invaders established the Batavian Republic in what had been the Netherlands, and installed Napoleon's brother (Louis Bonaparte) as the king. In 1804, the French enacted the ***Code Civil***, also known as the *Code Napoléon* because Napoléon was the emperor of France at that time. A version of the Civil Napoleonic Code was introduced in the Batavian Republic in 1809. This codified system of law replaced Roman-Dutch law in the Netherlands.

In this context, **civil law** is also called private law.

Professor says — 'Civil' can mean many things

The word 'civil' comes from the Latin word for citizen. In English, we use the word in many different ways.

- **Civil law** was the law in ancient Rome that applied to Roman citizens who wished to enforce their rights in a dispute.
- Civil law is the law of a state that allows citizens and the government to enforce their rights and take legal action against each other.
- Civil law, in the context of Western European *ius commune*, recognises the fact that this legal system was founded on Roman law.
- Civil war is a war between people of the same country.

In later chapters, you will come across the following meanings for the word 'civil':

- Civil rights are rights that belong to citizens.
- Civil marriage is a marriage performed by an official rather than a minister of religion.

Activity 2.5

Look in the dictionary and see how many more uses you can find for the word 'civil'. Make a list of your findings.

The end of the Republic of the Seven United Netherlands in 1795 marked the end of Roman-Dutch law in Europe. However, **Roman-Dutch law** survived in the former Dutch colonies of Java (Indonesia), Ceylon (Sri Lanka), British Guiana (Guyana) and of course, the Cape Colony.

The current legal system of the Netherlands is built on the French Code Civil, not **Roman-Dutch law**.

Ironically perhaps, the French invasion of the Netherlands in 1795, resulted in the survival of Roman-Dutch law as a living uncodified legal system. Britain was also at war with Napoleon in the early 19th century. Britain invaded and took control of the Cape in 1806 because of the Cape's strategic importance. Now that the Netherlands was controlled by France, the British did not want the Cape to remain in Dutch hands. The British occupation of the Cape in **1806** happened before the French Code was introduced in the Netherlands. This means that the Dutch were no longer in control of the Cape when the law of the Netherlands was replaced by the French Code Civil 1809. In the Netherlands itself, the Roman Dutch law was replaced by codified French law, but in South Africa, we continued to use the uncodified Roman-Dutch law.

In the same year, **1806**, Napoléon brought an end to the Holy Roman Empire, when he forced the Habsburgs (the Austrian royal family) to give up the title of Holy Roman Emperor.

2.4.2 Sources of Roman-Dutch law

The 17th- and 18th-century Dutch institutional writers are the most important sources of Roman-Dutch law. The institutional writers were responsible for combining Western European *ius commune* with Dutch customary law. These authors made use of the wisdom of Roman law principles and the Western European *ius commune*. Today, South African legal practitioners and scholars still consult the works of the institutional writers to better understand Roman-Dutch law. You will often encounter references to Roman-Dutch writers when reading legal cases. Let us meet some of the most important institutional writers.

Hugo de Groot

Hugo de Groot (1583 to 1645) is one of the world's most famous jurists. In cases and legal writing, De Groot is often referred to as Grotius, which is the Latin form of his name. De Groot made many important intellectual contributions to legal scholarship, political and theological philosophy, and even wrote poetry. This brilliant thinker started his studies at the age of 12 at the University of Leiden and was awarded his first doctorate in law at age 15. The Dutch authorities did not approve of De Groot's theological writings and De Groot was imprisoned at the Castle of Loevestein from June 1619 to March 1621. While in prison, De Groot wrote a foundational text of Roman-Dutch jurisprudence: ***Inleidinge tot de Hollandsche Regsgeleerdheid***. This book discusses the parts of the *Corpus Iuris Civilis* applicable to Holland and also examines rules of Dutch law that are based on Germanic custom. The *Inleidinge* is considered to be the first authoritative, work on Roman-Dutch law. The work was enormously influential on the scholarship of other important Roman-Dutch scholars including Simon van Leeuwen and Simon van Groenewegen van der Made. The *Inleidinge* was first translated into English in 1845 by Charles Herbert, who practised as an advocate in British Guiana (which, like the Cape, used Roman-Dutch law). Sir Andries Maasdorp, then Chief Justice of the Orange River Colony, translated the work into English in 1878. The translation was published in Cape Town as *The introduction to Dutch Jurisprudence of Hugo Grotius* and became a readily accessible text for legal practitioners and judges throughout southern Africa.

De Groot's '**Inleidinge**' was translated by Maasdorp as 'The Introduction to Dutch Jurisprudence of Hugo de Groot'.

De Groot was also one of the first specialists on international law and is best known internationally for his other major work *De Jure Belli ac Pacis* (*Concerning the Law of War and Peace*).

Simon van Leeuwen

Simon van Leeuwen (1626 to 1682) was also a graduate of the University of Leiden. The term Roman-Dutch law was first used in Simon van Leeuwen's work, ***Het Roomsch-Hollandsche Recht***, or Roman-Dutch Law. It seems that Van Leeuwen's decision to write a systematic work on Roman Dutch law was inspired by De Groot's *Inleidinge*. **Van Leeuwen**'s work on Roman-Dutch law was very influential on South African legal practitioners and judges. Sir John Gilbert Kotzé published a translation of Van Leeuwen's work in two volumes between 1881 and 1886, thus ensuring that the work was accessible. Kotzé was Chief Justice in the Transvaal, and later became a Judge of Appeal in the Appellate Division of the South African Supreme Court.

The translation, by Kotze, is published as '***Commentaries on Roman-Dutch Law***'.

Van Leeuwen's work discusses the Roman-Dutch law of the time and gives an insight into the application of our own common law.

Simon van Groenewegen van der Made

Simon van Groenewegen van der Made (1613 to 1652) also graduated from the University of Leiden. Groenewegen updated De Groot's *Inleidinge* in 1644. He added a commentary and also provides more accurate references and authorities (Grotius has written the work while in prison and without the benefit of sources materials). Groenewegen's most important work was *Tractatus de Legibus Abrogatis et Inusitatis in Hollandia Vicinisque Regioninbus*. This work examined important sources of Roman law such as the **Institutes**, the **Digest**, and **Codex** and the **Novellae** and showed which of the laws contained in these texts were still valid and which laws were no longer in use. Groenewegen's *Tractatus* is an extremely comprehensive and valuable record of Roman Dutch law in the 17th century. Professors Beinart and Hewett translated this work as *A treatise on the laws **abrogated** and no longer in use in Holland and neighbouring regions*.

Institutes, **Digest**, **Codex** and **Novellae** were the different parts of the *Corpus Iuris Civilis*.

In legal language, '**abrogate**' means to officially cancel, or repeal, a law.

Johannes Voet

Johannes Voet (1747 to 1713) is one of the most important sources of Roman-Dutch law and is often cited in court judgments to this day. Voet was a professor of law at the University of Herborn, Prussia, and later at the University of Leiden. Voet's most important work was his enormous ***Commentarius ad Pandectas***, or *Commentaries on the Pandects*. This work discusses the Pandects, or the Digest, of Justinian. The most important feature of the work is that Voet constantly refers to the contemporary Dutch law of the period. Thus this work is a comprehensive account of Roman-Dutch law: it examines the Roman law, but it interweaves this with the Dutch law of the period. It is a very practical work: Voet insisted on examining how the rules were applied in practice. The best known translation of the work is Percival Gane's *The Selective Voet*, published in eight volumes in the 1950s. Translations of parts of Voet's Commentaries had been published in South Africa (and is readily available to legal practitioners) since the late 19th century. These include Sir Roland Wilson's translation of Book 18 on the Contract of Sale (published in 1876) and Judge James Buchanan's translation of the first four books in the 1880s (for example, Book 2, Title 14 on Pledges, published in English in 1881). One of the most-cited translations is *The Roman and Roman-Dutch Law of Injuries*, which is Mellius de Villiers's translation of Book 47, Title 10, first published in 1899. Voet's work was readily available during the formative period of South African common law and it exerted an enormous influence on our law.

Earlier in the chapter, we mentioned that the Digest is also known as the **Pandectae**.

Johannes van der Linden

Johannes van der Linden (1756 to 1835) was the last of the institutional writers. Van der Linden was still producing legal scholarship when the Netherlands became the Batavian Republic. However, we refer only to the work produced before codification of the legal system in 1809. Van der Linden's work is important for understanding the development of Roman-Dutch law into the early 19th century. He offers us an insight into the ways in which the legal system had changed since the times of De Groot

almost 300 years before. Van der Lindens's work was extremely practical: he was a practising advocate and was later appointed as a judge in Amsterdam. Van der Linden wrote his ***Rechtgeleerd, Practicaal en Koopmanshandboek*** before the codification of the legal system of the Netherlands. This work was influential in the legal development of the law in the Zuid-Afrikaansche Republiek (1854 to 1902).

The ***Institutes of the Laws of Holland*** played an important role in the legal developments of the Zuid-Afrikaansche Republiek (1854 to 1902).

Professor says — Other sources of Roman-Dutch law

A number of other authors also contributed to the development of Roman-Dutch law, for example, Ulrich Huber, Cornelius van Bynkershoek (1673 to 1743), Gerloff Scheltinga (1708 to 1765), Willem Schorer (1717 to 1800) and Dionysius Godefried van der Keesel (1738 to 1816). We have only selected the most important institutional writers to show the development of Roman-Dutch law. There are other Dutch sources of law as well – for example, cases and legal opinions. These sources are important if you want to understand Roman-Dutch law better. Another source is the legislation contained in the *Groot Placaet-Boeck*. This work covers legislation enacted between 1097 and 1795 in the Netherlands. The *placaaten* still play an important role in the South African law of lease.

Activity 2.6

Answer the following questions:

1. What do you think is the most difficult aspect of reading and interpreting the works of the institutional writers?
2. Write short notes on Hugo de Groot's contribution to Roman-Dutch law.
3. What is the most important source of Roman-Dutch law? Give reasons for your answer.
4. Explain the following statement in a short paragraph: 'The law of the Netherlands is French in nature.'

2.5 Law in the Cape from 1652

Before the formation of the Union of South Africa in 1910, the Cape was an independent political entity. We can divide up the Cape's legal history pre-Union into two periods: first there was the period from 1652 until 1806 when the territory was under Dutch control. During this period, Roman-Dutch law was transplanted to the Cape of Good Hope. It became the legal system of the territory. The second period began with the British invasion in 1806. After the English invaded in 1806, the Cape became a British colony known as the Cape Colony. During the period of British occupation, English law started to influence legal development in southern Africa.

2.5.1 Roman-Dutch law in the Cape of Good Hope

In 1652, the *VOC* sent Jan van Riebeeck to the Cape to establish a Dutch settlement. Van Riebeeck planted a vegetable garden to serve as a refreshment station for Dutch ships sailing between Holland and the East. More Dutch settlers followed. The *VOC* was registered in Holland and it favoured the use of Roman-Dutch law to administer the territories that they controlled. As a result, Roman-Dutch law was adopted at the Cape of Good Hope.

Liquidated means that the company could not pay its debts and was declared bankrupt.

Professor says — The VOC

The *Verenigde Oostindische Compagnie* (*VOC*) was founded in 1602 and **liquidated** in 1795. With its headquarters in Holland, the *VOC* was the largest and most impressive trading company in the world. The *VOC* received the authority from the States-General to conduct trade between

Professor says (continued) The VOC

southern Africa and eastern countries as far east as Japan. The States-General also empowered this company to build fortifications and to maintain order in the foreign territories that the company controlled. The *VOC* controlled the fate of the Cape of Good Hope for more than a hundred years.

2.5.2 The British at the Cape of Good Hope

In 1795, Napoleon's armies invaded the Netherland and established the Batavian Republic. Britain was also at war with Napoleon at this time. The British were concerned about the Dutch control of the Cape of Good Hope: the Dutch were now French allies. The British feared that their trading routes to the East would be threatened if a French ally controlled the Cape. Acting on this fear, the British occupied the Cape in 1795, and again in 1806.

The first British occupation

The first British occupation of the Cape of Good Hope, from 1795 to 1803, was extremely brief. The British did not change the Cape's legal system at all, but continued to apply the existing Roman-Dutch law. When the Peace of Amiens ended the war between Britain and France in 1803, the Cape of Good Hope was returned to the Batavian Republic. This peace did not last long, however, and the British invaded the Cape for a second time in 1806.

The second British occupation

The second British occupation began in 1806. Again, the British decided to retain Roman-Dutch law as the basis of the Cape's legal system. However, the British did make some important changes to the Cape's legal system. An important example was the introduction of English procedural law in 1819. Procedural law prescribes the way in which a person enforces his rights in court. English procedure formalised the procedure to be used in cases in the **Cape Colony**. A particularly significant part of English procedure is the use of **adversarial** court proceedings instead of the **inquisitorial** court proceedings that were used in Europe.

During the second British occupation, the Cape of Good Hope became known as the **Cape Colony**.

Adversarial or accusatorial means that court proceedings are seen as a battle between two parties with the presiding officer acting as a passive referee.

An **inquisitorial** system means that, in court, the judge or other presiding officer plays an active role in fact-finding.

2.5.3 English law in the Cape Colony

According to Zimmerman and Visser, the British 'preserved, changed, modified or adapted this system, resulting in the South African legal system that we are still using today'.

Dutch law was codified in 1809. When we talk about the Roman-Dutch law that was transplanted to South Africa by the Dutch, we are referring to the law that existed before 1809. This old-fashioned legal system proved rather inadequate when faced with rapid changes in society and economy during the 19th century. English law could adapt to the changing world. English common law was still developing and changing. Furthermore, the British Parliament could pass specialised legislation that was suitable for the period. A good example of this is the legislation governing commercial companies. By the mid-nineteenth century, the British legislature had developed the first versions of its modern-day company law. Legislation in the Cape was modelled on the English legislation. For example, the Cape Colony's Joint Stock Companies Liability Act 23 of 1861 was modelled on the English Limited Liability Act, 1855. This Act was later replaced by the Cape Companies Act 25 of 1892, which was based on the English Companies Act, 1862. There were many other examples of Cape Acts that were copied from Acts passed in Britain, for example in insolvency law and shipping law. It is very easy to see the importation of English law based on English statutes. But principles of English law were also introduced in more subtle ways through court judgments. Naturally, a statute modelled on an English statute is likely to be interpreted using English legal principles. Beyond this, English law infiltrated the

South African legal system when judges referred to up-to-date English legal texts and court judgments in preference to the institutional writers who had written centuries before. Many of the judges had been educated in England and they were very comfortable with the English sources. Often, they misinterpreted rules of Roman-Dutch law and thought that they were essentially the same as similar rules in the English system. The introduction of the English system of judicial precedent led to the introduction of more English legal principles. In this way, the **Anglo-American legal tradition** started to influence the Cape Colony's legal system.

All areas that were colonised by Britain, such as Canada, America and Australia, adopted the English common law tradition. That is why we often refer to it as the **Anglo-American legal tradition**, because 'Anglo' means English.

The Charter of Justice of 1827 introduced a more English kind of legal system to the Cape Colony. Previously, the Council of Justice had been responsible for the administration of justice. The Charter of Justice removed the Council of Justice and replaced it with a supreme court. The new Supreme Court was modelled on the English courts and employed professional judges.

The first judges appointed to the Cape Supreme Court were all trained in the United Kingdom. They had a background in English law rather than Roman-Dutch law. Similarly, most of the advocates who appeared in the court had been trained at English universities. Some of the English-speaking legal practitioners found it difficult to read the Roman-Dutch writers. Many of the important texts on Roman-Dutch law were not translated until late in the 19th century. The first Chief Justice of the Cape Supreme Court was John Wylde (1781–1859). Wylde did not consider himself bound by institutional writers. He referred dismissively to 'musty Dutch books' and said that the court should not be 'paralysed … by the maxims of philosophers dozing over their midnight lamps.' Fortunately, the other senior judge on the court, William Menzies, was well-acquainted with Roman-Dutch law. Menzies had been educated in Edinburgh, where he had specialized in the study of Justinian's Digest. Menzies studied the Roman-Dutch texts thoroughly. When English rules seemed to be in conflict with Roman-Dutch rules, Menzies often took care to give effect to the rules of Roman-Dutch law and to avoid replacing them with the English rules.

The **English Colonies** is a reference to the Cape Colony and Natal.

One part of the common law that was dramatically influenced by English law was criminal law. The British were unimpressed by the criminal laws in force at the Cape during the Dutch period. By 1877, Lord Henry de Villiers (then Chief Justice of the Cape Colony) remarked that:

'The common law of South Africa is the Roman-Dutch law… In the **English Colonies** of South Africa, the Criminal Law of England has entirely replaced the Criminal Law of Holland.'

To **abolish** a law means to do away with or cancel the law.

Professor says — The Judicial Committee of the Privy Council

The Charter of Justice also allowed for appeals to be made to the Judicial Committee of the Privy Council, which was the highest court for territories under the control of Britain. The Lord Chancellor and other law lords or judges served on the Judicial Committee of the Privy Council. The British prime minister appointed the Lord Chancellor. One of his responsibilities was the functioning of the courts. Appeals from the South African Supreme Court of Appeals to the Privy Council was finally **abolished** in 1950.

Activity 2.7

Answer the following questions:

1. Who was responsible for introducing Roman-Dutch law to the Cape of Good Hope and why did they do so?
2. Why did Britain not abolish the practice of Roman-Dutch law at the Cape?
3. Does the system of judicial precedent form part of Roman law, Roman-Dutch law or English law?

Activity 2.7 (continued)

4. Was the Cape Colony Supreme Court modelled on the English legal system or Roman-Dutch law?
5. Write a paragraph on the development of the Cape Colony's legal system. Include information about the various legal systems that influenced this development.

2.6 Law beyond the Cape Colony

Some of the Dutch inhabitants of the Cape Colony were unhappy by the British occupation. In 1836, many dissatisfied Dutch settlers left the Cape Colony in the Great Trek. They went on to establish the independent territories of Natal, the Orange Free State and the South African Republic (Transvaal). Historians today have concluded that the primary reason for the Trek was the shortage of land available for farming. However, the trekkers themselves explained their motives somewhat differently. The famous **diary** by trekker Anna Steenkamp blamed the unsettled situation in the Eastern Cape. She complained that the farmers there were the victims of 'continued depredations and robberies' by the Xhosa. The Trekkers also objected to the emancipation of the slaves, and the tightening of the labour laws affecting the Khoisan apprentices on their farms. Some objected to the new British court structure and to the use of English as the language of record. Trekker leader, **Piet Retief** objected to British administration in general. He wrote that the English Government did not have the Dutch residents' best interests at heart, and the trekkers would govern themselves 'without interference in future'.

*Die **dagboek** van Anna Steenkamp* will provide insightful reading into the situation at that time.

Piet Retief's comments are sourced from Retief's Manifesto (which was published in the press).

The mass **migration** of the Dutch settlers into other parts of southern Africa ensured that Roman-Dutch law would become the common law in many parts of southern Africa. The independent states established by the trekkers in Natal, the Free State and the Transvaal chose Roman-Dutch law as their legal system. Even though the trekker states would all become British colonies eventually, Roman-Dutch law was retained as the common law system in these regions. In 1910, the British-controlled territories combined to become the Union of South Africa.

A **migration** is a move from one place to another. In the case of the Dutch settlers, the migration was away from British rule.

Professor says The South African Republic and the Republic of South Africa

It is important to distinguish between the South African Republic (*Zuid-Afrikaansche Republiek* in Dutch) and the Republic of South Africa. The South African Republic controlled the territory between the Vaal River and the Limpopo River. Today, this territory includes Gauteng, Limpopo, Mpumalanga and the North West Province. In 1910, the Cape Colony, Orange River Colony, Natal and Transvaal Colony combined to form the Union of South Africa – still under British control. The union was a British dominion, which was given sovereignty over its own affairs in 1931. British political influence finally ended in 1961 with the establishment of the Republic of South Africa.

2.6.1 Natal

In 1838, the Dutch inhabitants who moved away from the Cape Colony established the first independent state, namely the Republic of Natal. The new state chose *Hollandsche regspleging*, or Dutch jurisprudence, as its common law. Natal was independent for a brief period before becoming a colony of Britain in 1843. Britain extended the law of the Cape Colony to Natal in 1845, and later established a supreme court similar to the Supreme Court of the Cape Colony.

2.6.2 Orange Free State (1854 to 1902)

The Orange Free State was established as an independent state in 1854. In terms of the Orange Free State's constitution, *Het Roomsch Hollandsch Wet*, or Roman-Dutch law, was the common law of the

territory. However, the Orange Free State also used English law where convenient. For example, in 1875, the legislator of the Orange Free State introduced a supreme court modelled on the Cape Colony's Supreme Court. The Orange Free State lost its independence to Britain after the South African War (1899 to 1902) and it became the Orange River Colony. However, Britain retained Roman-Dutch law as common law in the Orange River Colony.

2.6.3 South African Republic (1852 to 1902)

The common law of the South African Republic was also based on Dutch law, or *de Hollandsche wet*. However, the South African Republic used the English court system. In 1877, the South African Republic introduced a supreme court similar to those in the Cape Colony, Natal and the Orange Free State.

The South African War ended the independence of the South African Republic. The republic was renamed the Transvaal Colony.

The Constitution of the South African Republic defined *de Hollandsche wet* as a reference to Van der Linden's *Rechtgeleerd, Practicaal en Koopmanshandboek*. Legal practitioners could also consult the works of Van Leeuwen or De Groot to interpret Roman-Dutch law.

Professor says — Law versus legislation

The reference to the institutional writers in the Constitution of the South African Republic shows that Roman-Dutch law was regarded as the republic's common law. However, the reference to *de Hollandsche wet* is not correct. The Dutch word 'wet' means legislation. The word 'legislation' refers to laws enacted by Parliament in the form of statutes. The meaning of 'legislation' will therefore not include the work of institutional writers. Today, the institutional writers are a source of South African common law, not statutory law.

2.6.4 The Union of South Africa

The territories of Natal, the Orange River Colony, the Cape Colony, and the Transvaal Colony united in 1910 to form the Union of South Africa. During the South African War, there had been a **number of calls** to bring the law of southern Africa closer to that of England. The debate over the status of Roman-Dutch law intensified with the formation of the Union: should the Union use Roman-Dutch law or English law as its common law? The debate was finally settled in favour of Roman-Dutch law. The Union of South Africa unified the different legal systems in use in South Africa. Before Union, each of the four colonies had applied its own legal system. All of them were based on Roman-Dutch law, and all had been influenced by English law. Henceforth, however, a single unified common law system would apply throughout South Africa. A new Appellate Division of the Supreme Court of South Africa was tasked with resolving contradictions between the laws of the former colonies.

The **number of calls** were made mostly in academic papers written on the subject.

Today, Roman-Dutch law remains the foundation of our legal system, although rules of English law are also part of our common law.

Activity 2.8

Answer the following questions:

1. Explain why the Cape, Natal, Orange Free State and South African Republic modelled their supreme courts on the British legal system, and not on the courts of the Netherlands.
2. Why, in your opinion, did Britain not change the legal system of the Cape Colony to English law in 1806?

2.7 Creating a South African common law

Modern South African common law is a mixed legal system. It is based on Roman-Dutch common law, but it includes rules and principles from both Roman-Dutch law and English law. This mixing of Roman-Dutch and English rules and principles did not always happen quietly and peacefully. For much of the 20th century there was a '*bellum juridicum*' (a war about the rules) between judges and lawyers who wanted to use the English rules that had crept into South African law during the 19th century, and those who wanted to get rid of all English rules and replace them with Roman-Dutch ones.

During the 19th century, the English-trained judges of the Supreme Court of the Cape Colony often used English rules and principles to solve the legal problems brought before them. Society was changing; the economy was growing; and judges sometimes found it comforting to use up-to-date English books and court judgments instead of the rules set out by Roman-Dutch writers like Voet, who had been dead for more than a hundred years.

We have already noted Chief Justice Lord Henry de Villiers' comments on the role of English law in the British Empire (see page 38). In his court judgments, Lord de Villiers often claimed that certain rules of English law were basically the same as rules of Roman-Dutch law and that English rules could therefore be applied in the Cape, even though officially the Cape had a Roman-Dutch common law system.

One famous example of this is the English rule of **valuable consideration**.

A **valuable consideration** means something of worth or value.

In England, contracts could only be legally binding if both parties got something out of the deal. In other words, there had to be a 'valuable consideration' from both sides – some kind of exchange.

In an early Cape case, *Alexander v Perry* 1974 (4) Buch 59, Mr Perry had entered into an employment contract with Mr Alexander. In terms of this contract, Mr Perry promised to give three months' notice if he resigned from his job as Mr Alexander's bookkeeper. Later, Mr Perry left his job without notice, and Mr Alexander sued him for breach of contract. Cape Chief Justice de Villiers decided that the contract had never been legally binding because Mr Perry got nothing out of the deal: there was no 'valuable consideration' in exchange for his promise to give notice. So we can see that in this case, Chief Justice de Villiers applied a rule of English law: he said that contracts will only be legally binding if there is some kind of 'valuable consideration' from both parties.

Meanwhile in the Transvaal, the Transvaal Supreme Court took a different approach. In *Rood v Wallach* 1904 (TS) 187 the court rejected the English rule of valuable consideration and said that contracts were always binding, provided that both the parties had a serious and deliberate intention to be bound by the contract and the contract was not unlawful. This was the rule set down by Johannes Voet.

After Union, the question of valuable consideration came before the new Appellate Division in the case *Conradie v Rossouw* 1919 AD 279. Mr and Mrs Rossouw had entered into a contract with Mr Conradie. The contract provided that Mr Conradie would have first option to buy their farm if they ever decided to sell it. Later, the Rossouws changed their minds and told Mr Conradie that they wanted to cancel the agreement. Mr Conradie sued them for breach of contract. The matter was first heard before the Cape Provincial Division. The Cape court applied the 'valuable consideration' rule and decided that since the Rossouws had not received any valuable consideration in terms of the contract, the contract was not binding.

Mr Conradie then appealed to the Appellate Division. This court adopted the Transvaal's attitude to the 'valuable consideration' rule. It rejected this rule of English law and said that the contract was binding, because according to Roman-Dutch sources like Voet, all contracts are binding provided that they are lawful and seriously intended. After this decision by South Africa's highest court, the English rule of valuable consideration was eliminated from South African law and it is not part of our law today.

This process of getting rid of English rules that had crept into South African common law was repeated many times. By the mid-20th century it had become almost a crusade by some Afrikaner judges and legal academics. They wanted to 'purify' South African private law and criminal law by scrapping all English rules and replacing them with rules from the Roman-Dutch sources.

But not all English rules were scrapped. Modern South African common law still contains English rules and principles. A good example of this is the trust.

Roman-Dutch law does not have trusts, but the **trust** became part of South African law because many English settlers had left money 'in trust' in their wills. The trust is a very useful legal institution and so it was convenient to keep it as part of our law. Our trust rules are not exactly the same as the English rules, however. They have been changed so that they fit in with our overall legal system.

A **trust** is a sum of money which is looked after by at least one person (the trustee) for the benefit of at least one other person (the beneficiary).

Between 1948 and 1990, South African law was dramatically changed through the apartheid system. Sometimes this involved changes to our common law. For example, in terms of Roman-Dutch common law, men and women are allowed to marry each other, provided that they are not already married; have reached a certain age; and are not too closely related to each other. The Prohibition of Mixed Marriages Act 55 of 1949 introduced a new rule: people who were classified as 'white' were only allowed to marry people who shared this classification.

The apartheid rules were **repealed** in the late 20th century, and the common law no longer contains rules that obviously discriminate on the basis of race. However, our common law still contains rules which discriminate in other ways. For example, in terms of the common law, children could not inherit **intestate** from their fathers if their fathers had never married their mothers.

Repealed means scrapped.

Intestate means without a will.

The Constitution says that the common law must be developed so that it is in keeping with the values and principles in our Bill of Rights. The Bill of Rights forbids discrimination on the grounds of 'birth'. This means that the law must not treat people differently just because their parents never married each other. The common law rules about intestate succession have been changed. The Intestate Succession Act 81 of 1987 now provides that all children have an equal right to inherit intestate from their parents, regardless of whether or not their parents ever married each other. You will learn more about the Bill of Rights and its influence on the common law in other chapters in this book.

2.7.1 Into the future

Our law is the product of thousands of years of development. As we have seen, the South African legal system is based on Roman-Dutch law. In turn, Roman-Dutch law is founded on the Western European ius commune. The Western European *ius commune* was based on the *Corpus Iuris Civilis*, a codification of Roman law.

According to the Constitution, South African law is capable of further development; in other words, our legal system can change and adapt to new challenges. The Constitution specifically requires the courts to develop the common law according to the values and principles contained in the Bill of Rights. So, our law is a living system: we are not stuck with the laws of colonial times. New laws, the development of common law principles and court decisions help to keep the law relevant to modern life. These changes to our legal system build on the foundation of the last 3 000 years.

Read through the case study below and answer the questions that follow.

Case study — Using common law sources to decide cases

Butters v Mncora 2012 (4) SA 1 (SCA) was a judgment of the Supreme Court of Appeal. Ms Mncora and Mr Butters had cohabitated for 20 years in a permanent life partnership. They had built a home and raised their children together. The relationship terminated suddenly when Mr Butters decided to marry a third party.

Ms Mncora had devoted her life to working for the family in the home. She had not developed a career outside of the household. She had no money of her own. Mr Butters had devoted his time to working outside of the household. He had become very wealthy during the 20-year relationship.

Case study (continued) Using common law sources to decide cases

Ms Mncora approached the court asking for a share of Mr Butters's fortune. Ms Mncora argued that she and Mr Butters had been partners in a universal partnership and that, in terms of the ordinary common law rules, she should be given a share of the partnership assets in proportion to her contribution.

The Supreme Court of Appeal examined the common law rules applicable to universal partnerships. The Supreme Court of Appeal found that there are two types of universal partnerships in our law: the *societas universorum bonorum*, which is a truly universal partnership where 'the parties agree to put in common all their property, present and future' (see paragraph 14 of the judgment), and the *societas universorum quae ex quaestu veniunt*, where 'the parties agree that all they may acquire during the existence of the partnership, from every kind of *commercial* undertaking, shall be partnership property' (see paragraph 14). Ms Mncora did not qualify as a partner in terms of the *societas universorum quae ex quaestu veniunt* because she had not contributed to the partnership's commercial enterprises. She would qualify as a partner in terms of the *societas universorum bonorum* based on her contribution in the household. However, all previous South African case law on this point had ruled that only married couples (or couples in putative marriages) could form the *societas universorum bonorum* (see paragraph 14).

1. Refer to paragraph 15 of the judgment. The previous South African cases that limited operation of the *societas universorum bonorum* to married couples were based on an interpretation of important common law writers. Which common law writers limited operation of the *societas universorum bonorum* to married couples or couples in putative marriages?

The Supreme Court of Appeal refers to additional common law writers who do not limit operation of the *societas universorum bonorum* to married couples, but rather extend operation of the *societas universorum bonorum* to any persons who decide to pool all their resources in a universal partnership.

2. Refer to paragraph 15 of the judgment. Which common law writers contradict the conclusions of Grotius and Voet (according to the Supreme Court of Appeal)?
3. Which common law text does the Supreme Court of Appeal find particularly instructive on this point?

Some academic commentators were rather critical of the Supreme Court of Appeal's reliance on a rather obscure and 'newly discovered' source of Roman-Dutch law.

4. Find a copy of the journal article: Barratt, A. 'Teleological Pragmatism, A historical History and Ignoring the Constitution – Recent Examples from the Supreme Court of Appeal' (2016) 133 *South African Law Journal* 189–221.
5. What is meant by the term 'teleological pragmatism'? See page 189 of the journal article.
6. Why does Barratt conclude that the Supreme Court of Appeal's reliance on historical common law sources in *Butters v Mncora* is an example of teleological pragmatism?
7. What does Barratt consider the dangers and weaknesses in the court's reliance on these sources?
8 What does Barratt believe that the court should have done instead in the *Butters v Mncora* matter?

Activity 2.9

Answer the following questions:

1. Draw a mind map of the historical sources of the South African legal system.
2. Is the South African legal system a codified system? Explain your answer.
3. Give an example of a rule of English law that had crept into the South African legal system and was replaced by the Roman-Dutch rule.
4. Do you think that South African law was improved by replacing English rules with Roman-Dutch rules?
5. In terms of the common law, wives were under their husbands' marital power; children born to unmarried parents were treated differently from children whose parents were married to each other; same-sex couples could not marry. How has the Constitution shaped legal development of these common law rules? Can you think of other examples?

What do you think?

Compare the *VOC* with a modern company such as Microsoft®. Do you think companies should have the authority to control foreign territories, or do you think that this power should belong to individual states?

Chapter summary

In this chapter, we discussed the history and development of South African law:

- South African law is the product of thousands of years of legal development and thought.
- The South African legal system is a mixture of more than one legal tradition.
- Roman law, Western European *ius commune*, English common law and Roman-Dutch law influenced South African law.

We have learned the following about the development of South Africa's legal system:

- The South African legal system is a hybrid legal system.
- South Africa inherited its legal system from Holland and England.
- Roman-Dutch law is the product of Western European *ius commune*.
- English common law was based on old legal customs and case law.
- English common law introduced English legal principles (for example, judicial precedent) into South African common law.

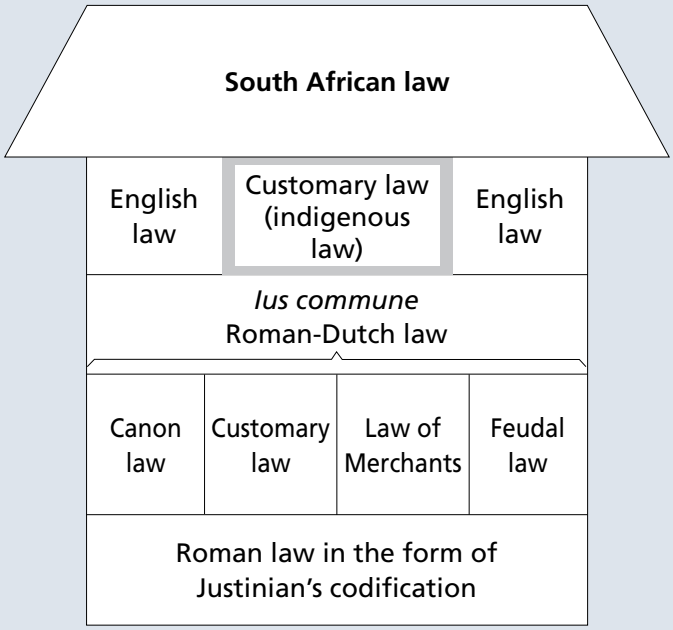

Figure 2.2 The different legal systems that contributed to the development of South African law

Concept for Figure 2.2: Wouter de Vos, Department of Public Law, University of Cape Town.

- The South African legal system is an uncodified legal system.
- The primary sources of South African law are statutory law, common law, judicial precedents and customary law.
- South African common law comprises Roman-Dutch law and English legal principles and case law.

About Roman legal development, we have learned the following:

- From primitive beginnings, Roman law developed to become a highly sophisticated system of laws.
- A number of officials, such as the praetors and jurists, were responsible for legal development.
- The contributions of the jurists are the high point of Roman legal development.
- The Roman jurists played a less important role towards the end of the Principate.
- During the military dictatorship, imperial legislation aided legal development.
- The *Corpus Iuris Civilis* marked the end of Roman legal development.
- The *Corpus Iuris Civilis* was later used as the foundation of Western European *ius commune*.

The Western European *ius commune* is a mixture of different legal systems:

- Roman law, in the form of the *Corpus Iuris Civilis*, was part of the *ius commune*.
- Germanic tribes controlled large parts of Europe after the fall of the Western Roman Empire in AD 476. Germanic customary law was primitive and was based on unwritten customs handed from one generation to the next.
- Feudal law dates back to the 8th century in Western Europe, and governed the relationship between lords and vassals.
- Canon law was the legal system that governed the Roman Catholic Church. The church based its legal system on Roman law. The *lex mercatoria*, or the law of merchants, consisted of rules and traditions that merchants used to regulate their dealings with one another.
- During the Renaissance, Roman law, in the form of the *Corpus Iuris Civilis*, was rediscovered.
- The glossators made the *Corpus Iuris Civilis* accessible to other scholars.
- The *ultramontani* used the *Corpus Iuris Civilis* to solve practical legal problems.
- The commentators built on the work of the glossators and *ultramontani* to develop Western European *ius commune*.
- The different schools were responsible for the infiltration and reception of Roman legal principles throughout Western Europe.

We have learned the following about the development of Roman-Dutch law:

- Roman-Dutch law is the product of Western European *ius commune*.
- The Netherlands had no unified legal system. Holland therefore had its own legal system.
- The publications of the institutional writers are still used to interpret and clarify Roman-Dutch law in South Africa.
- The current legal system of the Netherlands is based on the French *Code Civil*.

We have learned the following about the law in the Cape:

- The *VOC* transplanted Roman-Dutch law to the Cape in 1652.
- After the second British occupation of the Cape in 1806, English law started to influence legal development in southern Africa as lawyers and judges had been trained in English law.
- Britain retained Roman-Dutch law in the Cape Colony as the basis of the Colony's common law.
- However, the British colonial government at the Cape introduced English legal principles such as judicial precedent, and legislation modelled on the British legal system, such as the introduction of a supreme court.

We have learned about how the law developed beyond the Cape Colony:

- Roman-Dutch law was the common law of the Cape, Natal, Orange Free State and South African Republic.
- Legal development in the period 1806 to 1910 was mostly modelled on English law.
- The Cape Colony, Natal, Orange River Colony and Transvaal Colony unified in 1910 to become the Union of South Africa. Officially, Roman-Dutch law was the common law of the Union.

We have learned the following about legal development in South Africa during the 20th century:

- Modern South African common law is a mixed legal system and contains rules from both Roman-Dutch law and English law.
- During the 20th century the courts replaced many English rules that had crept into the South African legal system with rules from Roman-Dutch law common law.
- The Constitution of 1996 requires the courts to develop the common law according to the values and principles contained in the Bill of Rights.
- The South African common law is a living system. It is able to adapt and meet modern challenges.

The following timeline provides a further visual aid or summary of the history or development of our law:

753 BC to 476 AD The early Roman Empire

753 BC The city of Rome is established.

753 to 510 BC The period of the kings

510 to 27 BC The Republic. Consuls rule; praetor develops law, magistrates administer.

450 BC The Code of the Twelve Tables – first codification of Roman legal system. Students study and jurists interpret and develop the law.

27 BC to 284 AD The Principate. Emperor rules – peace and prosperity.
Jurists take over legal development; later the emperor enacts legislation, demoting jurists to interpreters of law.

284 to 476 AD The Dominate

284 Succession battles, Barbarian invasions, civil war, economic crises and military dictatorship hamper legal development.

284 to 305 Empire is divided into east (Constantinople) and west (Rome).

409 End of Roman civilisation in Britain.

410 The Visigoths capture Rome.

476 to 1000 AD The early Middle Ages, or Dark Ages

476 Western Roman Empire collapses – Europe is ruled by Germanic tribes.

- Germanic customary law largely replaces Roman law in Europe.
- The personality principle ensures the survival of a simplified Roman law until the 12th century.
- Church continues to use canon law.

527 to 565 (Eastern) Emperor Justinian attempts to restore the Roman Empire.

528 to 534 The *Corpus Iuris Civilis* sums up almost 1 000 years of Roman law.

800 Charlemagne (Charles the Great) is crowned Emperor of the Holy Roman Empire (western Europe), which lasts until 1806.

- Feudalism creates many small Germanic states, with codified legal systems.
- The territoriality principle replaces the personality principle.
- The Roman Catholic Church governs parts of the empire using canon law.

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Later Middle Ages

11th and 12th century [scholars:] The *glossators* in Italy and France publish the *Glossa Ordinaria* to make the *Corpus Iuris Civilis* more accessible. Roman law starts to spread across Europe to become the foundation of Western European common law (*ius commune*).

13th century [scholars:] The *ultramontani* apply the *Corpus Iuris Civilis* to solve practical legal problems.

14th century onwards Most countries in Western Europe use the *ius commune*.

The Renaissance/Early modern period

14th to 16th centuries Renaissance – economic and cultural revival in Western Europe. The printing press is invented. [scholars:] The *commentators* develop Western European *ius commune* by merging the *Corpus Iuris Civilis* with Germanic customary law, canon law, feudal law and *lex mercatoria*. All the countries of Europe (excluding England and Scandinavia) accept *ius commune* as common law.

1453 The Eastern Roman Empire (Byzantine Empire) ends when the Turks of the Ottoman Empire overthrow Constantinople.

1581 Holland gains independence from Spain and becomes part of the new Republic of the Seven United Netherlands. As a province, it retains its own legal system (Dutch law).

16th to 17th centuries Dutch law is influenced by Western European *ius commune*; the *institutional writers* record Roman–Dutch law.

1652 to 1901 European law in South Africa

1652 The Dutch settlers of the VOC bring Roman-Dutch law to the Cape of Good Hope.

1789 to 1799 The French Revolution

1795 Napoléon invades the Netherlands. The Batavian Republic replaces the Republic of the Seven United Netherlands.

1795 to 1803 The British occupy the Cape but retain Roman-Dutch law.

1804 The French *Code Civil* is enacted in Batavia.

1806 The British take control of the Cape Colony again. Roman-Dutch law remains the basis of common law, but most legal development in South Africa for the next century is modelled on English law.
In Europe, Napoléon brings an end to the Holy Roman Empire.

1809 The *Code Civil* replaces Roman-Dutch law in the Netherlands.
Roman-Dutch law survives in the former Dutch colonies.

1819 English procedural law is introduced in the Cape Colony.

1827 The Charter of Justice is introduced to the Cape Colony. The Council of Justice is replaced by an English-style court with judges trained in English law. The Charter allows for appeals to be made to the Judicial Committee of the Privy Council.

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1834	Slavery is abolished in the Cape Colony.
1836	The Great Trek begins, leading to the later establishment of the independent territories of Natal, the Orange Free State and the South African Republic (Transvaal), all with Roman-Dutch law as their common law but influenced, over time, by English law practices.
1838	In the Netherlands, the Dutch code replaces the ***Code Civil***.
1838	The Voortrekkers establish the Republic of Natalia.
1843	Natal becomes a British colony.
1845	Britain extends the law of the Cape Colony to Natal, later establishing a supreme court there.
1852	The Voortrekkers establish the South African Republic (ZAR, between the Vaal River and the Limpopo River).
1854	The Orange Free State is established.
1875	A supreme court is introduced in the Orange Free State.
1877	A supreme court is introduced in the South African Republic.
1899 to 1902	Anglo-Boer War (South African War)

1902 to 2010

1902	The Orange Free State becomes the Orange River Colony and the ZAR becomes the Transvaal Colony. However, Britain retains Roman-Dutch law as common law in the colonies.
1910	The four colonies combine to form the Union of South Africa under British control. Roman-Dutch law retains it status as the common law in a single, unified legal system – though incorporating parts of English law.
1931	The union is granted sovereignty over its own affairs. Lawyers disagree about use of English rules versus pure Roman-Dutch law.
1948 to 1990	Apartheid legislation introduces dramatic changes to South African law.
1950	Appeals to the Privy Council are abolished.
1961	South Africa becomes a republic, ending British political influence (but not the disagreements over English rules).
1990s	Apartheid rules and laws are repealed
1997	The new Constitution of the Republic of South Africa takes effect. It recognises Roman-Dutch law as the common law and empowers the courts to develop the common law according to the values and principles in the Bill of Rights.
2010	The South African common law continues to adapt and meet modern challenges.

Review your understanding

1. The South African legal system is called a hybrid legal system. Explain this concept by referring to the two European legal traditions that influenced the South African legal system.
2. Is the South African legal system an exact copy of Roman-Dutch law and English law? Give reasons for your answer.
3. Describe the influence of the *Corpus Iuris Civilis* on the development of Western European *ius commune*.
4. Explain the role of the different schools of law in the development of Western European *ius commune*.
5. Comment on the importance of the writings of the Dutch institutional writers for modern South Africa.
6. a) Explain the different meanings of the term 'common law'.
   b) What meaning do we give to the term in the South African legal context?

Further reading

The textbooks listed below provide a good in-depth discussion on the law in general and, more specifically, South African legal developments:

Hahlo, H.R. and Kahn, E. 1968. *The South African legal system and its background.* Cape Town: Juta and Co. (Pty) Ltd

Hosten, W.J. 1995. *Introduction to South African law and legal theory.* Durban: LexisNexis South Africa

Robinson, T., Fergus, D. and Gordon, W.M. 1985. *An introduction to European legal history.* Abingdon: Professional Books

Walker, E.A. 1925. *Lord de Villiers and his times; South Africa 1842–1914.* London: Constable

Zimmerman, R. and Visser, D. 1996. *Southern Cross: Civil law and Common law in South Africa.* Cape Town: Juta and Co. (Pty) Ltd

Section 2

The trunk that supports our law

Chapters in this section

- **Chapter 3** The Constitution
- **Chapter 4** Legislation
- **Chapter 5** Legal ethics and professional responsibility
- **Chapter 6** Case law
- **Chapter 7** Common law
- **Chapter 8** Customary law
- **Chapter 9** Secondary sources
- **Chapter 10** The court structure
- **Chapter 11** The legal profession

You will learn about

- Sources of law
- The courts
- The legal profession

Sources of law, the courts and the legal profession

In Section 1, we introduced you to the idea that the law is like a tree, protecting the people of this country. We started by examining the roots of this tree, by looking at the objectives and functions of the law, and by tracing the history of our law. If the roots of our tree of law include the English common law, the Roman-Dutch law and customary law, then the sources of law are the trunk of the tree. These sources support the law and can be divided into primary and secondary sources.

In Section 2, we look at these sources and also at the South African court system and the legal profession because they are part of the trunk that gives the tree of law support and life. What do we mean by the word 'source' in this book? A source is the place where you can find the answer to a legal problem or question, or, to put it in a more academic way, a source is the origin of the authority on which legal decision-making rests. The trunk of our law tree bears all the sources that lawyers need. These are the tools of the trade and you will get to know how to use them throughout this book.

Primary sources are the sources that are consulted by lawyers first. They are said to be binding and carry the most weight and persuasiveness in legal argument. For example, when a court is deciding a matter, it will take an earlier decision of the **Constitutional Court** on the same issue more seriously than the unreported decision of a **private arbitrator**, or the views of an academic in a journal article.

The **Constitutional Court** is the highest court in the land.

A **private arbitrator** acts as a judge, but she is not employed by the state to do so.

You will see that we cover the Constitution first (in Chapter 3) – it is the supreme or highest law in our country and is an important source of law. The other primary sources are legislation in general, case law, common law and customary law. We deal next with legislation or written law (in Chapter 4), as it is the highest source of our law after the Constitution. The third edition of *Introduction to South African law* includes a section on ethics and the law, which is covered in Chapter 5. The other primary sources follow and are dealt with in sequential chapters – case law, common law and customary law are covered in Chapters 6, 7 and 8 respectively.

The primary sources of law are supported by secondary sources (covered in Chapter 9).

Secondary sources are the writings and opinions of authors and legal researchers. They do not create new law and are not binding authority. When you page through a textbook or a law journal, you will see that different authors report on and review statutes and case law. They also give recommendations on what the law should be.

Secondary sources have persuasive value only. Although our law is not found in secondary sources, sometimes judges and magistrates can be convinced by the opinions and arguments of authors. In addition, the work of researchers and authors, especially experts within a specific area of law, can contribute to legal reform as their opinions could lead to the development of new legislation.

In Chapters 10 and 11 we look at how the court system and the legal profession support the law and allow it to work. In Africa, a mature Baobab tree is sometimes used to describe the vastness of knowledge and wisdom. This tree can have a circumference of up to 30 metres, and it would take 15 grown men holding hands in a circle to encompass the large trunk of the Baobab tree. No single person has all the knowledge and wisdom in the world, but knowledge and wisdom are within the reach of the collective human experience. Everyone in the legal system, from the police to the judges, as well as ordinary citizens, has a role to play in upholding the law.

Chapter 3

The Constitution

The main ideas

- What is a constitution?
- The history of our Constitution
- The Constitution as the supreme law and the application of the Bill of Rights
- Constitutional principles
- Other selected areas of importance of the Constitution

The main skills

- Understand the relevance of a Constitution in the context of the interplay between 'law' and 'power'.
- Draw a timeline of historical events leading to the adoption of the Constitution.
- Draw a mind map explaining the basic layout of the Constitution.
- Discuss the advantages of the new constitutional order.
- Analyse a court judgment in relation to the Constitution's protection of human rights.
- Provide a detailed explanation as to the importance of the Constitution.

Apply your mind

The 'rule of law' principle, which is a **constitutional principle**, is referred to on numerous occasions especially by politicians and jurists around the world. According to the 'rule of law' principle, the law is viewed as superior to all and everything. This also implies that the government and the society for and over which a government governs, must adhere to the law; and that the law must be impartially enforced by independent courts or tribunals in accordance with fair procedures. Also, the 'rule of law' principle does not imply the superiority of any law; rather it dictates that the government must respect certain constitutional principles and values, as well as the individual's basic rights. Bearing this in mind, do you think our Constitution is reflective of the 'rule of law' principle and what does this tell us about the importance of the Constitution?

In 1994, the first democratically based elections took place in South Africa and in which all adult persons, irrespective of race, culture or religion could participate. Shortly afterwards, South Africa witnessed the promulgation of the Constitution of South Africa, which forms the foundation of the South African legal system.

It is of the utmost importance to know the background, nature and relevance of the Constitution. This necessitates having a look at what the importance of a constitution in general is; the history of the South African Constitution; the Constitution as the supreme law; the meaning and application of human rights; the meaning of selected constitutional principles and other selected parts of importance of the Constitution. Also note that this chapter must be read together with Chapter 12, which deals with 'Constitutional Law and Human rights'.

A **constitutional principle** is a norm or standard that assists in providing for effective governance directed to the maintenance and protection of the interests of all within a society.

Before you start

The following words come from the **preamble** to the Constitution of South Africa.

A **preamble** is an introductory section to an Act (or any other formal document) and it places the Act in a specific context.

"We, the people of South Africa,
Recognise the injustices of our past;
Honour those who suffered for justice and freedom in our land;
Respect those who have worked to build and develop our country; and
Believe that South Africa belongs to all who live in it, united in our diversity.
We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to:

- heal the divisions of the past and establish a society based on democratic values, social
- justice and fundamental human rights
- lay the foundations for a democratic and open society in which government is based on
- the will of the people and every citizen is equally protected by law
- improve the quality of life of all citizens and free the potential of each person
- build a united and democratic South Africa able to take its rightful place as a sovereign
- state in the family of nations.

May God protect our people.
Nkosi Sikelel' iAfrika. Morena boloka setjhaba sa heso.
God seën Suid-Afrika. God bless South Africa.
Mudzimu fhatutshedza Afurika. Hosi katekisa Afrika."

Many of you are most probably familiar with these words or at least the ideas that they express and this is what the Constitution is basically all about. The Constitution is also directed towards what we sing in our national anthem when we say, "… let us live and strive for freedom …". This will make more sense as you go through this chapter. Note that we will explore the operation of constitutional law in more detail in Chapter 12.

The **Constitution of South Africa** is a special type of law that contains the most important rules for the government and for society. South Africa's Constitution includes rules on how the country's government is supposed to work.

3.1 What is a constitution?

The seed for the **Constitution of South Africa** was planted and nurtured alongside considerable sacrifice, which is evident when looking at South Africa's history of white minority rule, racism and gender discrimination. Our history is inundated with heroic persons who opposed such minority governance, racism and gender discrimination. The South African Constitution, like all constitutions that are based on moral values such as freedom, human **dignity**, **equality** and **democracy**, can be compared to the wheel that was one of the most important and helpful inventions in the history of mankind. Today we take the design and importance of the wheel for granted, yet we fail to realise that a long period of time passed before the invention of the wheel. The same applies to our Constitution. Philosophers and jurists have through the centuries presented ideas aimed at the effective ordering of society. Many of these ideas were applied to societies around the world over many years and in our modern age we can proudly confirm that there are countries that base their governance and legal systems on Constitutions that reflect important principles, values and rights, examples being America, Canada, Germany and South Africa. The South African Constitution can therefore be viewed as the product of many centuries of thinking, sacrifice, application and experience regarding a **prescriptive** formula which serves as the basis for the harmonisation, protection and regulation of interests within a given society. This prescriptive formula of the South African Constitution is founded upon the values listed in section 1 of the said Constitution, for example, as referred to earlier, the values of human dignity, freedom, equality and democracy, which are elaborated upon in Chapter 12.

A person's **dignity** is his right to be respected as a human being.

Equality is a situation in which people have the same rights and advantages.

In a **democracy**, every citizen in the country can vote to elect its government officials.

Saying how something should or must be done, or what should be done, is **prescriptive**.

To better illustrate what a Constitution is all about, imagine a group of people who are stranded on a primitive island. The survival and peaceful existence of this group necessitates thought on basic norms so as to ensure the safety and survival of all the members of this group. The same idea can be applied to any society that has, as its basic need, the preservation of the lives and interests of all that live in it. In this regard, one finds two important factors that become relevant namely 'power' and 'laws' and how these relate to one another. Power is found in those members of the group on the island who for example, are physically strong, intelligent and skilled at hunting. These forms of power are required if the group wants to survive on the island. However, if these members who represent the different forms of power only apply their strengths towards the satisfaction of their own interests then this would not always be helpful towards the group as a whole, and therefore we find that there is always the potential risk of the **abuse of power**. This in turn necessitates laws to regulate these forms of power towards the good of everyone in the group, for example, those who are skilled at hunting need to channel these skills (or these powers) towards providing all within the group with something to eat. In other words, those who can hunt are obligated by the basic law formulated by the stranded group on the island to direct their hunting skills toward the good of the whole group on the island. What we therefore learn from this is that the presence of both 'power' and 'laws' is of relevance to any society. For South African society we find on the one hand, power in the form of, for example, the defence force and police services; and on the other hand, the foundational laws as reflected in the values and constitutional principles prescribed by the South African Constitution and to which all, including the authorities, are subservient to. It is therefore reiterated that both power and law are therefore required for the successful protection, regulation and maintenance of the interests within a society, whether such a society is comprised of a small group of persons stranded on an island or constitutes all the people living in South Africa. Where political power is dominant over the law it can result in dictatorial governments that abuse their power so as to serve the exclusive interests of those in charge and which eventually leads to the harming of a society. Where the law in the form of foundational **moral values** such as freedom, human dignity and equality are dominant over the political power then we find that the government does not selfishly govern; rather it governs so as to serve the interests of its citizens and therefore of the public interest or good. This is why the Constitution of South Africa is of the utmost importance as it sets out the foundational constitutional principles, values and rights, as well as structures, mechanisms and obligations for government and society to apply the power that accompanies them and that is necessitated for the good of all within South Africa. The Constitution therefore also addresses complex questions such as:

The **abuse of power** is when an unlawful act is committed in an official capacity to serve the interests of those in power and which affects the performance of official duties.

Moral values in the context of this chapter refer to those values that people generally agree upon and which constitute important values. People generally will agree that for example, murder, theft, corruption, fraud and disrespect towards your neighbour are immoral acts. Also note that moral values are inextricably connected to natural law.

- How far may the judiciary go in determining whether legislation or conduct is in line with the Constitution especially regarding contentious matters such as the death penalty and abortion?
- Should the views of the majority always serve as a measure regarding the furtherance of the public interest? What about the interests of minority groups?
- How should the rights in the Bill of Rights be interpreted?
- How should political power precisely be structured for it to function towards the good of the society over which it governs?
- What should the level of interaction be between the various powers of government, such as for example, the **executive**, the judiciary and the legislature, and what should the functions of each of these be?
- In which instances may a right be justifiably limited (if at all)?

The **executive** is the part of the South African government that is responsible for carrying out and administering legislation and consists of the President, the Deputy President and the Ministers, which in turn constitute the Cabinet.

Professor says — What is the public interest?

Mention has been made to public interest. You have probably come across arguments justifying certain actions based on the prioritisation of the public interest (or public good/general welfare). References to the 'public interest' abound in debates pertaining to constitutional law and it basically means that that which is in the interest of everyone in society serves as a qualification for prioritisation by the government and the law. An example would be the importance of promulgating legislation that is directed towards the protection of the environment; the reasoning being that a polluted environment will not bode well for the health and quality of the living conditions of all those in a given society who are confronted with such an environment. Having said this, what is to be understood by public interest is not always simple as different views pertaining to contentious matters may add complexity towards reaching general agreement on what constitutes the public good. Examples in this regard are questions related to the legalisation of pornography, prostitution, euthanasia, abortion and the teaching of religion in public schools. Can you think of other examples in this regard? On what matters do you think consensus can be reached regarding their inclusion under the banner of public interest?

All law, whether legislation, the common law or judgments by the judiciary, is ultimately directed towards the protection and regulation of the interests of all those within a given society. However, those **prescribed** constitutional principles, values and rights reflected in a Constitution serve as the foundational norms to which all other forms of law are subservient to. This is confirmed when looking at section 2 of the South African Constitution, which reads as follows: "The Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled." Also note that it is assumed that all law, such as national and provincial legislation, the common law or customary law, is constitutional (in line with the Constitution) until proven otherwise. Below, reference is made to other sections of the Constitution that confirm the superiority of the Constitution, which includes the Bill of Rights.

Prescribed refers to 'what ought to be done', and when dealing with laws we find that they are inherently prescriptive by nature because they state what ought to be or not be done.

Bearing the above in mind, we can therefore confirm that the constitution of a country is a special and fundamental type of law that includes the most important prescriptions for a society and its government. As stated earlier, a country's constitution includes the most important constitutional principles, values and rights that form the basis for the maintenance and protection of the public good, as well as rules on how the country's government is supposed to be structured so as to be effective. It can therefore be concluded that the Constitution is important because it:

- is the highest law of South Africa
- prescribes the most important constitutional principles, values and rights that allow the members of a society to enjoy their interests and to exist peacefully
- governs political issues
- governs the state, the community and individuals.

In 1994, South Africa became a constitutional democracy. A democracy is a government chosen by the people or their **elected representatives**. A constitutional democracy is a democratic system of government that operates according to a constitution. As we mentioned above, the Constitution is the supreme law in South Africa. This means that any law that is in violation of the Constitution's provisions (for example, values or human rights) will be viewed as unconstitutional. In other words, all laws are bound to the Constitution. It is also important to note that it is not only the laws other than the Constitution that are subordinate to the Constitution but also any conduct. As we will see below, government, natural persons and **juristic persons** are bound to one of the most important parts of the Constitution, namely the Bill of Rights.

An **elected representative** is someone who has been chosen (in the case of government, through an election) to act on behalf of another person or group.

Juristic persons are companies and close corporations, such as banks, universities, etc.

Professor says The tap in the garden

Imagine a large and beautiful garden with a tap in it. For the flowers, shrubs and the lawn in the garden to be maintained properly, the water from the tap needs to be directed to all the relevant parts of the garden so as to ensure that the flowers, shrubs and the lawn are properly maintained. Merely opening the tap will not contribute towards the maintenance of the garden because the water will not be evenly spread throughout the garden. Rather, the water from the tap needs to be channelled in the right direction, as is done, for example, by attaching a hosepipe to the tap and channelling the water to all the parts of the garden. Bearing this in mind, note that the water that comes out of the hosepipe represents energy that is released when the tap is opened. This can be compared to a form of power. If this power is allowed to just pour out without any meaningful direction, then this can cause damage to the garden. Similarly, in any given society, one finds that the authority or power that is there (like the water coming from a tap) requires specific channelling so as to serve the interests of all in such a society. We can therefore say that the hosepipe represents all those fundamental norms required so as to arrange the proper protection and maintenance of the interests of individuals and groups of individuals in a society. The South African Constitution is a good example of such a layout of fundamental norms so as to effectively deal with the interests of South African society. Can you maybe think of other examples so as to explain the relevance and importance of a Constitution?

3.2 The history of our Constitution

Before we can address the Constitution in more detail we need to look at the history behind and regarding the Constitution. The Constitution of South Africa (1996) is not the first constitution in our history, for example, there was the Constitution of the Republic of South Africa (1963) and the Tricameral Constitution of the Republic of South Africa (1983). However, these constitutions did not represent the interests of all the citizens of the country, and Parliament represented mainly the interests of the white minority. Before 1994, South Africa was a **parliamentary sovereignty**. This meant that members of parliament could pass any laws, as long as they followed the proper procedure. In addition, the country's courts did not have the power and independence to overrule any laws that violated the citizens' human rights.

Parliamentary sovereignty means that the legislative, or law-making, body is supreme over all other government institutions, including executive or judicial bodies.

3.2.1 The Interim Constitution

South Africa's **Interim** Constitution came into effect on the date of the first democratic elections in South Africa: 27 April 1994. It introduced a new system of government aimed to bring South Africa from its apartheid past into a future based on equality and democracy. For the first time in South Africa's history, the Constitution recognised and legally protected all its citizens' human rights. The Interim Constitution ended discrimination based on amongst others, your race, **sex**, sexual orientation, religion or culture. In other words, the law would no longer favour one group of people over another. The Interim Constitution acted as the precursor to the finalisation of the Final Constitution in 1996.

The word **interim** refers to temporary.

Sex, in this context, refers to whether you are male or female.

3.2.2 The Final Constitution

In 1996, the Constitution became the supreme law of the country. It is the supreme law because all the branches of government, all law, as well as natural and juristic persons are bound to the principles, values and rights set out in the Constitution. In the past, Parliament had free reign pertaining to what laws could be promulgated and legislation, as stated earlier, could not be challenged in a court of law. Today, the courts, by the authority of the Constitution, act independently and can challenge the constitutionality of conduct and laws. Also, there is now what is called the entrenchment of important parts of the Constitution, such as section 1, which includes the values and the Bill of Rights (Chapter 2).

This means that the said parts of the Constitution cannot easily be amended by Parliament, which is a good thing because this implies that the constitutional principles, values and rights reflected in the Constitution are here to stay.

Professor says The correct way to refer to the Constitution

South Africa's Constitution was previously known as the Constitution of the Republic of South Africa, Act 108 of 1996. In 2005, a new law shortened the long title to the Constitution of the Republic of South Africa, 1996, or the Constitution, 1996. The Act number was removed from the title of the Constitution. The reason for this is that the Constitution, unlike other Acts of the Republic of South Africa, was not passed by Parliament, but was adopted by the Constitutional Assembly. The Constitutional Assembly was created to draft the Constitution and receive submissions from the public regarding what should be included in the Constitution. The Constitutional Assembly was not a court and it was not part of Parliament. Therefore, the Constitution and any changes to the Constitution should be treated differently from other Acts.

3.3 The Constitution as the supreme law and the application of the Bill of Rights

As mentioned above, section 2 of the South African Constitution states that:

> "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."

Section 2 is therefore referred to as the supremacy clause because people, institutions (such as companies, sports clubs, schools and universities), legislation, the common law, customary law and the government may not act in ways that are in conflict with the Constitution. Section 8(1) and (2) of the Constitution provides that the legislature, the executive, the judiciary, organs of state, natural persons and juristic persons are bound to the Bill of Rights, which further confirms the supremacy of the Constitution as the Bill of Rights is contained in Chapter 2 of the Constitution. The Constitution is an important source of law, for example, the Constitutional Court develops the common law in accordance with the values and human rights contained in the Constitution. Also, the Constitution places an obligation on the government to formulate legislation that promotes various human rights, for example, section 9(4) of the Constitution states: "National legislation must be enacted to prevent or prohibit unfair discrimination".

3.3.1 The Bill of Rights

Chapter 2 of the Constitution contains the Bill of Rights, which is one of the most important chapters in our Constitution. Section 7(1) of the Constitution states that:

> "The Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom."

According to section 7(2) of the Constitution, the government must respect, protect, promote and fulfil the rights contained in the Bill of Rights. We showed in Chapter 1 of this book that the human rights contained in the Bill of Rights reflect natural law theory. Human rights relate to the basic freedoms of all human beings and:

- are judicially enforceable (the courts can enforce the rights)
- are universal
- exist, even if a government or society do not acknowledge them
- place obligations, or duties, on individuals and governments
- set minimum standards for social and government practices.

Visit the website of the Constitutional Court at http://www.concourt.gov.za/site/theconstitution/history.htm

The application of the Bill of Rights

The application of the Bill of Rights concerns mainly the issues of:

- who benefits from the Bill of Rights?
- who is bound by the Bill of Rights?

In terms of the Constitution, natural persons and juristic persons benefit from the Bill of Rights. With regard to natural persons, the Constitution refers to the words 'everyone' and 'no-one', which has to be interpreted as widely as possible, except where the Constitution itself specifies the bearer of a right in a more narrow sense, for example:

- s 19 allows political rights to citizens only, and the right to vote to adults only,
- s 23(2) allows employees certain rights, while s 23(3) allows employers certain rights; and
- s 23(4) allows trade unions certain rights,
- s 20 allows citizens not to be deprived of citizenship, and s 22 allows citizens the right to freedom of trade, career and profession,
- s 28 provides for children's rights, and
- ss 35(1), (2) and (3) are limited to arrested, detained, and accused persons respectively.

Section 8(4) of the Constitution determines that **juristic persons** can claim human rights if the nature of the right and the nature of the entity permits. A company therefore will not be able to claim the right to human dignity, life or freedom and security of the person, but definitely the rights to freedom of expression.

To qualify as a **juristic person** such as for example, a company, an entity must: (i) possess internal structures of authority that can act in a peremptory manner within the entity and have an internal legal order binding the entity into unity; (ii) be able to exist irrespective of the coming and going of individual members.

Note that sections 8(1) and (2) of the Constitution is of relevance regarding the duty aspect pertaining to the Bill of Rights and provides that the legislature, the executive, the judiciary, organs of state, natural persons and juristic persons are bound to the Bill of Rights.

We also have to distinguish between the direct and indirect application of the Bill of Rights. Indirect application means that the Bill of Rights is mediated through other law. This means that a competent court must first attempt to interpret legislation or a section thereof in conformity with the Bill of Rights (indirect application) before considering a declaration that the legislation is in conflict with the Bill of Rights and invalid (direct application). Direct application can therefore be where a competent court declares specific legislation or a part thereof unconstitutional, whilst indirect application is where a competent court interprets legislation or a section thereof as being in line with the Constitution. If the Bill of Rights forms such an integral part of our legal system, then it becomes obvious that interpreting the Bill of Rights is of the utmost importance. In this regard, section 39(1) of the Constitution reads as follows:

> "When interpreting the Bill of rights, a court, tribunal or forum – (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider **foreign law**."

Foreign law refers to the laws of other countries.

Case study The Constution's role in the protection of human rights

The Constitutional Court judgment of *Government of South Africa v Grootboom and Others* 2001 (1) SA 46 (CC) (referred to as the Grootboom-case) serves as an appropriate example of the Constitution's important role in the protection of human rights together with the relevance of both the judiciary and the executive in this regard. Consequently, this judgment is illustrative of the channelling of power in accordance with foundational norms as set out by our Constitution (and as applied by our courts) so as to serve the basic interests of the citizens of South Africa. The Grootboom-judgment dealt in brief with a claim by squatters for the granting

Case study (continued) The Constution's role in the protection of human rights

of relief related to access to adequate housing as they had nowhere to stay. In this regard, the squatters claimed protection in accordance with section 26 of the Constitution which partly reads as follows:

> (1)"Everyone has the right to have access to adequate housing, (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right ...".

The Court in the said case emphasised the obligation on government to see to it that the poor and deplorable living conditions of many citizens be remedied. It was the reasoning of the Court that if a person's socio-economic position is not good then this may harm the freedom, human dignity and equality of the person and that consequently many other rights would not be protected. However, the Court was of the view that although socio-economic rights are important, it is not always possible for the government to effectively provide the necessary protection in this regard due to, for example, financial constraints. Having said this, the Court confirmed its responsibility towards protecting the rights of those persons with no access to adequate housing or shelter. Therefore, this case confirms that it is for the judiciary to investigate whether government has taken all reasonable legislative (and other) steps within its available resources to provide access to adequate housing to those persons who have the absolute minimum in life. The Court also made it clear that it is for the government to decide for itself on what specific policies should be set in place for this purpose as it is government that should have the relevant expertise in this regard. The Court consequently found that government did not take all reasonable measures so as to address the protection of persons that had no access to adequate housing and the court instructed the government to do more about the matter for all those in South Africa who had no access to adequate housing or shelter.

3.3.2 Constitutional principles

Chapter 3 of the Constitution of South Africa states that all **spheres of government** and organs of state within these spheres must preserve the peace and unity of South Africa, as well as secure the well-being of the people of South Africa. An organ of state, according to section 239 of the Constitution of South Africa, refers to any department of state or any institution that exercises a power in terms of the Constitution (or a provincial constitution) or that exercises a public power or that performs a public function in terms of any legislation.

Sphere of government refers to the national and provincial spheres of, for example, the legislature.

Cooperative government

These spheres of government and organs of state should cooperate with one another in mutual trust and friendly relations. This is reflective of the principle of cooperative government that supports an interrelated and mutual working relationship between spheres of government and organs of state within these spheres. Having said this, the said chapter also emphasises that spheres of government and organs of state should not intrude upon the geographical, functional or institutional integrity of government in another sphere. This provides a degree of independence, as well as pertaining to spheres of government and organs of state.

Separation of powers and checks and balances

Although the South African Constitution does not refer directly to the **separation of powers** principle, it indirectly reflects this principle. This principle advocates the division of government powers into the legislature, executive and the judiciary. The reason for this is the prevention of an excessive concentration of power in a single entity or person. For example, the idea related to parliamentary sovereignty as was found in a pre-democratic South Africa illustrates the excessive use of power in one segment of government, namely

A system where powers and responsibilities are divided among the legislative branch, executive branch and judicial branch is known as **separation of powers**.

that of the executive, and the judiciary had no authority to determine whether the actions of the executive were in violation of, for example, fundamental human rights. This however, does not imply that there should be a too rigid separation between the legislature, executive and the judiciary meaning that provision needs to be made for some degree of interaction between these powers of government, which assists in such powers being more effective. For example, the courts, whilst allowing the executive some degree of independence to do its job, may then be required to see to it that the Constitution has been adhered to by the executive and inform the executive that it needs to act in accordance with the Constitution. This is referred to as the principle of **checks and balances**. This is illustrated in the Grootboom-judgment that was described earlier.

Checks and balances is a system that makes it possible for some people or parts of an organisation to control the others, so that no particular person or part has too much power or influence.

3.4 Other selected areas of importance in the Constitution

Some other areas of importance in the Constitution has other important chapters that deal with, for example, parliament; provincial government; local government; the courts and the administration of justice; the establishment of state institutions; national security and finances.

3.4.1 Parliament

Chapter 4 of the Constitution deals with important issues related to Parliament which is comprised of the National Assembly and the National Council of Provinces. According to section 46(1) of the Constitution of South Africa, the National Assembly consists of no fewer than 350 and no more than 400 women and men elected as members in terms of an electoral system and which, according to section 55 of the said Constitution, the National Assembly may amongst others, consider, pass, amend or reject legislation.

The National Council of Provinces, according to section 60 of the Constitution of South Africa, is comprised of a single delegation from each province, such delegation in turn being comprised of the Premier of a province (or his or her substitute) as well as three special delegates and six permanent delegates.

3.4.2 Provincial government

The **provincial government** is the part of the government's administration that acts in the interests of a specific province. Chapter 6 of the Constitution deals with the provinces of South Africa and provincial issues, such as the **provincial premier** and the organisation and importance of the provincial legislatures.

The **premier** of a **province** is the head of the **provincial government**.

3.4.3 Local government

Chapter 7 of the Constitution deals with branches of government that act in the interests of smaller areas within a province. These include town and city municipalities, as well as district municipalities that act in the interests of more than one town or city.

3.4.4 The courts and the administration of justice

Chapter 8 of the Constitution describes the main courts in South Africa and their functions. This chapter also makes it clear that the courts are independent and they must apply the Constitution impartially and without fear, favour or prejudice.

3.4.5 The establishment of state institutions

Chapter 9 of the Constitution provides for the establishment of state institutions that strengthen democracy in South Africa. Examples of such institutions are:

- the Human Rights Commission, which works to promote and protect human rights and a culture of human rights
- the Commission for Gender Equality, which works to create respect for women's rights
- the Auditor-General, who is responsible for checking the accuracy of the government's financial statements
- the Independent Electoral Commission, which manages elections fairly, without taking sides.

3.4.6 National security

Chapter 11 of the Constitution deals with the responsibilities and functioning of security services, including the defence force, the police service and intelligence services.

3.4.7 Finances

Chapter 13 deals with the National Revenue Fund and budgetary matters on a national, provincial and municipal level.

What do you think?

Read the popular book by William Golding called 'Lord of the Flies' which was published in 1954 and has been adapted to more than one movie. It tells the fictional story of a group of British boys who survived a plane crash on an isolated island in the Pacific Ocean. Does this story tell you anything regarding the relevance and importance of the South African Constitution? Explain in detail.

Chapter summary

- A Constitution provides an effective channelling of power by means of foundational norms so as to serve the interests of the society to which it applies.
- In 1994, South Africa became a constitutional democracy when it adopted an interim Constitution. In 1996, the Constitution became the supreme law of the country.
- The Constitution is the product of many centuries of thinking, sacrifice, application and experience regarding a prescriptive formula that serves as the basis for the harmonisation, protection and regulation of interests in South Africa.
- The Constitution is the supreme law, which means that all laws, organs of state, the judiciary, the executive, the legislature, as well as natural and juristic persons are bound to it.
- The Constitution sets out the foundational constitutional principles, values and rights, as well as the most effective structures, mechanisms and obligations for government to apply its power or authority in service towards the good of all in South Africa.
- Section 1 of the Constitution lists the foundational values, such as equality, freedom and human dignity, whilst Chapter 2 of the Constitution contains the Bill of Rights.
- In terms of the Constitution, natural persons and juristic persons benefit from the Bill of Rights.
- Constitutional principles include that of cooperative government, separation of powers, as well as checks and balances.
- The Constitution has chapters that deal with, for example, provincial government; parliament; local government; the courts and the administration of justice; the establishment of state institutions; national security and finances.

Review your understanding

1. Explain the need for a Constitution for any society.
2. What is meant by the 'public interest' and is this always an easy concept to work with?
3. Describe the historical development of the Constitution of South Africa.
4. What is meant by 'entrenchment' and why is it of importance in the context of a Constitution?
5. What are human rights?
6. Provide examples of the various types of natural persons provided for by the Constitution who are beneficiaries of human rights?
7. List all that is, according to section 8 of the South African Constitution, bound to the Bill of Rights.
8. May a company also claim human rights protection? Explain.
9. Briefly explain the direct and indirect application of the Bill of Rights.
10. Explain the application of human rights by the Constitutional Court against the background of *Government of South Africa v Grootboom and Others* 2001 (1) SA 46 (CC).
11. Refer to the three examples of constitutional principles and briefly explain each of them.
12. List the themes of seven selected chapters of importance in the Constitution.

Further reading

Currie, I. and De Waal, J. 2013 (6th ed.) *The Bill of Rights Handbook.* Cape Town: Juta and Co. (Pty) Ltd

De Vos, P. and Freedman, W. (eds.) 2014. *South African Constitutional Law in Context.* Cape Town: Oxford University Press Southern Africa

The following cases show how the Constitution has influenced various areas of everyday life and changed the legal position relating to certain areas of law:

Christian Education South Africa v Minister of Education 2000 (4) SA 757 (CC); [2000] 10 BCLR 1051 (CC)
(The focus of this case was freedom of religion and corporal punishment in schools.)

Government of the Republic of South Africa v Grootboom 2001 (1) SA 46 (CC); [2000] 11 BCLR 1169 (CC)
(This case dealt with people's right to have access to housing.)

Minister of Health v Treatment Action Campaign (2) 2002 (5) SA 721 (CC); [2002] 10 BCLR 1033 (CC)
(This case dealt with the right to have access to medical treatment for mothers who were HIV positive.)

S v Makwanyane 1995 (3) SA 391 (CC); [1995] 6 BCLR 665 (CC)
(This case dealt with the constitutionality of the death penalty for murderers.)

Mazibuko v City of Johannesburg 2010 (4) SA 1 (CC)
(This case dealt with the right to have access to water.)

Legislation

Chapter 4

The main ideas

- The concept of legislation
- Law makers
- The legislative process
- Statutory interpretation

The main skills

- Read and understand legislation.
- Explain the role played by the judiciary on legislation.
- Think critically about how statutes ought to control society's behaviour.
- Distinguish between by-laws and provincial and parliamentary legislation.
- Cite a statute and apply the statute to relevant practical problems.
- Thoroughly understand the entire legislative process.
- Understand each stage of the legislative process.
- Interpret legislation in accordance with the Constitution of the Republic of South Africa, 1996.

Apply your mind

In the case of *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (15) ZACC; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC), Ngcobo J. stated that 'the technique of paying attention to context in statutory construction is now required by the Constitution, in particular, s 39(2)'. As pointed out above, that provision introduces a mandatory requirement to construe every piece of legislation in a manner that promotes the 'spirit, purport and objects of the Bill of Rights'. In view of what Ngcobo J stated in this case, explain why you think that a contextual or purposive reading of a statute must remain faithful to the actual wording of the statute?

In this chapter, we focus on legislation, an important primary source of law. We discuss statutory interpretation, and how you as a student should refer to legislation in your assessments. Emphasis is also made to different levels of government that pass laws. We further discuss how the courts interpret and apply legislation to factual scenarios to keep up with the values enshrined in the Constitution.

Before you start

Interpretation and application of certain legislation may seem unfair on other people or juristic persons. By way of an example, look at section 197 of the Labour Relations Act 66 of 1995, which provides that when selling a business to another company, the buying company also buys the workers, assets and liabilities of the selling company. This has the effect that if the workers of the selling company had claims against the selling company before the sale of business, such claims could be borne by the buying company should the latter fail to conduct risk assessment of the business it seeks to buy. With this legislation, the government seeks to protect workers against exploitation by employers. This position sounds unfair on the buying company but it is in line with the purpose of the previously mentioned legislation, which is to avoid job losses and worker exploitation.

4.1 What is legislation?

Legislation is the law that is documented and published in **statute** books and on the internet. These laws can be codified, for example, all law related to labour law would be found in the Labour Relations Act. In South Africa, the Parliament **passes legislation** that is binding on the whole country, while the provincial legislature is vested with powers to pass legislation that is only binding within the jurisdiction of that particular province. Once the Parliament passes legislation or any of the courts makes a decision, their decisions are binding.

Statute is another word for piece of legislation.

The process of **passing legislation** is called enactment. Example: We say that Parliament has *enacted* legislation to deal with basic conditions of employment.

4.1.1 Practical importance of legislation

It is not enough for Parliament to **enact** the legislation but the **judiciary** has a further duty to apply and enforce it. Our courts can only do this successfully if they test the legislation to ensure that it complies with the values and principles enshrined in the Constitution. This simply means that in order for the statute to be valid and enforceable, it must not violate any of the rights enshrined in the Constitution. This is because the Constitution is the supreme law of the country, therefore no piece of legislation should infringe on it. When adjudicating upon a particular case, the **presiding officer** must, having read the papers, assessed the evidence and heard the arguments presented before him/her, determine which piece of legislation is in dispute and decide how to interpret such legislation. This is the information that the presiding officer will use to determine which statute applies to the case before court and then apply it to the facts. Interpretation of statute is a process that courts adopt to ensure that they give effect to the purpose for which a particular legislation was enacted, taking into account the values. Once that process has been concluded, the presiding officer will make a decision that will be binding to the parties and the matter will be settled. However, such a decision may be taken on review or appealed against, except for the decisions of the Constitutional Court.

Judiciary is a term that relates to our courts of law whose primary duty is to interpret legislation and apply it to factual problems.

Presiding officer means a judge or magistrate hearing a particular case.

Professor says — Amending existing legislation

It is important that as lawyer, you are able to identify the problem presented to you by your client to be able to provide accurate advice and be able to understand what legislation applies to that problem. It is also important to note that as time and circumstances change, there is always a need to amend the existing legislation. This is so because, as time goes by, and legislation is interpreted by the courts, certain problems arise from the application of such legislation, which necessitate amendments. This does not require that the whole statute be re-written but could be done through an Amendment Act. For example, Labour Relations Amendment Act 6 of 2014, this Act does not alter the Labour Relations Act but amends certain sections of that Act.

Activity 4.1

Answer the following questions:

1. With the Constitution of South Africa, conferring on everyone's rights in the Bill of Rights and further having enacted laws to protect such rights, can you think of any two or three statutes that create controversy within our society?
2. Have a discussion with your classmates. What are your views on these laws that are controversial and against your own beliefs?

4.1.2 Reading a statute

As a lawyer, you cannot advance any legal argument without citing or quoting relevant legislation. This is, however, not a skill that one obtains when in practice but it begins now while you are a student when submitting assignments and/or responding to assessment questions. As with any other legal authority,

referring to legislation for the first time in your answer, you need to give full citation of the Act, for example, the Arbitration Act 42 of 1965. It is only in subsequent paragraphs that you may refer to the Act by the title only, for example, Arbitration Act. Citing and quoting relevant law to an assessment question provides legal authority for your argument to assist your lecturer in understanding the basis of your argument. The effect of this is that all legal arguments must be justified with provision of relevant legislation, case law, common law, customary law and other relevant sources. When reading a statute, always note that it will have a citation that contains information that helps you find the statute. This information will further allow you to determine whether this is the main or an amended Act. Here is an example.

(27 April 2004 – to date)

[This is the current version and applies as from 27 April 2004, i.e. the date of commencement of the Prevention and Combatting of Corrupt Activities Act 12 of 2004 – to date]

ARBITRATION ACT 42 OF 1965

(Government Notice 526 in Government Gazette 1084 dated 14 April 1965. Commencement date: 14 April 1965)

as amended by:

General Law Amendment Act 49 of 1996 - Government Notice 1601 in Government Gazette 17477 dated 4 October 1996. Commencement date: 4 October 1996.

Justice Laws Rationalisation Act 18 of 1996 – Government Notice 632 in Government Gazette 17123 dated 19 April 1996. Commencement date: 1 April 1997 [Proc. No. R23, Gazette No. 17849]

Prevention and Combating of Corrupt Activities Act 12 of 2004 – Government Notice 559 in Government Gazette 26311 dated 28 April 2004. Commencement date: 27 April 2004 (see section 37(1) of the Act)

ACT

To provide for the settlement of disputes by arbitration tribunals in terms of written arbitration agreements and for the enforcement of the awards of such arbitration tribunals.

(English text signed by the State President.)

(Assented to 5th April, 1965.)

BE IT ENACTED by the State President, the Senate and the House of Assembly of the Republic of South Africa, as follows:

ARRANGEMENT OF SECTIONS

DEFINITIONS

1. Definitions

MATTERS NOT SUBJECT TO ARBITRATION

2. Matters not subject to arbitration

Figure 4.1 A copy of Arbitration Act 42 of 1965

Assume that Company A is largely dependent on Company B for the supply of top class vehicles for its business. The two companies have an agreement in terms of which Company A agrees to purchase 100 vehicles from Company B at an agreed purchase price. Terms of the agreement dictate that Company B must deliver 50 vehicles by end of January against the payment of 25 per cent of the purchase price. On delivery of the vehicles, Company A fails to pay the required deposit. This clearly demonstrates a failure to perform on the part of Company A and thus necessitates legal action to seek an order for specific performance. Let us assume that despite demand by Company B for such payment, Company A still failed to pay the deposit while in possession of the vehicles. Company B has a right to take the matter to court, an exercise that would prove quite expensive and lengthy. Let us assume that Company B decides to take the matter to court despite there being an arbitration agreement in place, Company A may invoke section 6(1) of the Act to stay the proceedings, that is to say, the matter should be arbitrated upon first. Not only does the Act provide a speedy and cheap way of resolving disputes between these two companies but it also helps them preserve their commercial relationship.

It is important to note that a statute may contain the title (often referred to as the short title), the long title and the preamble. Below are the examples of each of these and a brief explanation on their importance and where they are found in a piece of legislation:

1. The title

The title, which is often referred to as the short title, is where the courts or lawyers cite the formal name by which a piece of primary legislation may be known. It serves no further purpose other than to give a convenient name for the statute in question. An example of a short title would be *The Arbitration Act, 1965.*

2. The long title

The long title is the formal title appearing at the head of a statute and gives an explanation on what the legislation is about. In the long title, you will have an idea even before reading the relevant sections of the Act what the Acts seeks to achieve and to whom it is applicable. Using the Arbitration Act again, an example of a long title would be:

> "To provide for the settlement of disputes by arbitration tribunals in terms of written arbitration agreements and for the enforcement of the awards of such arbitration tribunals".

3. The preamble of the Act

A preamble is a statement of introduction that expressly explains the document's purpose and underlying philosophy. It seeks to recite historical facts that are relevant to the subject of the statute. In other words, when reading the preamble you would be able to see the historical background against which the statute has been enacted. It must not be confused with the long title as the latter serves to indicate what the statute is about and to whom does it apply, whereas the former indicates the reasons behind the need for such legislation. It is also important to note that not every piece of legislation has a preamble and this is the position for the Arbitration Act 42 of 1965. For purposes of better understanding, what the preamble looks like, students are advised to look at the preamble to the Constitution of the Republic of South Africa.

Legislation is an important tool that government relies on in ensuring that society is organised and protection of society. It gives direction as to what laws are applicable to who and what rights and responsibilities every citizen has. However, legislation would be of no force or effect if there were no mechanisms in place to enforce it. For an example, the Labour Relations Act 66 of 1995 governs and regulates relationships between employers and workers and/or worker's unions. These regulations also affect how the workplace should be managed in a manner that seeks to promote peace and harmony amongst the parties. The Act further regulates how disputes of mutual interest should be handled, therefore, should any of the parties involved not adhere to the provisions of the Act, there will be legal consequences as provided for in the Act. This has the effect that, the Act has not been enacted in vain because it sets, within itself, enforcement mechanisms. Further, the legislation directs the parties into the right direction in that they always know what is expected of them. For example, in terms of section 198B (3) of the Act provides for circumstances in which an employer may employ any person on a fixed term contract for a period

exceeding three months. It further states in clear and unambiguous terms what consequences would follow if the employer failed to adhere to the provisions of the Act without justification as provided for in that section. This is a clear indication and confirmation that without this legislation and enforcement, employers would be at liberty to do as they pleased in dealing with fixed term contracts of employment.

4.2 The law makers

It is not enough to know that there are laws in this country to which every citizen has a legal duty to obey. It is equally important that we understand who makes these laws. As our government is divided into three branches, namely, the legislature, the executive and the judiciary, it is further subdivided into national, provincial and local government levels. These three levels of government are all empowered with law-making powers. Note that the different kinds of law that each level of government may pass differs from the others in both nature and how they apply.

4.2.1 National legislation

This is the kind of legislation that is passed by Parliament every year and it applies to and binds the entire country. It is important to note that this legislation must still pass the constitutional muster, in other words, it must uphold the values and principles enshrined in our Constitution. Where national legislation is in conflict with either the provincial or the local legislation, the former will usually apply as provided for in section 146 of the Constitution of the Republic of South Africa, 1996.

4.2.2 Provincial legislation

Our country consists of nine provinces, each with its own administration and legislature with powers similar to those of the national legislature. This provincial legislature passes laws that are only binding on authorities, government officials, people and institutions within that province. These laws may not apply nationally, or in another province. By way of an example, the laws passed in Mpumalanga Province cannot apply in Gauteng. This legislation, as is the case with national legislation, must also pass the constitutional muster. Schedule 4 of the Constitution of the Republic of South Africa, 1996, further makes provision for functional areas of concurrent national and provincial legislative competence. This means that the powers and functions at the national and provincial levels of government shall include exclusive and concurrent powers, as well as the power to perform functions for other levels of government on an agency or delegation basis. These relate to, *inter alia*, disaster management, pollution control, cultural matters, soil conservation, etc.

Professor says — Provincial legislation must not risk economic plan

Section 146(3) of the Constitution of the Republic of South Africa, 1996 provides that national legislation prevails over any provincial legislation if national legislation is aimed at preventing unreasonable action by a province that is prejudicial to the economic, health or security interest of another province or the country as a whole or impedes the implementation of national economic policy. This means that national legislation will not simply prevail over provincial legislation but first there must be risk to the economic well-being, health or security interest of another province or of the country if provincial legislation were to be applied. This has the effect that all provincial legislation must be drafted in a manner that does not offend the country's economic plan or its implementation, health or security interests.

4.2.3 Local legislation

As South Africa is divided into nine provinces, each of these provinces is divided into smaller geographical areas referred to as municipalities. These municipalities have law-making powers and make decisions about how best to develop their geographical areas, for example, which area is suited to building churches, residential houses, etc. They are further responsible for law enforcement within their respective geographical areas. The laws that they pass are called by-laws. For example, Nelson Mandela Bay Metropolitan

Municipality has an electricity supply by-law, the purpose of which is to control how electricity is distributed and supplied to people residing within this municipality.

4.3 The legislative process

Every piece of legislation that is passed should agree with the values and principles enshrined in the Constitution. The Constitution therefore guides Parliament on the procedures that need to be adhered to when making laws. These include what must be done, how and by when. This is called legislative process.

Sections 73–82 of the Constitution describe the procedure that must be followed in the legislative process. The following diagram shows the process that Parliament goes through when passing a new law:

Figure 4.2 A diagram representing the legislative process

4.3.1 Initiation of a bill

The first stage in the legislative process is the initiation phase. When the government intends to pass a new law, it must find out whether there is a need for this law. This entails research on the issue and how it will affect the public. On concluding the research, the government must compile a report indicating a standpoint, or view, on the issue. This report also indicates how the government intends to solve identified problems by passing new legislation or amending existing legislation. The report will then be published in the *Government Gazett*e.

Professor says The South African Law Reform Commission

The South African Law Reform Commission is put in place to research all branches of the law in order to make recommendations to Government for the development, improvement, modernisation or reform of the law. The South African Law Reform Commission (SALRC) was established by the South African Law Reform Commission Act, 1973 (Act No. 19 of 1973), with its mission of continuous reform of the law of South Africa, in an open and inclusive manner, in accordance with the principles and values of the Constitution to meet the needs of a changing society operating under the rule of law. The Commission's duty is to investigate matters appearing on a programme approved by the Minister of Justice and Constitutional Development. Reports and other documents published by the Commission are found on the Commission's website: http://salawreform.justice.gov.za The Commission issues a 'discussion paper' where it calls interested parties, including the public, to comment on the changes that a particular department introduces. The Commission will give directions as to when the comments are due and after that it will consider and formulate a report.

4.3.2 Public participation

As the proposed legislation, or change to existing legislation, often brings about changes in the society, the initiation phase includes a stage for public participation through the **Green Paper** and **White Papers**.

These two papers give individuals and interested groups an opportunity to comment on the proposed bill. Ordinary people can therefore take part in the legislative process. This is in line with the objects and purport of the Bill of Rights, as well as promoting transparency.

For an example, legislation regulating same-sex relationships, or civil unions, raises very controversial issues. There is always conflict of interests from among the society especially those based on religious differences. It is therefore important that legislature gives the public an opportunity to express their different views in order to see how to reconcile them in line with the Constitution. People may be called in to comment either orally at public meetings in venues in the community or in writing. The Green Paper is made available to the public through publication in the Government Gazette for comments. Having considered the public views, the government department responsible for this bill, in this case, the Department of Justice publishes a revised White Paper. The White Paper contains the standpoint of the government, as well as the views of the public.

A **Green Paper** is proposed legislation in an early stage of development. It is published for public comment. A **White Paper** is a modified or improved version of a Green Paper. In terms of the legislative process, the White Paper takes into account the views of the public on the proposed legislation. In a participatory democracy, the public is involved in the making of new laws.

In *Matatiele Municipality and Others v President of the Republic of South Africa and Others* (2) (CCT73/05A) 2006 ZACC 12; 2007 (1) BCLR 47 (CC) (18 August 2006) at paragraph 55, the Court held that:

> "... the Constitution contemplates that the public should be given the opportunity to participate in the law-making process".

When the provincial legislatures make rules to regulate their proceedings, they are required to do so 'with due regard to representative and participatory democracy, accountability, transparency and public involvement'. In addition, they are empowered to hold public hearings and "receive petitions,

representations or submissions from any interested persons or institutions." They are required to conduct their business in an open manner and hold their sittings and those of their committees in public; they must provide public access to their proceedings and those of their committees; and they may not exclude the public from the sittings of their committees 'unless it is reasonable and justifiable to do so in an open and democratic society'. All this facilitates public participation. This is a clear indication that the Court does not take failure by the legislature to consult the public lightly.

Case study — Does public participation mean the views of the public must prevail?

In the case *of Merafong Demarcation Forum and Others v President of Republic of South Africa and Others* 2008 ZACC 10, The Constitutional Court ('the Court') had been called upon to analyse and clarify the nature and extent of the obligation to "facilitate public involvement" in legislation and other processes placed upon legislative bodies by the Constitution. In a bid to abolish cross-boundary municipalities two Bills were passed in the National Assembly and, according to section 74, the legislative process was to be completed in the National Council of Provinces. The following was stated in relation to Merafong Municipality as an example of this concern:

> "Merafong City Local Municipality is to be excluded from the municipal area of the West Rand District Municipality and included in the municipal area of the Southern District Municipality. Westonaria is to remain in the West Rand District Municipality."

In compliance with the requirements of the Constitution it was therefore necessary to arrange public participation on the aforementioned legislation under section 118(1)(a). The events played out as follows: the Gauteng Provincial Legislature, through a Portfolio Committee, and the North West Provincial Legislature engaged on the issue with the community of Merafong from which opposition by various community structures was voiced against being incorporated to the North West Province. A negotiating mandate was adopted in favour of what the majority in the community had expressed and in light of 'impact assessment and analysis of the public hearing submissions'. Subsequently, the Portfolio Committee met with the Legislature's legal advisors and then the Select Committee on Judicial and Constitutional Matters. Because of those consultations, the Gauteng Provincial Legislature deviated from the negotiating mandate in support of the Amendment Bill that included the Merafong Municipality in the North West Province. In the final mandate, the Legislature sighted various reasons for the change. The issues before the Court were: (i) Was there sufficient public involvement by the provincial legislatures. (ii) Was the decision to exclude Merafong Municipality from Gauteng (the change in the mandate) rational? The Appellants also contended that the legislature was never open to persuasion because the Minister had beforehand stated on a public website that Merafong Municipality would be incorporated into the North West Province and that the decision was made before public participation took place and furthermore, that it was due to political pressure that the Respondents were reluctant to provide reasons for their final mandate. The Court held that findings were based on the facts and evidence before it; it cannot make a finding on whether there was any political pressure. The test for rationality is whether the exercise of public power is linked to a legitimate governmental purpose. The Court held that the Gauteng Provincial Legislature's conduct was linked to a legitimate purpose of eliminating cross-boundary municipalities and the creation of viable and economically sustainable municipalities and therefore rational. The Court also noted that in keeping with separation of powers the judiciary should not substitute their opinions with what they do not agree with in legislature. According to the majority, the obligation to facilitate public involvement does not mean that the public's views will prevail. The judgment goes further to say that government cannot be expected to be bound by the wishes of the minority and that public participation should supplement elections and majority rule, and 'not to conflict with or even overrule or veto them'.

Case study (continued) Does public participation mean the views of the public must prevail?

1. Do you think the decision to exclude Merafong Municipality from Gauteng was justified?
2. What do you understand this phrase from the judgment to mean 'in keeping with separation of powers the judiciary should not substitute their opinions with what they do not agree with in legislature'?

4.3.3 Initiation of the bill into Parliament

The cabinet must approve the document that contains the proposed legislation. The document is then introduced into Parliament through the Speaker of the House or the Chairperson of the National Council of Provinces. Under normal circumstances, the government department responsible for introduction of the bill will present it to Parliament. However, a Member of Parliament may also introduce a bill and that is called a private member's bill.

4.3.4 Examination of the bill by Parliament and the portfolio committee

Once the Members of Parliament have read the bill and debated on it, it is now given to the relevant portfolio committee whose main function is to make changes and amendments to the bill considering the debates and the public comments. The amended bill is then sent back to Parliament for a second reading and debate. Should Parliament recommend further changes, the bill will be sent back to the portfolio committee.

4.3.5 Voting on the bill

As indicated earlier, debating and reading the bill does not translate to the bill being accepted by the Members of Parliament. It is for this reason that, before the president assents to the bill, Members of Parliament must vote in favour of the bill or against it. If both Houses of Parliament are in favour of the bill, the law is passed.

4.3.6 Assent to the bill by the President

Section 79 of the Constitution grants powers to the President to assent to all new legislation. This step occurs after Parliament has voted in favour of the bill. When the president assents to the bill, it becomes law in the Republic, comes into force, and has binding legal authority. Note that the application of the Act may be either retrospective or retroactive. This means that it could apply to incidents relating to the provisions of the Act that occurred before the enactment of the Act, or it could apply to all matters regardless of when the incident occurred.

4.4 Interpretation of legislation

Have you ever thought of why we all need lawyers when we are in trouble with the law? It is not always easy for an ordinary citizen to understand what exactly a provision in an Act of Parliament means. For this reason, we seek legal advice and representation because lawyers know and understand how to best apply the law to real-life situations. The law must be interpreted correctly. As much as Parliament tries to use simple plain language, there are terms that are not so easy to understand or possibly have more than one meaning. Interpretation of legislation may raise difficulties in various ways. Here are a few examples:

- The drafters may refrain from using certain words simply because they believe such words are implied in the text. The difficulty that arises here is that readers may not identify that these words are actually implied.
- The drafters may use a broad term and leave it to the readers to decide what it means or where it is applicable.

- Ambiguous words are often used and they may have unforeseeable developments. For example, when an Act is passed, there are areas that the drafters may not have covered leaving it in the hands of the courts to decide on such issues.

Section 23(5) of the Constitution provides that:

> "every employer or trade union or employee has a right to engage in collective bargaining. It never said because one has such a right it then follows that the other has a duty to ensure the other fulfils that right. This necessitated interpretation by the courts of law."

4.5 The Constitution of the Republic of South Africa

The Constitution is the highest law in the country and is the starting point for interpreting legislation. Section 39 of the Constitution holds that the courts must promote the Bill of Rights when interpreting any legislation. Whatever interpretation the court applies, the rights as contained in the Bill of Rights must be respected, promoted and protected. Section 39 also directs that we must consider **international law** and may consider **foreign law**. International law has played an important role in assisting our courts in the interpretation of our legislation.

International law refers to documents such as formal agreements between countries and judgments of international courts. **Foreign law** refers to the local court decisions of a specific country.

Case study The Constitutional Court's approach to statutory interpretation

In the case *of Provincial Minister for Local Government, Environmental Affairs and Development Planning, Western Cape v Municipal Council of the Oudtshoorn Municipality and Others* (2015) ZACC 24 at paragraph 12, the Court stated that it had:

> "… previously stated that when interpreting a statute, Judicial Officers must consider the language used, as well as the purpose and context and must endeavour to interpret the statute in a manner that renders the statute constitutionally compliant."

The Court here was making reference to a decision in *Cool Ideas 1186 (CC) v Hubbard and Another* 2014 ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) at paragraph 28. In this case, the Court certified the approaches that we will deal with below.

4.6 Approaches used to interpret legislation

It is the duty of the courts to decide whether a particular law applies to a situation. To make this decision, lawyers and judges need to interpret the law. Our law recognises four approaches to statutory interpretation. These are:

1. the textual approach
2. the purposive approach
3. the contextual approach
4. the influence of international and foreign law.

It is not always easy to determine the legislature's intention and further interpretation becomes necessary in certain circumstances. For this reason, the Constitution imposes a single theoretical starting point in statutory interpretation. The interpretation of legislation can be further observed in the case of *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism 2004 (4) SA 490 (CC),* where Ngcobo J reasoned that:

> "The Constitution is the starting point in interpreting legislation … first, the interpretation that is placed upon a statute must, where possible be one that would advance at least an identifiable value enshrined in the Bill of Rights; and second, the statute must be capable of such interpretation … The emerging trend in statutory construction is to have regard to the context in which the words occur, even where the words to be construed are clear and unambiguous."

It is important to understand the background against which these approaches are formed. Section 1 of the Constitution provides that South Africa is a **sovereign state** founded, ***inter alia***, on human dignity, non-racialism and sexism and most importantly on the supremacy of the constitution as a rule of law. Therefore, all legislation must be compliant with the Constitution. Section 233 of the Constitution further makes provision that when our courts interpret any legislation, they must consider any reasonable interpretation that is consistent with international law over any alternative interpretation that defeats this purpose. Despite being a sovereign country, South Africa still realises the importance of developing its laws by referring to international trends.

Sovereign state simply means that South Africa is an independent country that is represented by one centralised government that is not reporting to any other country or government but has super powers over its geographical territory.

Inter alia is a Latin term used in legal writing to indicate 'among other things'.

4.6.1 Textual approach

The textual approach looks at the wording of the language used when writing the statute and gives it its grammatical meaning. Some Acts do have a name that addresses, without any uncertainties, what it seeks to achieve. For example, the Unemployment Insurance Amendment Act 10 of 2016 is an Act of the Republic of South Africa, which amends the Unemployed Insurance Act, 2001, to provide for the extension of unemployment insurance benefits to learners who are undergoing learnership training, as well as civil servants. This takes the words as they appear and applies them to the real-life scenario without relying on the aid of other interpretative approaches.

4.6.2 Purposive approach

The purposive approach tries to determine why a particular law was created in the first place. In the case of *Bertie van Zyl (Pty) Ltd and Another v Minister for Safety and Security and Others* 2010 (2) SA 181 (CC), where the court had to decide on employers using farm workers to provide private security services for remuneration, reward, a fee or benefit, and whether they were required to register as security service providers in terms of the provisions of the Private Security Industry Regulation Act 56 of 2001. Mokgoro J (in the majority judgment with whom Langa CJ, Moseneke DCJ, Ngcobo J, Sachs J, Skweyiya J, Van der Westhuizen J and Yacoob J concurred) held that 'our Constitution requires a purposive approach to statutory interpretation'. The judge, however, warned that a contextual or purposive reading of a statute must remain faithful to the actual wording of the statute. It then follows that our courts adopt this approach once the interpretation of the words yield no positive result. Schultze JA in the case of *Standard Bank Investment Corporation v Competition Commission and Others, Liberty Life Association of Africa Ltd v Competition Commission and Others* (44/2000, 50/2000) 2000 ZASCA 20 held that it is not necessary to use the purposive approach where the words of the Act are clear and unambiguous. Therefore, once the textual approach serves the interpretation process, the matter is put to rest.

In the purposive approach, the court considers the social, political or economic basis of the legislation. For example, the legislature considered the history of South Africa and the inequalities introduced by the apartheid regime when it enacted the Labour Relations Act 66 of 1995. The Labour Relations Act for example deals with fairness and equal treatment of all employees in the workplace. This is contrary to previous apartheid workplace statutes where for example white male employees in particular enjoyed more rights than black and female employees. To this end, affirmative action was introduced through the Employment Equity Act to address the imbalances of the past. That is, therefore, one of the purposes for which the Act was enacted.

In *Mansingh v General Council of the Bar and Others* (CCT 43/13) 2013 ZACC 40; 2014 (2) SA 26 (CC); 2014 (1) BCLR 85 (CC) (28 November 2013) at paragraph 27, the Court held that:

> "It is well-established that courts need not look to the drafter's intention when engaging in constitutional (or statutory) interpretation. However, as stated above, we must adopt a purposive reading of section 84(2)(k). When there is documentary evidence regarding that purpose, we may, in appropriate circumstances, have regard to such evidence – the *travaux préparatoires*."

4.6.3 Contextual approach

The contextual approach places legislation in the context of real-life circumstances. For example, once we have identified the purpose of the provision in the Bill of Rights, we are able to identify to whom the right applies and in which circumstances. This approach to interpreting legislation relies on:

- the historical and political events that led to the enactment of the legislation
- the textual content of the rest of the legislation
- commission reports and parliamentary debates.

4.6.4 Historical and political events

If we understand the historical and political context of the legislation, we are in a better position to understand the purpose of that legislation. For a long time, South Africa had laws that were arbitrary to the majority of its citizens; laws which were mainly aimed at oppressing non-white citizens of the country. These laws were not based on human rights and the protection of human dignity. During the apartheid regime, South Africa did not have a constitution that protected human rights. Laws that sought to protect the interests of the minority were passed by Parliament as it deemed fit. These laws were first aimed at promoting racism and secondly, at promoting unfair treatment of the non-white population. This apartheid system led to instability in South Africa as the majority constantly protested against the application of the laws of the apartheid regime. The majority of the population were not allowed to vote as only white people could vote. The right to vote was later extended to Coloured and Indian people. A breakthrough came about in 1990 when Dr Nelson Rolihlahla Mandela, a former leader of the African National Congress and the first black president of the country, was released from prison after serving 27 years on Robben Island because of his opposition to the apartheid government. As a pioneer of the negotiations that saw our country unite for the first time, Dr Mandela ensured, together with other stakeholders, including Dr F W de Klerk, that the new Constitution that would protect and promote humanity.

For this reason, our courts attach extreme importance to the history of the country when interpreting legislation. This history gives its textual, purposive or contextual meaning. As an example, the Independent Electoral Commission Act 51 of 1996 was enacted to give all South Africans the right to vote.

4.6.5 Textual content of legislation

The drafting history of the Constitution is another aid that can help us interpret the provisions of the Bill of Rights. When politicians negotiated on what should be contained in the Constitution, they made statements that were documented or recorded. Reference could always be made to these reports in order to try to find out what they had in mind when the Constitution was created. In the case of the *Provincial Minister for Local Government, Environmental Affairs and Development Planning, Western Cape v Municipal Council of the Oudtshoorn Municipality and Others (CCT05/15) 2015 ZACC 24; 2015 (6) SA 115 (CC); 2015 (10) BCLR 1187 (CC) (18 August 2015)* at paragraph 12, the Court held that:

> "This Court has previously stated that when interpreting a statute, Judicial Officers must consider the language used as well as the purpose and context and must endeavour to interpret the statute in a manner that renders the statute constitutionally compliant."

This indicates that our Constitutional Court seriously considers the above-mentioned approaches as prerequisites for statutory interpretation.

Commission reports and parliamentary debates

When interpreting legislation, courts will sometimes make reference to commission reports, as well as to parliamentary debates. Guidelines can be taken from the following cases:

- In *Western Cape Provincial Governnment: In re DVB Behuising (Pty) Ltd* 2001 (1) SA 500 (CC), the Consitutional Court made use of parliamentary debates in its interpretation of statute.
- In *Chairperson of the National Council of Provinces v Malema (535/2015) 2016 ZASCA 69 (20 May 2016)*, the Supreme Court of Appeal used parliamentary debates in deciding whether words uttered by a Member of Parliament, Mr. Julius Malema were consistent with the right to freedom of expression.

- In *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2003 (3) SA 389 (W), the court made reference to parliamentary debates, reports of task teams and the views of academics in interpreting the Films and Publications Act 65 of 1996.

4.7 Common law interpretative rules and presumptions

There are a number of rules and presumptions that we can use to interpret legislation.

- All unrepealed legislation remain law.
- *Eiusdem generis* – 'things that are the same' rule is used when an Act includes a 'similar items' section. *Eiusdem generis* can be used where there is more than one similar item, or if listed items are all of the same type. For example, cattle, sheep, horses or any other domestic animals' would not include lions or tigers because they are wild animals.
- *Expressio unius est exclusio alterius*, or 'the expression of one implies the exclusion of the others'. For example, in *Renaissance BJM Securities (Proprietary) Limited v Grup* (JA60/2014) 2015 ZALAC 48; 2016 (2) BLLR 135 (LAC); 2016 (37) ILJ 646 (LAC) (17 November 2015) this rule was applied where the court held at paragraph 30 that:

  > "Clause 4.5 only regulates the hand-out but not the handcuffs. Where special mention is made of an obligation, some other obligation, which would otherwise normally be implied in the circumstances, is excluded: *expressio unius est exclusio alterius*. Special mention was made of the amount to be paid but no mention was made of the restriction/obligation of continued employment. In my view, the court *a quo* was correct in concluding that the money was meant to be a sign-on incentive and not a stay-on incentive."

- There is a presumption against altering the common law or legislation, unless express provision is made, or the new law is irreconcilable with existing legislation or common law.
- There is presumption against penalty or punishment without fault.
- Standard common law defences are available for new crimes, such as private defence.
- Criminal laws should favour the person whose rights are threatened.

Case study — Constitutional Court decisions concerning the Children's Act and surrogacy

In *AB and Another v Minister of Social Development* (CCT155/15) 2016 ZACC 43; 2017 (3) BCLR 267 (CC); 2017 (3) SA 570 (CC), the Court dealt with the issue where a woman was medically unable to fall pregnant using her own gametes, or with the assistance, of donated gametes by way of In Vitro Fertilisation (IVF). Between 2005 and 2010, she underwent 18 IVF cycles, which were all unsuccessful in helping her fall pregnant. The woman considered a surrogate motherhood agreement. However, she was informed that as a single woman incapable of donating a gamete, she could not legally enter into a surrogacy agreement, as section 294 of the Children's Act requires the gametes of at least one commissioning parent to be used in the conception of the child contemplated by the surrogacy agreement. With the assistance of the Surrogacy Advisory Group, the woman wanted to challenge the constitutionality of section 294 of the Children's Act in the Constitutional Court. Section 294 provides that:

> "No surrogate motherhood agreement is valid unless the conception of the child contemplated in the agreement is to be effected by the use of the gametes of both commissioning parents or, if that is not possible due to biological, medical or other valid reasons, the gamete of at least one of the commissioning parents or, where the commissioning parent is a single person, the gamete of that person."

The majority of the Court found that the differentiation between the genetic link requirement in section 294 of the Children's Act and the IVF regulations is rational. It further held that the requirement of donor gamete within the context of surrogacy indeed served a rational purpose of creating a bond between the child and the commissioning parents or parent. The minority judgment found that section 294 violated the right to make decisions concerning reproduction and the right to equality.

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What do you think?

In the above case, which approach do you think the Constitutional Court judges adopted in the majority judgment and why?

Chapter summary

In this chapter, we have learned the following about legislation and the legislative process:

- Legislation is the primary source of law.
- Legislation is the most important source of our law.
- Parliament is entrusted with the responsibility to pass legislation.
- It is our courts' duty to interpret and apply legislation to settle disputes.
- It is the application and interpretation of legislation that would influence decisions of the court.
- Without legislation there would be no order in our society.
- As society changes, legislation should provide for such changes.
- Legislation helps the executive branch of government in carrying out its duties.
- Each legislation is based on a specific area or type of problem.
- Always cite legislation as your authority in tests, assignments and examinations.
- Legislation guides the society as to what kinds of behaviours are either accepted or not accepted.
- Legislation prescribes legal consequences for those who disobey it.
- There are three branches of government, executive, legislature and judiciary.
- There are three different levels of government, national, provincial and local government.
- All three levels of government have legislative making powers.
- All legislation must pass the constitutional muster.
- While national legislation binds the entire country, provincial and local legislation is only binding in specific areas or parts of the country.
- Provincial legislation is binding in that province only.
- By-laws apply in that geographical area only.
- In cases of conflict between national and provincial legislation, the former will prevail.
- The content of the new law must be fair to all.
- The legislature must follow the proper legislative process.
- The courts must apply and interpret the relevant legislation.
- The courts are responsible for interpreting legislation that applies to the court cases that appear before them.
- The legislature consists of National Assembly and Council of Provinces.
- The following are the steps in the legislative process:
  - initiation of the bill
  - introduction of the bill into parliament
  - first reading and debate of the bill in parliament
  - first scrutiny of the bill by the portfolio committee
  - second reading of the bill
  - second scrutiny of the bill by the portfolio committee
  - voting on the bill
  - assent to the bill by the president
  - publishing of the Act in the *Government Gazette*.
- The new law comes into effect from the date of commencement, which appears on the first page of the Act
- The new Act is binding on everyone in South Africa.
- Legislation is not always easy to understand from reading the text. This makes further interpretation necessary.
- The starting point in statutory interpretation is the Constitution.
- Literal meaning of the words used must be considered.

- The purpose for which the statute was enacted must be considered.
- The context in which a particular statute was enacted must be considered. This will help the reader to understand to whom the Act is applicable and in what circumstances.
- International law must be considered while foreign law may be considered.
- Common law interpretative rules and presumption also play a huge role in statutory interpretation.

Review your understanding

Choose the correct answer to each of the following questions:

1. _____ is the primary source of law.
   a) Legislation
   b) Parliament
   c) The President
   d) The Constitution
   e) The Judiciary
2. What is the point of departure in statutory interpretation? What is it that we must consider in this process?
3. What is your understanding of the textual approach?
4. Considering the apartheid history in South Africa, can you think of at least two instances that could have led to enactment of a particular legislation?
5. Why is it important to consider section 39 of the Constitution when interpreting legislation?
6. Does the law passed in one province bind the people in another province?
7. What are the differences between national legislation on one hand and provincial and local legislation on the other?
8. Why do you think it is necessary that by-laws are only binding in a specific municipal area?
9. Why should the public be consulted before legislation is passed?
10. Considering changes in society and how people live, is there an area of law that you think needs to be amended?

Further reading

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Mansingh v General Council of the Bar and Others (CCT 43/13) 2013 ZACC 40; 2014 (2) SA 26 (CC); 2014 (1) BCLR 85 (CC) (28 November 2013) at para 27, http://www.saflii.org/za/cases/ZACC/2013/40.pdf

Merafong Demarcation Forum and Others v President of Republic of South Africa and Others 2008 ZACC 10, http://www.saflii.org/za/journals/LDD/2008/15.pdf

Provincial Minister for Local Government, Environmental Affairs and Development Planning, Western Cape v Municipal Council of the Oudtshoorn Municipality and Others 2015 ZACC 24 at para 12, http://www.saflii.org/za/cases/ZACC/2015/24.pdf

A New Approach to Statutory Interpretation, https://lawaspect.com/new-approach-statutory-interpretation

Chapter 5

Legal ethics and professional responsibility

The main ideas

- The different theoretical approaches to legal ethics and ethical decision-making
- The purpose, function and sources of legal ethics
- The kinds of ethical dilemmas which lawyers face, and the context in which they arise
- Some of the most important rules and principles of legal ethics

The main skills

- Debate current ethical issues and think critically about existing practices.
- Assess the impact that situational pressure and individual behaviour have on practice.
- Apply ethical rules to practical scenarios.

Apply your mind

The Digest (D 24.14) that you read about in Chapter 2 tells us that law is a noble profession. Despite this view, it seems that lawyers have attracted criticism for hundreds of years as many anti-lawyer jokes and television programmes can testify to. The reality is that there are many lawyers in South Africa who act with integrity in attempting to achieve justice. On the other hand, a minority of lawyers in South Africa frequently act in immoral, unjust (and in some cases, 'sloppy') ways which cause significant harmful consequences for clients and for the moral integrity of lawyers themselves and the legal profession in general. Given these realities, how can you prepare yourself to make ethical decisions as a future legal practitioner?

This chapter is a basic introduction to legal ethics and professional responsibility in South Africa. We look at the context of ethical decision-making in general, and also the particular rules governing the profession. Importantly, we consider the process of decision-making and the context of the environment in which the decision takes place. In this way, you are both emotionally and professionally prepared for the decisions you will make in practice.

Before you start

When you were thinking about becoming a lawyer, did anyone tell you a joke about lawyers' unethical behaviour? Did anyone put doubt in your mind about what lawyers are prepared to do for their clients against what seems to be the 'right thing to do'? Think of the following scenario: your client tells you that he is guilty of murder and intends to lie when giving testimony. What do you do? Your client wants you to destroy a particular damaging piece of evidence against her, or at least allow her to destroy it. What do you do?

Legal ethics and professional responsibility deal with these types of issues, and more particularly, with the tension that arises between your duty to client, your duty to court and your duty to justice – duties that are set out in various lawyer codes across most commonwealth jurisdictions worldwide. In this chapter, we will consider these duties and think about ways in which to handle difficult situations where professional conduct rules do not seem to give us an answer.

5.1 What are legal ethics and professional responsibility?

It is important that you recognise that legal ethics and professional responsibility are two different areas of your professional life as a lawyer. Legal ethics is a form of 'applied' or 'practical' ethics in that it is

used to explain or justify how **general ethical norms** may be applied by lawyers when representing clients in the legal system.

General ethical norms are how one should live or behave.

Professional responsibility rules – on the other hand – are the published rules and regulations that apply to lawyers by virtue of them being members of a professional body. These rules often reflect on certain moral issues, and set out various moral imperatives, such as honesty, good faith and care. However, as you will find out from general legal practice, rules often run out, or there are 'grey areas' where you have to decide how to interpret the rule or balance your duty to client versus your duty to the court and your duty to justice. You may even have to decide how to proceed where there is no rule.

Read the following case study adapted from a famous case in the United States and answer the questions that follow.

Case study Legal ethics and professional responsibility

A person is in a horrible accident on a construction site and sues the construction company for his injuries. You act for this construction company and it is fairly clear that there was negligence on their part. You advise the company to concede this, but advise that you will contest quantum. They are asking for R500 000 for his injuries, temporary loss of future earnings and general pain and suffering. You ask for an independent examination of the person by your medical expert. Your medical expert finds that apart from the manifest external injuries, the plaintiff has an aneurysm of the aorta. The medical expert reports this to you. He also reports that the claim is consistent with injuries of this type. Apart from the existence of the aortic aneurysm, which could push the claim up to R1.2 million if the plaintiff can show that the aneurysm was caused by the accident, it is a likely scenario.

Before the close of pleadings and the discovery of any documents, you are contacted by the plaintiff's lawyers and asked whether you would consider settling the matter since the plaintiff wishes to get on with his life, and he is running out of funds. They ask for a settlement of R420 000. It is obvious that their medical expert did not pick up the aneurysm.

1. How would you advise your client?
2. Do you settle on this amount?
3. Would it make a difference if your client (the construction company) had not paid their public liability insurance timeously, and therefore would have to cover this from the company's profits?

(Note: an aortic aneurysm can usually be repaired with surgery if found in time, but if left unchecked it will most likely result in the fatality of the carrier.)

Source: Adapted from *Spaulding v Zimmerman* 263 Minn. 346, 116 N.W.2d 704, 1962 Minn. LEXIS 789 (Minn. 1962)

5.2 Process of ethical reflection and decision-making

While ethical theories and rules guide our decision-making as lawyers, it is important to recognise that decision making does not happen in a vacuum and there are many factors that affect our ability to make sound ethical decisions: these may be because we are tired, scared, fearful of authority, or even because we are financially needy and under pressure, etc. It is useful then to consider mental models for decision-making that can make us more aware of these factors and ensure that we make decisions based on the right reasons in real-life situations. In summary, we can say that good decision-making is the ability to recognise three influences:

1. Context (behavioural psychology)
2. Character (your own background, beliefs and theories)
3. Calling (professional rules and codes).

In order to make an ethical decision it is useful to approach your decision-making in a systematic way and actively think about how to develop judgment. One way is to use a model developed by a psychologist named James Rest. The model is not particular to lawyers, but has been used in the legal context. Interestingly, Rest initially thought about why people make unethical decisions. He found four possible reasons for moral failure:

1. Missing the moral issue
2. Defective moral reasoning
3. Insufficient moral motivation
4. Ineffective implementation.

In response to these reasons, he developed a four step model, each of which he saw as necessary for the right decision to be made:

1. Moral sensitivity to identify that there is a need for a moral decision
2. Clear ethical reasoning that can reach a morally defensible decision
3. Identity formation and motivation that will assist the decision maker to make the moral decision over competing interests.
4. Competence and courage to implement the moral decision.

If you follow this model as a lawyer, it will help you to recognise when a decision involves an ethical question (Rest's first reason). Once you recognise that there is an ethical decision to be made, you need wise judgment when values and/or rules conflict (Rest's second reason), as well as the integrity to keep self-interest from clouding your judgment (Rest's third reason). Finally, you need courage to implement the decision you make (Rest's fourth reason).

5.3 Theories justifying the lawyer's role

In most commonwealth countries, there are four main ethical approaches that are used to explain the actions of lawyers:

1. Adversarial advocacy or neutral partisanship (known as the standard approach)
2. Responsible lawyering
3. Moral activism
4. Ethics of care.

In recent times, as a result of the specific South African situation, commentators have suggested that we follow a fifth approach:

5. African communitarianism.

We explore each of these approaches below.

5.3.1 Adversarial advocacy (the standard approach)

The neutral partisanship approach is the standard approach to what lawyers' roles and ethics ought to be in most common law countries, including South Africa. It gives a relatively clear answer to lawyers as to what to do in most situations, that is, a lawyer should advance their client's interests by any legal means necessary. The distinctive role of the lawyer is that of loyalty to the client. There are no legal duties on third parties or the public other than those imposed on citizens in general. In this approach, form is favoured over substance.

The approach is often termed as an 'amoral' approach because it requires you to do things as a lawyer that you would not do because of your own/ordinary morality. It requires you to act in 'role' in that you do not judge your client's claim or cause, or bring your own morality into the picture. You are therefore

morally permitted, if not required, to use all lawful means to gain your client's case and not to judge your client in the process.

Thus, this approach argues that neutrality is key when a lawyer takes on a client's case. The lawyer must not use his or her own moral opinions and consideration of general ethical concerns in representation. The lawyer's role is simply to provide access to the legal system for their client. In addition to neutrality, other key characteristics of this approach are the principles of partisanship and non-accountability. The principle of partisanship means that the lawyer should do all for the client that the client would do for themselves, if the client had knowledge of the law. This is because the adversarial system is based on party control of the proceedings, with each party ensuring that all legitimate arguments in their own favour are put forward. The role is often justified by referring to its ability to enhance the autonomy of the client in accessing the law.

Case study Lord Brougham and Adv. Kemp J Kemp

In the 1820s in England, Lord Brougham defended Queen Caroline, who was married to King George IV. King George IV was trying to rid himself of Caroline in court (he could not divorce her by law) by alleging that she had committed adultery. However, it was well known that the King himself had been unfaithful. Lord Brougham defended the Queen and, as an example of the neutral partisanship role, implied that he would use all means to defend his client. This is his famous statement on the point:

> "An advocate, by the sacred duty which he owes his client, knows, in the discharge of that office, but one person in the world, that client and none other. To save that client at all expedient means – to protect that client at all hazards and costs to all others, and among others to himself is the highest and most unquestioned of his duties; and he must not regard the alarm, the suffering, the torment, the destruction, which he may bring upon any other."

Just short of 200 years later in South Africa, Advocate Kemp J Kemp's approach to corruption charges against his client Jacob Zuma, President of South Africa, appears similar. In commenting on his approach to his client's case, Adv. Kemp J Kemp effectively argued that he will use every means within the law to defend his client:

> "This is not a battle where you send a champion out and have a little fight and that's it – this is more like Stalingrad … We will fight [opponents] in every room, in every street, in every house."

While the neutral partisanship role is arguably still the dominant approach to lawyering in South Africa, many commentators have looked at alternative ways of thinking about lawyers' ethics. In South Africa, the duty to client is subject to duty to the court and to justice (see the rules of professional responsibility set out later In this chapter). In this way, it is arguable that lawyers should not be allowed to exploit every loophole in the law, take advantage of their opponent's mistakes and stretch every legal and factual interpretation to win for the client. The other major criticism of the neutral partisanship role is that it presumes that both parties have equal access to justice. However, we know that in South Africa in particular, that this is not the case. As a result then, other approaches to lawyering as set out below are seen as better ways of representing a client.

5.3.2 Responsible lawyering

Responsible lawyering is an alternative to neutral partisanship. While neutral partisanship sees the lawyer as acting primarily in the client's interests, responsible lawyering sees the lawyer playing an equally important role as an officer of the court, and as guardian of the legal system. In this approach, the lawyer focuses on maintaining justice and integrity within the system. In this way, a lawyer using this approach

will not use loopholes or procedural rules to fight the client's case if abusing these loopholes or rules will frustrate the substance and spirit of the law. In this case, contrary to using every legal means possible, a responsible lawyer will not use procedural rules to delay or frustrate, despite such delay being in the client's immediate interest. A lawyer in this instance looks at the integrity of the legal system in acting for their client.

5.3.3 Moral activism

Moral activism is a role often associated with those lawyers who prefer to practice in public interest litigation centres, such as the Legal Resources Centre, the Women's Legal Centre and Open Democracy South Africa, to mention a few. Most of the obvious moral activist lawyers are those anti-apartheid lawyers like George Bizos, Bram Fischer, Oliver Tambo, Arthur Chaskalson and Nelson Mandela. Lawyers in this mould appear to be particularly concerned with doing justice. They do not hide behind their 'role' and accept that they should abide by ordinary ethics. They see legal practice as a way to change people, institutions and the law; to bring it closer to their ideal of justice. While moral activist lawyering appears to be concerned with justice, there is the possibility that they may value their commitment to a particular cause above their duty to the actual client.

5.3.4 Ethics of care

The ethics of care approach to lawyering has also been called 'relational lawyering'. This is because it focuses on relationships. It differs from African communitarianism in 5.3.5 below in the sense that the lawyer focuses on the immediate relationships he or she has with the client as opposed to the greater community. This approach sees the job of the lawyer to serve the best interests of his or her clients in a holistic way, focusing on problem solving and reconciliation. The ethics of care approach also encourages clients to be part of the problem-solving process where the attorney-client relationship is built on mutual trust, and the knowledge is shared. The relational lawyer will tend to focus on the client rather than on justice as some abstract concept or on winning. The ethics of care approach can be a very positive way of lawyering, but because it focuses on immediate relationships, it can be criticised for being too conservative in that the lawyer does not think about the broader community or where adversarial conduct will achieve a better outcome.

5.3.5 African Communitarianism

While the concept of the *ubuntu* has been used extensively by our courts, and even featured in the postamble of the Interim Constitution of the Republic of South Africa Act 200 of 1993, its use as an approach to lawyering has not been developed as well in relation to other approaches. It arguably provides a different approach to neutral partisanship as it focuses on harmony in the community, rather than on the client's autonomy as being the ultimate aim of a lawyers' role. Adopting this type of approach requires a lawyer to consider how his or her representation of his or her client best achieves harmony in the community.

It is arguable that this approach is more in keeping with the values of the final Constitution which have been described by Justice Khampepe of the Constitutional Court as social, redistributive and caring, amongst other things. Using *ubuntu* in legal practice asks the lawyer to see his or her client in relation to the community, hence the much used Nguni saying that ***umuntu ngumuntu ngabantu*** or the Sotho saying, ***motho ke motho ka batho ba bangwe***.

A rough translation of ***umuntu ngumuntu ngabantu*** and ***motho ke motho ka batho ba bangwe*** mean 'a person is a person because of other people'.

While *ubuntu* is said to incorporate dignity and respect, it does not envision a legal system that only serves the individual ends of a client.

Professor says Can a good lawyer be a good person?

Much of the debate in legal ethics can be summarised by the question asked by Charles Fried in a 1976 paper: "Can a good lawyer be a good person?" In this question, he basically asks whether the professional rules, especially around a lawyer's duty to the client, can be justified in moral terms. What makes professional ethics challenging is that lawyers act on behalf of other people, not for themselves. Therefore, when lawyers act, they act on behalf of their clients. Many argue that the morality of a lawyer's conduct can only be judged within the standards created by their role as lawyer; others insist that lawyers must be judged by the standards of 'ordinary' morality and must not find refuge in the standard conception of an amoral professional lawyer role.

5.4 Context and behavioural psychology of the legal profession

While the theories explain and justify why a lawyer will act in a particular way, these theories cannot account for the context in which lawyers operate. We need to understand the cues and pressures of legal practice, especially for candidate attorneys and those starting out in legal practice.

Case study Henrietta Peter

The case of *The Law Society of the Cape of Good Hope v Peter* [2006] SCA 37 (RSA) is a good example of how young lawyers can make unethical decisions – not because they are 'bad' or 'unethical' people, but because of the kinds of pressure that young lawyers face in legal practice. In this case, the lawyer in question used money from her trust account to pay for her debts. You will see later in this chapter that this is against professional responsibility rules. As a result, the court suspended this lawyer from practice for one year. The court found it necessary to suspend the young lawyer given that the public, that is, clients, need to trust that the legal profession will take care of their money. However, for our purposes, the lawyer's circumstances give us food for thought about how her context and situation pressured her into making the kind of decisions she made. An adapted version of her affidavit to court about her conduct follows:

1. My name is Henrietta Peter and I am 29 years old.
2. I spent seven years studying for my LLB degree and my studies were achieved through substantial sacrifice by my parents, both of whom worked hard to give their children tertiary education, something they themselves did not have.
3. I was never exposed to practice in a conventional law firm and was not in any way exposed to bookkeeping, management of trust accounts or the practical business aspects of running an attorney's practice.
4. I did not make use of the moneys received into trust for personal luxuries or high living.
5. I did not attempt to hide the misappropriations by false book entries or some elaborate scheme.
6. I deeply regret what I did.
7. In February 2008, I attempted suicide because I was suffering from depression and stress due, *inter alia*, to my realisation that I had misappropriated trust funds, work-related stress with which I was unable to cope and the fact that I was involved in an abusive and physical relationship with the executive member of the trade union, who originally assisted me in setting up my law firm.

5.4.1 Social experiments

Over the years, social experimentation has shown how the various social factors and contexts, such as those mentioned by Peter above, affect decision-making. In particular, there have been famous experiments that have shown how, amongst other things, group think, that is, the culture of an organisation, authority and de-individualisation can make people make bad decisions. We look at the two famous experiments in this field to demonstrate this point. These studies suggest that many people, whom we would ordinarily describe as 'honest,' will often suppress their independent judgment in favour of a group's opinion or a higher authority, or offer little resistance in the face of an illegal or unethical demand.

Milgram experiment – Obedience to authority

Milgram, a psychologist from Yale University wanted to know how instructions from a higher authority affected people. In particular, he wanted to know how far people would go in harming other people on the instructions of an authority figure. To do this, he advertised for volunteers (all male) to participate in an experiment, which he told them was a study about 'memory and learning'. The experiment worked like this: At the beginning of the experiment, a volunteer was introduced to another participant, who, in fact, was Milgram. They then drew straws to take on either the role of learner or teacher. Unbeknown to the volunteer, this was fixed in a way that the volunteer was always the teacher. A third person, the 'experimenter', sat in one room with the teacher, while the learner was placed in another room strapped to a chair with electrodes. The teacher volunteer was placed in front of a 'dummy' electric shock generator and was told that every time that the learner got a question wrong, he needed to administer an electric shock, increasing the level of shock each time. There were 30 switches on the shock generator marked from 15 volts (slight shock) to 450 (danger – severe shock). The questions consisted of a list of word pairs that the learner had to remember. The teacher was told by the experimenter to test the learner by naming a word and asking the learner to recall its partner/pair from a list of four possible choices. During the course of the experiment, the learner deliberately gave mainly wrong answers and the volunteer teacher gave him an electric shock. When the volunteer teacher refused to administer a shock, the experimenter prodded the teacher to continue as follows:

- Prod 1: Please continue.
- Prod 2: The experiment requires you to continue.
- Prod 3: It is absolutely essential that you continue.
- Prod 4: You have no other choice but to continue.

The volunteer teacher believed that for each wrong answer, the learner was receiving actual shocks. As the shocks increased, the volunteer teacher was led to believe that the learner was banging the wall, shouting and screaming. When the final shock was administered, the learner went quiet, as if dead. In reality, there were no shocks and it was a tape recorder making those sounds as the volunteer teacher administered the shocks.

After conducting the experiment with 40 volunteers, Milgram found that 65% (two-thirds) of participants, namely, volunteer teachers, continued to the highest level of 450 volts – enough to kill the learner. All the participants continued to 300 volts. This was a shocking result and Milgram's comments are very pertinent for lawyers who act under supervision of a senior attorney or take instructions from a client. According to Milgram this is because the legal and philosophic aspects of obedience are very important, but they don't say much about how most people behave in real situations.

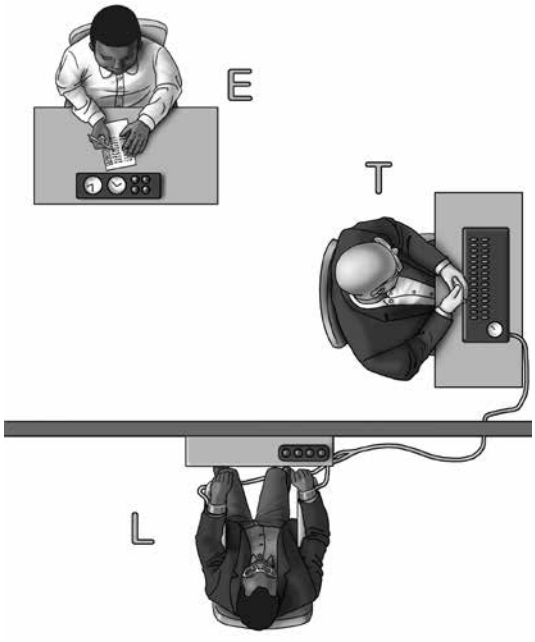

Figure 5.1 The Milgram experiment

The Good Samaritan experiment

In the Christian Bible, there is a story of three people who passed by a man on the side of the road who had just been beaten up by criminals. While a priest and a Levite just passed by, a third person, a Samaritan helped the man. This story has become known as the parable of the Good Samaritan and people often think of the parable as distinguishing good people from bad people. However, two experimenters, Darley and Batson, wondered whether it was really that simple and set up an experiment at Princeton Theological Seminary to test whether this was the case. Forty student volunteers were told that they were participating in a study on religious education and vocations. In one building in the university, they completed a questionnaire. They were then were instructed to go to another building to give either a talk on the Good Samaritan or a talk on jobs. The volunteers were told that they were late, but to varying degrees. Between the first and the second building, the experimenters placed an actor who played the part of a man hunched over, and in desperate need of help. Interestingly, the researchers found that the overriding factor, as to whether the volunteer stopped to help, was whether they were in a hurry or not: Nearly two thirds of people stopped to lend assistance when they had time. When a volunteer was in a rush, this dropped to one in ten. The researchers found out that religious beliefs did not make a noticeable difference as to whether a volunteer stopped, but that people who were on the way to deliver a talk about helping others were nearly twice as likely to help as those talking about jobs. This result is important for those who practice in the legal environment. It shows that when you are pressured, you can make bad decisions. In this experiment, in particular, being pressured by time turned ordinarily compassionate people into people who did not care about the suffering of another person.

Figure 5.2 The Good Samaritan experiment

5.4.2 Lessons from social experiments for the legal profession

It is hard to imagine that a candidate attorney with a massive loan debt and few job offers, when asked by a partner or a senior associate to do something unethical, will have the courage to say no, whether it is **padding a bill** or destroying evidence. We would further hope that the young lawyer would report the issue. However, experiments like the Milgram experiment show us that in some contexts, a subordinate lawyer will often comply with unethical instructions unless they have strong support networks and a developed sense of judgment. Further, the Good Samaritan study shows us that when we are in a pressured environment, we can miss important ethical issues about our conduct.

Padding a bill is an expression used when lawyers inflate hours spent on a client's file, (for example, a lawyer charges you for 8 hours of work, although he or she only worked on your case for 5 hours), or put unnecessary items on the invoice.

The crucial insight gained from these experiments for all lawyers, not only young lawyers entering practice, is that there is often a significant gap between what legal ethics requires and how lawyers typically behave. Indeed, lawyers will too often obey obviously unethical or illegal instructions or fail to report the wrongdoing of other lawyers.

Read this book on ethical issues arising from a pressured law firm environment:

Milton C. Regan Jr. 2004. *Eat What You Kill: The Fall of a Wall Street Lawyer*. University of Michigan.

Professor says Strengths and weaknesses of new lawyers

Situational and psychological pressures in a law firm culture can affect a new lawyer's ethical decision-making both positively and negatively. The psychologist Daniel Kahnemann explores a human bias that he calls the WYSIATI problem, which stands for "What You See Is All There Is". He uses this abbreviation to note that humans can jump to conclusions on the basis of limited information and make the wrong decision. The WYSIATI problem is created when a person focuses on existing evidence and ignores absent evidence in making an ethical decision. In order to present this problem, Kahneman advocates for deliberate thinking, in much the same way as James Rest's mental model. Catherine O'Grady, writing about ethical decision-making, highlights how new lawyers have both strengths and weaknesses when faced with these pressures. The strengths of new lawyers include the following:

- New lawyers are less dependent on business schemes and intuition, and are more likely to deliberately frame situations in terms of the ethical dilemmas they pose.
- They are less powerful in work environment; thus, less vulnerable to the attraction of financial rewards over ethics.
- They are less likely to succumb to the **WYSIATI problem**.
- They are more likely to conduct the depth of research necessary to avoid framing issues too narrowly.
- They are less vulnerable to conflicts of interest grounded in financial incentives because they are removed from directly sharing in firm profits.

New lawyers show weaknesses in the following ways:

- They are uniquely vulnerable to certain situational work place pressures, such as motivated blindness and pluralistic ignorance.
- They are more likely to engage in wrongful obedience when directed by superiors to do something ethically questionable.
- They are more tempted to cheat and engage in self-puffery for advancement reasons.
- They are more likely to be overwhelmed and stressed by unfamiliar situations leading to cognitive overload and tired brain.
- They are particularly susceptible to financial pressures due to high student loan debt, depressed job market and insufficient starting salaries.

Source: Gage O'Grady, C. 'Behavioural legal ethics, decision-making and the new attorney's unique professional perspective.' (2015) 15 *Arizona Law Journal* 671 at 695

5.5 Professional responsibility

This section considers the structures and processes of the regulatory system that affects lawyers' ethics and behaviour. The main statutes that govern attorneys and advocates are the Attorneys Act 53 of 1979 and the Admission of Advocates Act 74 of 1964. Although the Legal Practice Act 28 of 2014 is not yet in force, it is on its way, given that currently, the transitional body of the Act – the 'National Forum' – is currently negotiating the final details of the transformation of the legal profession through the Act.

There are two major ways in which the legal profession (in fact, most professions!) regulate ethical behaviour. The first is through admission requirements and the second is through the code of conduct expected of a lawyer.

5.5.1 Admission requirements

Apart from rules relating to citizenship, age and training, both Acts and the Legal Practice Act 28 of 2014 require that a person be 'fit and proper' before they are admitted to the bar or side bar.

What is a 'fit and proper' person? There is no definition of 'fit and proper' in the legislation governing the legal profession. However, courts have discussed this requirement when admitting legal practitioners and also when the courts have struck a practitioner from **the roll** for unprofessional conduct. There are a number of characteristics that the courts have commonly accepted as 'fit and proper': a person must show integrity, reliability and honesty, in relation to both their clients and the courts. A legal practitioner who is a fit and proper person will understand the importance of the obligations placed on him/her by the profession. Attorneys and advocates are officers of the court. This means that they are to act with utmost good faith towards the court, to act honestly and in compliance with the rules of the court in the best interest of his/her client.

The roll refers to a list of all admitted lawyers practising in a particular area. Being struck off the roll means that the attorney or advocate's name is removed from the list and that he or she can no longer practise law as an attorney or advocate.

Courts have made important statements about being fit and proper. In *Vassan v Law Society of the Cape of Good Hope* 1998 (4) SA 532 (SCA), Eksteen JA remarked as follows:

> "…[I]t must be borne in mind that the profession of an attorney, as of any other officer of the Court, is an honourable profession which demands complete honesty, reliability and integrity from its members …". (at 538G)

In *Kekana v Society of Advocates of South Africa* 1998 (4) SA 649 (SCA), Hefer JA stated:

> "…[T]here is a serious objection to allowing an advocate to continue practicing once he has revealed himself as prepared to lie under oath**.** Legal practitioners occupy a unique position. On the one hand, they serve the interests of their clients, which require a case to be presented fearlessly and vigorously. On the other hand, as officers of the Court they serve the interests of justice itself by acting as a bulwark against the admission of fabricated evidence. Both professions have strict ethical rules aimed at preventing their members from becoming parties to the deception of the Court" (at 655I).

In the case of *General Council of the Bar of South Africa v Jiba and Others* 2017 (2) SA 122, the court agreed with the author Du Plessis in finding that lawyers should possess the following qualities:

- "integrity – meaning impeccable honesty or an antipathy to doing anything dishonest or irregular for the sake of personal gain
- dignity – practitioners should conduct themselves in a dignified manner and should also maintain the dignity of the court
- the possession of knowledge and technical skills
- a capacity for hard work
- respect for legal order
- a sense of equality or fairness".

Source: *De Rebus*, 1981:424-427.

Often, the best way to judge whether someone is fit and proper is to consider the circumstances in which the courts have found a person *not* to be fit and proper. In these circumstances, law societies or the General Council of the Bar usually apply to the court to strike the lawyer from the roll or suspend them from practice. In determining whether a practitioner should be struck from the roll, the court adopts a three-fold enquiry:

- First, the court must decide if the alleged conduct complained of has been established on a balance of probabilities. This is a factual inquiry.
- Second, the court must consider whether, given this conduct, the person concerned is a fit and proper person to continue to practise. The court has discretion in this regard and its judgment involves a weighing up of the conduct complained of against the conduct expected of a fit and proper person to practise. This is a value judgment consideration.
- Thirdly, the court must inquire whether in all of the circumstances the person in question is to be removed from the roll or whether an order of suspension from practice would suffice. This is also a matter for the discretion of the court.

In deciding on what course to follow, the court will not first and foremost impose a penalty or punish the legal practitioner. Rather, the court's main consideration in whether to strike an attorney from the roll is whether it is necessary to protect the public.

Activity 5.1

Listed below are examples of when the court considered an attorney or advocate not to be fit and proper in admission or striking off applications. Link the name of the case with the conduct that was found to be unfit and improper.

Conduct	Name of case
1. Previous convictions for smoking dagga, with the intention to continue disobeying the law	a) In re *Ngwenya v Society of Advocates, Pretoria, and Another* 2006 (2) SA 88 (W)
2. Plagiarism where there is no full disclosure to the law society	b) *Mtshabe v Law Society of the Cape of Good Hope* 2014 (5) SA 376 (ECM)
3. Being on parole without showing true remorse for one's actions	c) In re *Legal Profession Act* 2004; re OG [2007] VSC 520 (Australian case)
4. Alleging that he was wrongly convicted, in the alternative, that he has shown remorse for the actions that led to his conviction	d) *Prince v President of the Law Society of the Cape of Good Hope* 2002 (2) SA 794 (CC)
5. Signing a letter that guaranteed that the advocate had received money from a client when he, in fact, had not received the money	e) *Fine v Society of Advocates of SA* (WLD) 1983 (4) SA 488 (A)

5.5.2 Code of conduct

Presently, the divided profession has separate rules relating to advocates and attorneys, but both parts of the profession adhere to the general principle that a lawyer's paramount duty is to his or her client subject to his or her duties to the interests of justice and to the court.

The theories that you studied at the beginning of this chapter show how there are different ways of interpreting this three-fold duty. South Africa's code of conduct does not contain as much guidance as, for example, the American Bar Association (ABA) rules. This means that South African lawyers have a higher duty to interpret the rules in making ethical decisions.

Advocates: Uniform rules of professional ethics

These rules have been drafted by a voluntary association, the General Council of the Bar, and are designed for the guidance of members of the advocate's profession. The most important rules in relation to ethics are set out at paragraph 3 onwards:

> "3.1 Duty to client
> According to the best traditions of the Bar, an advocate should, while acting with all due courtesy to the tribunal before which he is appearing, fearlessly uphold the interests of his client without regard to any unpleasant consequences either to himself or to any other person. Counsel has the same privilege as his client of asserting and defending the client's fact, and the use of every argument and observation, that can legitimately, according to the principles and practice of law, conduce to this end; and any attempt to restrict this privilege should be jealously watched."

Despite this duty to client, advocates also have the duty to disclose to the court material facts of which an advocate has knowledge (para. 3.2). However, similar to the National Forum's Code of Conduct set out below, the advocate's duty is governed, on the one hand, by his overriding duty not to mislead the court, and, on the other, by his duty not to disclose to any person, including in a proper case – the court itself, information confided to him as counsel.

The rules recognise that it may be difficult to know when counsel may be said to have knowledge of facts and the rules recognise that advocates should refer to the Bar Council for guidance. However, it is often not possible to receive this guidance when you have to make decisions in pressured situations, and it is helpful to consider some of the decisions discussed under the duty sections set out below.

5.5.3 National Forum on the Legal Profession Code of Conduct

The Attorney's (and, in future, Advocate's) code of conduct is the National Forum on the Legal Profession Code of Conduct made under the authority of section 9 7(1)(b) of the Legal Practice Act 28 of 2014. While this code is not yet in force, it is representative of most of the regulations of the law societies, such as the Cape Law Society and the Law Society of the Northern Provinces.

Section 3 of Part II of the Code sets out that legal practitioners, candidate legal practitioners and juristic entities shall:

"3.1 maintain the highest standards of honesty and integrity

3.2 uphold the Constitution of the Republic and the principles and values enshrined therein, and without limiting the generality of these principles and values, shall not, in the course of his or her or its practice or business activities, discriminate against any person on any grounds prohibited in the Constitution

3.3 treat the interests of their clients as paramount, provided that their conduct shall be subject always to:

3.3.1 their duty to the court

3.3.2 the interests of justice

3.3.3 the observation of the law

3.3.4 the maintenance of the ethical standards prescribed by this code, any other code of ethics applicable to them and any ethical standards generally recognised by the profession …".

How does a lawyer deal with balancing the duties set out in 3.3 above? It is best to understand your approach to lawyering, but also to consider what the courts have said in this regard.

5.5.4 Duty to client

The duty to client is to represent their interests and to give clients professional, honest and unbiased advice at all times. This means that you should not represent a client where you have a conflict of interest. A conflict of interest can exist where you represent two clients with competing interests at the same time, or where you have an interest in a matter yourself. There could also be a situation called a 'successive' conflict of interest, which means that you have information from the previous client that could be used for a future client. This obviously raises the issue that you have a duty to keep attorney-client confidentiality. Because of this, some law firms have tried to use the concept of a **Chinese wall**, which is a name for an internal measure adopted by a firm to ensure that information gained while acting for one client does not leak to people in another part of the same firm, who are acting for another client to whom that information may be highly relevant.

There has not been a South African case that deals with **Chinese walls**, but – no doubt – in the globalised market, law firms are already doing this.

Read the following case study and answer the questions that follow.

Case study Duty to client

Consider the following scenario adapted from a case that took place in England, yet which is highly relevant for South Africa:

Imagine that you are one of the managing directors for a large firm of attorneys in Gauteng. In 2009, your firm acted for Andrei Kovalenko, a successful businessman, in a complex litigation over a period of 18 months. The firm used 168 out of a possible 300 personnel in the matter. The matter was settled in 2011 but your firm had, during their representation, acquired confidential information about Mr Kovalenko's assets and financial affairs. In 2014, the South African Revenue Service (SARS) commenced an investigation into the affairs of an investment agency of which Andrei Kovalenko had been the chairperson from 2006–2010. Given the firm's expertise in tax evasion and customs and excise, SARS seeks to retain your firm to assist in this investigation. The firm no longer represents Mr Kovalenko and is keen to acquire government work.

1. Prepare an opinion to your fellow managing directors in which you set out the issues.
2. What practical steps can be taken to avoid any conflict of interest?
3. Do you think this will be sufficient to protect the past and (potentially) future client?

Source: Adapted from *Prince Jefri Bolkiah v KPMG (a firm)* [1991] 1 All ER 517

5.5.5 Duty to court

As discussed, an advocate or an attorney must be reliable, honest and have integrity. To see how this operates in respect of their duty to court, three case examples are useful.

1. *Kekana v Society of Advocates of* SA 1998 (4) SA 649 (SCA): In this case, the attorney lied to the court about billing the Legal Aid Board for a meal that he bought for another. Because the advocate was dishonest with the court about this and persisted in lying about the meal, he was struck from the roll.
2. *General Council of the Bar v Mattys* 2002 (5) SA 1 (E): Amongst a number of complaints against Mr Matthys, he was found to have misled presiding officers (judges and magistrates) and failing to properly consult with a client leading to giving a false version of a robbery defence.
3. *Van der Berg v General Council of the Bar* [2007] SCA 16 (RSA): In this interesting case, the court found that the advocate could finalise an affidavit that he suspected was untrue. The court commented that he would be misleading the court only if he *knew* that the affidavit was untrue. However, since he had evidence that put the affidavit in doubt (he had taken a trip to Switzerland where he could not find the trustees of the so-called trust), the court found that he should have disclosed this evidence at the same time.

The duty to court also involves the need to act with utmost good faith towards the court and articulate the best argument available. If the advocate knows of judgments that damage or go against his or her case, it is important that the attorney or advocate discloses these cases.

Case study Spy tapes

This matter dealt with a decision to review the National Prosecution Authority's (NPA) decision not to prosecute President Jacob Zuma. Despite representing the NPA, Adv. Epstein disclosed to the court that he had come across an issue that he was 'duty-bound' to raise. He referred to previous case law that went against his argument that the NPA's decision not to prosecute

Case study (continued) Spy tapes

was a rational one. This case law was precedent for the fact that a National Director of Public Prosecutions (NDPP) cannot review his or her own decision – something that the NDPP had in fact done in the case he was arguing. Thus, even if the court decisions did not support his argument, he had to disclose these decisions to the court.

Source: Adapted from Spy tapes case – heard by SCA early Sept 2017 at the oral hearing: http://ewn.co.za/2017/09/14/spy-tapes-appeal-npa-has-steep-hill-to-climb-judge (EWN report by Shimoney Regter)

5.5.6 Duty to the interests of justice

The code of conduct requires that lawyers uphold the Constitution of the Republic and the principles and values enshrined therein. For our particular purposes, it is important to remember that the main way to access justice in South Africa is through lawyers. Thus, lawyers have a special responsibility in South Africa to ensure this. This duty is even weightier because of the history of South Africa. The **Truth and Reconciliation Commission**, set up in 1997 to investigate crimes during apartheid, found that the organised legal profession "generally and subconsciously or unwittingly connived in the legislative and executive pursuit of injustice" and that many lawyers "actively contributed to the entrenchment and defence of apartheid through the courts."

The South African **Truth and Reconciliation Commission (TRC)** was set up by the Government of National Unity to help deal with what happened under apartheid.

What responsibility do lawyers have in pursuing justice in South Africa today then? The Constitution sets out that all persons have a general right of access to the courts (s 34). In addition, all those arrested, detained and accused (s 35) have a right to legal representation, as well as specific guarantees for minors.

5.5.7 Selected other duties of legal practitioners

There are many other duties and rules relating to the conduct of practitioners, which are not strictly 'ethical' in the philosophical sense, but nevertheless the transgression of these rules impact on the prestige and status of the profession. More importantly, these duties impact on the trust that the public puts in the legal profession. These types of duties relate to courtesy, etiquette, marketing and so forth. We focus on just one of these important duties that are required to maintain public trust – the duty to open and manage a separate trust account.

Duty to open and manage a separate trust account

The Attorney's Act, supported by the various regulations (and in the future: Part V of the National Forum's Code of Conduct) require that attorneys open a trust account that is kept strictly separate from their business account. When the Legal Practice Act 28 of 2014 is in force, advocates who want to consult with clients without the intervention of an attorney will also have to comply with these rules in opening a trust account. The rules set out important principles in relation to the handling of this trust account:

1. Attorneys must keep a separate trust account which, at any time, must have sufficient funds to fully cover trust obligations.
2. Attorneys are not entitled to transfer trust funds for fees unless these fees are due to attorney and recorded in books of account.
3. Trust accounts are subject to inspection by the law society upon notice.

The courts have decided that even where an attorney seeks to pay back trust money or shows deep remorse for their actions, those who misappropriate trust money may be struck from the roll of attorneys. Judges have noted that a misappropriation of trust funds is 'about the worst professional sin

that an attorney can commit' and that it is 'amongst the most serious offences of which an attorney may make him or herself guilty of, since it undermines the very core of the relationship between attorney and client'.

Case study Henrietta Peter judgment

Earlier, we discussed the *Peter* case in relation to how she used money from her trust account. The focus earlier was on the idea that it is important to recognise the many pressures that young lawyers face starting out in practice. You will recall that she had been suicidal, faced financial pressures and had taken money out of her trust account (planning to put it back) to pay for basic essentials. The Supreme Court of Appeal did not strike her from the roll, but suspended her from practising law for one year. It further introduced an interesting obligation on her return to the profession: the court ruled that when she returned to the profession after her suspension, she could only do so under the supervision of another attorney for another year. In other words, she could not practise for her own account or run her own law firm (and thus manage a trust account on her own). It did so out of concern for public trust in her ability to manage a trust account.

What do you think?

Think about your duty to client, duty to court and duty towards the interests of justice.
What would you do where there is a clash of duties in circumstances where your client wants you to advise them how to evade tax legislation, or if your client tells you that he intends to ask his wife to lie during testimony to provide him with an alibi?

Chapter summary

In this chapter, we learned about the following aspects of ethical decision-making as a legal practitioner:

- You should make a distinction between:
  - legal ethics – as a way of understanding why lawyers act in role
  - professional responsibility – as rules which the regulatory body of the profession requires each legal practitioner to follow.
- Five approaches to legal ethics are set out. These are:
  - neutral partisanship
  - responsible lawyering
  - ethics of care
  - moral activism
  - African communitarianism.
- Along with these theoretical approaches, behavioural psychology and social experimentation can affect good decision-making. In order to make good decisions, a person should at least go through a process of:
  - recognising the ethical issue
  - exercising moral judgment
  - exercising moral motivation
  - exercising moral courage.
- In terms of professional responsibility, there are two different codes for advocates and attorneys. Once the legal practice is in force, one code will be applicable to all legal practitioners in South Africa.
- The duties to the client, the court and the interests of justice are emphasised and all three duties are considered, along with one special duty of attorneys – that is – the duty to manage trust money in a trust account.

Review your understanding

1. Think about the first activity in this chapter, dealing with the aortic aneurysm. Given what you have learned, would you disclose the aneurysm to the other side? Why or why not?
2. Discuss the difference between 'legal ethics' and 'professional responsibility'.
3. Discuss the difference between the five types of approaches to lawyering. What do you think is most suitable in the South African context? Why?
4. What can social experiments teach us about ethical decision-making in a pressured legal environment? How can a new lawyer prepare themselves for this environment?
5. What are the three main duties of a lawyer?
6. How would you resolve the following ethical issues?
   a) You have been advising and acting for Mr Sithole over the last five years. During this time, you drafted his will and various business agreements that he is party to. His wife, Mrs Sithole, approaches you to represent her in a divorce action that she intends to institute against her husband.
   b) Your client has been charged with raping a first-year student in her room in one of the residences on campus. He admits that he had sexual intercourse with her without her consent but indicates that he is going to plead not guilty as there weren't any eyewitnesses. He is of the view that the state is required to prove that he is guilty and that he does not need to prove that he is innocent.
   c) Your client has been sued for damages as a result of breach of contract. Your client admits to you that he is liable to pay the amount claimed to the plaintiff but instructs you to fabricate (make up) a defence to the plaintiff's claim in order to delay the matter.

Further reading

There are many helpful international ethics text books and articles which are useful to consult regarding the lawyer's role.

Freedman, M.H. and Smith, A. 2016. *Understanding Lawyer's Ethics.* 5th edn. Carolina: Carolina Academic Press

Gage O'Grady, C. 2015. 'Behavioural legal ethics, decision making and the new attorney's unique professional perspective'. *Arizona Law Journal*, 671

Narvaez, D and Rest, J.R. 1995. 'The four components of acting morally'. In Kurtines, W. and Gewritz, J. (eds). 1995. *Moral behaviour and moral development: An introduction*. New York: McGraw-Hill

Parker, C. and Evans, A. 2014. *Inside Lawyers' Ethics.* 2nd edn. Melbourne: Cambridge University Press

Quigley, W.P. 2007. 'Letter to a law student interested in social justice.' *De Paul Journal for Social Justice*, 7

Wendel, W B. 2014. *Ethics and Law: An introduction.* Cambridge: Cambridge University Press

In South Africa, there is not a lot of literature on the lawyer's role. The following texts and articles are a useful starting point.

Chanock, M. 2001. *The Making of South African Legal Culture 1902–1936: Fear, favour and prejudice.* Cambridge: Cambridge University Press
(This is an excellent text on the history of the legal profession in South Africa and its final chapter is well worth a read.)

Hoffman, M. 1997. *Lewis and Kyrou's handy hints on legal practice.* Cape Town: Butterworths

Metz, T. 2007. 'Towards an African moral theory'. 15. *Journal of Political Philosophy*, 321

Morris, E. et al. 2010. *Technique in Litigation.* 6th edn. Cape Town: Juta and Co. (Pty) Ltd

Mnyongani, F. 2009. 'Whose morality? Towards a legal profession with an ethical content that is African.' *SAPR/PL*, 24

For the latest information on the status of the code of conduct and rules of the profession, it is useful to visit the Law Society of South Africa website (http://www.issa.org.za) and the General Council of the Bar website (http://www.sabar.co.za).

Another useful website containing information about ethics for both students and teachers is:
http://www.teachinglegalethics.org/

The International Bar Association has an international code of ethics which is available on their website at:
https://www.ibanet.org/

Case law

Chapter 6

The main ideas

- Case law as an important source of South Africa law
- What does 'case law' or a 'judgment' refer to?
- Why are court cases reported or published?
- Where and how to find a reported court case
- How to make sense of a reported court case or judgment

The main skills

- Explain these concepts: case law, judgment or reported court case.
- Discuss the relevance of case law as a source of South African law.
- Explain the *stare decisis* doctrine (the doctrine of judicial precedent).
- Critically analyse this doctrine with reference to advantages and disadvantages.
- Interpret and understand the basic structure of a reported court case.
- Use the correct legal terminology when referring to a reported court case.
- Distinguish between civil and criminal cases.
- Distinguish between two types of civil proceedings: application vs action.
- Distinguish between the parties/litigants in a reported court case.
- Distinguish between *ratio decidendi* and *obiter dicta.*
- Use the library to find a reported court case.

Apply your mind

By now, you would no doubt have seen media reports on controversial or otherwise important court cases or witnessed court proceedings in action. Think of the Oscar Pistorius criminal trial, the Henri van Breda, Christopher Panayiotou and Hope Zinde murder trials, the e-toll court matter, the Nkandla court case, the Al-Bashir decision and court applications by the Gupta family to stop banks from closing certain bank accounts, to mention a few. Court cases in South Africa involve a wide range of issues and require the presiding officer to apply established legal principles to the facts of a particular case. Court cases often pose difficult legal questions which the presiding officer needs to resolve with reference to other reported court cases (case law), legislation (Acts), international documents (ie. treaties) or other sources of law. To illustrate this principle, read any of the cases listed under 'Further reading' at the end of this chapter in your own time. You will note that each of these cases refer to various sources of the law, most importantly, other cases and legislation.

This chapter is an introduction to case law as a source of South African law. Once you understand the concept of a reported court case (case law), you will realise that it is one of the most important sources of legal rules and a significant tool available to the legal practitioner. Case law will also form a crucial part of your study material in all law courses over the course of the next few years. It is important that you familiarise yourself with the general format and structure of reported court cases. You will see that all reported cases follow a particular structure and that information appears in a set order. You should also get into the habit of reading prescribed cases as this skill will stand you in good stead as a prospective legal practitioner.

As a starting point, there are different types of reported court cases. We will examine the difference between so-called civil court cases and criminal court cases. We will look at the doctrine of judicial

precedent, which explains why lower courts have to follow the decisions of the higher courts in the country and why the decisions of superior courts have to be followed in subsequent similar cases. These courts therefore create a binding precedent that lower courts have to follow. Finally, we will look at the standard structure in which a court case is usually reported or published. By discussing each of the various components, or parts, of a court case, you will learn how to read, interpret and make sense of a reported court case. This is something that legal practitioners (i.e. attorneys or advocates) have to do on a daily basis.

Before you start

Have you ever attended an actual court case or witnessed court proceedings on television or in films? If so, you would have noticed that the **presiding officer**, or the **bench**, is required to listen to the oral arguments presented by the legal representatives on behalf of the parties to the case. Sometimes **a party to a case** may not have legal representation. This means that there is no attorney/advocate appearing in court on behalf of the party to present the case to the court. The party will then be given an opportunity to state her case to the court herself. However, for various reasons, including the complexity of legal proceedings, it is advisable for a party to have legal representation as far as possible and appropriate to do so.

Eventually, at the end of a court case, the presiding officer has to make a decision in the matter. The decision is referred to as a **judgment**. The judgment concludes with a **court order**. Before taking a decision however, the presiding officer has to consider the evidence presented with regard to the facts of the case and evaluate the legal arguments that are presented to him on behalf of the parties to the case. The evidence may take various forms, such as oral evidence, documentary evidence, real evidence etc., and will be presented to the court during the course of the hearing of the matter. In addition to presenting evidence to the court, legal representatives will make legal submissions to the bench. *Legal arguments* or submissions refer to the reasons why the court should decide one way or another on what the law says about the facts of the matter. We follow an adversarial trial system in South Africa, which entails adversaries confronting each other in a neutral forum (the court) with an objective presiding officer. To summarise, the sequence in court:

Presentation of evidence by both parties → legal argument by the legal representatives → judgment and court order.

The judgment and court order does not necessarily mean the end of the matter. If for example, there has been a **procedural irregularity**, the matter can be taken on review and will therefore be reconsidered. If a party is dissatisfied with the decision of the court on the basis that the court erred in its finding and wants to question the substantive correctness of the decision, the party, known as the appellant, can take the matter on appeal. Appeal and review are therefore examples of steps that can be taken after judgment has been given in a matter.

Many, but not all, court cases are formally reported or published in writing, but not all cases are formally reported.

The **presiding officer** is often referred to as the **bench**. This is especially so if the presiding officer is a judge and is even more typical if more than one judge hears the matter.

A **party to a case** is referred to as a litigant, since the person is a party to litigation.

The **judgment** typically sets out the various arguments and the reasoning of the court.

A **court order** is the instruction given by the court as to how the matter should be resolved, i.e. someone should do something, pay something or refrain from doing something.

Procedural irregularity refers to, for example, relevant evidence not being considered by the court or irrelevant evidence allowed by the court.

6.1 Case law as an important source of South African law

Case law is a primary source of South African law. Together with legislation, these are some of the most important tools available to a legal practitioner.

When you present a legal argument in court on behalf of your client, you are required to refer to and argue a matter with reference to the legal principles and the law as it stands. The court is not interested in your opinion. This means that you need to present **legal authority** for your submissions; to support your arguments with established legal principles rather than vague notions of what is fair and just in the circumstances. To do this, you need to find reported cases that support your client's case. You even need to consider cases that weaken your client's case and deal with these as part of your submissions to court.

Legal authority refers to the sources of the law, such as case law (court cases) and legislation.

6.2 What does 'case law' or a 'judgment' refer to?

When it comes to dispute resolution mechanisms, disputes or disagreements between parties can be resolved by formal institutions referred to as courts or informally, through other methods, such as mediation or arbitration. The court is the forum or platform for the adjudication of both civil and criminal cases.

In terms of the Constitution of South Africa, 1996, judicial authority is vested in the courts. Chapter 8 of the Constitution deals with courts and the administration of justice in South Africa and contains a number of relevant sections, as shown in Table 6.1.

Table 6.1 Sections of the Constitution and the administration of justice

Section number	What it deals with
165	Judicial authority
166	Judicial system
167	Constitutional Court
168	Supreme Court of Appeal
169	High Court of South Africa
170	Other courts
171	Court procedures
172	Powers of courts in constitutional matters

Section number	What it deals with
173	Inherent power
174	Appointment of judicial officers
175	Acting judges
176	Terms of office and remuneration
177	Removal of judges
178	Judicial Service Commission
179	Prosecuting authority
180	Other matters concerning administration of justice

Generally, a court case involves a situation where one party has taken another to court and has asked the court to resolve the dispute between them. This means that the court is required to listen to the parties (through their legal representatives), consider the facts of the case, assess the evidence, ask questions where necessary and come to a conclusion. The case ends with the presiding officer taking a decision that resolves the dispute between the parties. As explained, the decision may then be reported in the form of a judgment, which includes a court order.

The presiding officer in court is referred to as a judge, in the High Court, or a magistrate, in the Magistrates' Courts.

Court proceedings are usually open to members of the public.

However, in cases dealing with sensitive matters, such as sexual or indecent offences committed against children, etc., the court may exercise its discretion and order that proceedings take place privately **behind closed doors**. Public policy interests, the interest of the parties and/or the interest of justice may require proceedings to take place behind closed doors.

When it comes to dispute resolution mechanisms, disputes or disagreements between parties can be resolved by formal institutions such as the courts or informally, through other methods, such as mediation and arbitration, etc. The court is the forum or platform for the adjudication of both civil and criminal cases.

Read the case study and discuss the questions that follow.

Court proceedings are part of the judicial contest, or litigation, between the parties. Ultimately, the matter goes to court for a final decision.

The Latin term for **behind closed doors** is '*in camera*'.

Case study — Cameras in the courtroom

In recent times, the media has been allowed in the courtroom to televise or sound record the proceedings in certain matters. From the media summary, which is available on www.saflii.org, in the decision of *The NDPP v Media 24 Limited and Others* and *Van Breda v Media 24 Limited and Others* [2017] 3 All SA 622 (SCA) (21 June 2017) and *Van Breda v Media 24 Ltd and Others* 2017 (5) SA 533 (SCA) we learn that:

> "The Supreme Court of Appeal (SCA) opined that the question whether, and under what circumstances, cameras should be permitted in South African courtrooms provokes tension

between the rights of the media to freedom of expression, on the one hand and the fair trial rights of an accused person, on the other. Further, that when two constitutional rights are in conflict, the rights should as far as possible be harmonised with one another. The SCA held that the right to freedom of expression is not limited to the right to speak, but also to receive information and ideas. The court recognized the key position that the media holds in society and found that the constitutional right to freedom of expression goes hand in hand with the principle of open justice, according to which trial proceedings should be conducted publicly in open court.

In considering the right to a fair trial, the SCA acknowledged that one of the most persuasive objections relating to the opposition of cameras in courts is the possible effect that cameras, and the larger audience they represent, may have on the testimony of witnesses in criminal trials. The SCA held that courtrooms are already public places with a physical public presence and that it was open to debate whether such public presence could be said to have an inhibiting or distracting effect on counsel, judges and/or the witnesses. The SCA emphasised that it remains the duty of the trial court in the exercise of its discretion under s 173 of the Constitution, to examine with care the approach to be taken with regard to each application.

… The default position, so stated the SCA, is that there can be no objection in principle to the media recording and broadcasting counsel's address and all rulings and judgments (in respect of both conviction and sentence) delivered in open court. In addition to a case-by-case determination, when a witness objects to coverage of his or her testimony, such witness should be required to assert such objection before the trial judge, specifying the grounds therefor and the effects he or she asserts such coverage would have upon his or her testimony. This approach entails as well a witness-by-witness determination and recognises that a distinction may have to be drawn between expert, professional (such as police officers) and lay witnesses. Such an individualised enquiry, held the SCA, is more finely attuned to reconciling the competing rights at play than is a blanket ban on the presence of cameras from the whole proceeding when only one participant objects. Under this approach cameras are permitted to film or televise all non-objecting witnesses and spurious objections can also be dealt with. If the judge determines that a witness has a valid objection to cameras, alternatives to regular photographic or television coverage could be explored that might assuage the witness' fears. For example, television journalists are often able to disguise the identity of a person being interviewed by means of special lighting techniques and electronic voice alteration, or merely by shielding the witness from the camera. In other instances, broadcast of testimony of an objecting witness could be delayed until after the trial is over.

Consequently, having had regard to the position in various foreign jurisdictions as well as the need for an intricate balancing of the constitutional rights at play, the SCA concluded that courts should not restrict the nature and scope of the broadcast unless the prejudice is demonstrable and there is a real risk that such prejudice will occur. Mere conjecture or speculation that prejudice might occur, so stated the SCA, ought not to be enough".

Source: http://www.saflii.org/za/cases/ZASCA/2017/97.html

1. Should live broadcasts be allowed simply because a court case may be interesting to the public? Or should this be limited to cases which are in fact in the public interest.
2. What about the right to a fair trial?

Professor says — Silence! The court is in session

As a law student, you should attempt to attend at least one court case during the course of your first year of studies. This will help you understand how the legal process works and why court decisions/case law, together with legislation, are primary and binding sources of South African law. It will also be interesting to see the various role-players in the litigation process.

Make a plan to find the court nearest to you – it will be interesting to experience the law in action! Proceedings normally commence at 10:00 am in the High Court and 9:00 am in the Magistrates' Courts. Make sure that you arrive at court in time and that your cell phone is switched off during court proceedings. It is important to observe court etiquette, which refers to protocol, or the customary code of behaviour in society or among members of a particular profession, when attending court proceedings.

Let's look at the differences between civil court cases and criminal court cases so that you don't confuse the two.

6.2.1 Civil cases

In a civil case, one party, or litigant – this can be a natural person or a **juristic person** – has taken another party to court for one of two purposes:

1. to claim, or ask for, money (action procedure)
2. to enforce rights against another person, in other words, to force the other person to do something or not do something (application procedure).

Examples of **juristic persons** are companies and close corporations. A juristic entity has a separate legal personality and can sue or be sued in its own name. For purposes of court proceedings, such entities will testify or give evidence through a duly authorised representative, such as a director.

Action procedure

For the first purpose – to claim, or ask for, money – the *action* procedure is used.

1. The parties are referred to as the plaintiff and the defendant. The parties exchange court documents known as pleadings and the matter ends in a civil trial, where oral evidence will be presented.
2. Examples of the action procedure include:
   - a claim for damages (financial loss)
     - Following a motor vehicle collision between two parties, the party whose motor vehicle was damaged as a result of the collision, in other words, who is the owner of the damaged vehicle, will have legal standing to claim an amount of money from the party whose negligence (by exceeding the speed limit, not keeping a proper lookout or texting while driving) caused the collision. The first party may approach the court to claim, for example, the costs of repairing her vehicle to its pre-collision condition as well as any medical costs, together with interest and legal costs.
   - a claim for damages following breach of contract
   - a divorce matter.

Application procedure

For the second purpose – to enforce rights against another person – the application procedure is used.

1. The parties are referred to as the applicant and the respondent. The parties exchange sworn statements or affidavits and the matter will be argued by the legal representatives in motion court. An affidavit is a sworn statement signed in the presence of a commissioner of oaths. The commissioner (i.e. the police official, bank manager or attorney) is required to administer the oath by asking the person who signs the document (referred to as the deponent) certain questions, for example, if he understands the content; if he has an objection to taking the oath and if he considers this as binding on his conscience, before attaching her stamp and signature to the document.

2. Examples of the application procedure include:
   - an **interdict** – rather than claiming an amount of money/damages, the party may apply for an interdict, as will be the case when, for example, you want to force your neighbour to remove branches from trees that are encroaching or hanging over onto your property. This is an example of a so-called bilateral application, as there is typically two parties before the court, the applicant and the respondent.
   - an application to prevent a newspaper from publishing **defamatory** information about a person
   - an application for admission as attorney or advocate. This is an example of a so-called ex parte application, since there is only one party before the court, without any opposition. For purposes of entry into the legal profession, a prospective attorney or advocate has to formally apply to court for her name to be added to the role of practitioners.
   - an application to compel a party to comply with the rules of the court during the litigation process. This is an example of a so-called interlocutory or interim application, as it is provisional or temporary application which is brought to obtain ancillary relief incidental to the main proceedings or main case between the parties.

An **interdict** is an order compelling a person to do something or preventing someone from doing something.

Defamation is an example of a delict or unlawful action causing harm to a person's reputation.

The nature of the remedy that the court is called upon to provide is different depending on whether the action or the application procedure is used. In a civil case, the purpose is not to punish anyone but simply to recover an amount of money/damages or to force a person to perform a particular action, other than the payment of money, or to refrain from doing something.

Civil cases are regulated, or governed, by the law of civil procedure. It regulates civil matters between legal subjects.

6.2.2 Criminal cases

In a criminal case a person called the perpetrator has committed a crime/criminal offence. In other words, he/she has done something that is illegal and the community expects the state to take steps against the perpetrator and ultimately for the person to be punished for what he/she has done. As a result, the state will prosecute an accused, who is the person thought to be the perpetrator, and if found guilty (in other words, convicted), he will be punished. The purpose of a criminal case is to punish a convicted person for having committed a violation of the law. The punishment can take the form of, for example, a jail sentence or a fine payable to the state. Examples of crimes include murder, rape, theft, fraud, terrorism, kidnapping, **money laundering** and treason, to name a few.

Criminal cases are regulated, or governed, by the law of criminal procedure. The law of criminal procedure is that part of the law that prescribes the procedure to be followed in criminal matters between the state and the accused. It provides the rules on how to prosecute and punish the accused.

Money laundering can be defined as the process of making illegally-gained proceeds (i.e. 'dirty money') appear legal (i.e. 'clean'). This is done by concealing the origins of the illegally obtained money, through for example, depositing the funds into a legitimate bank account (i.e. a firm of attorneys' trust bank account) and then asking for the money to be paid back.

Professor says — The role of the state in civil cases

The distinction between civil and criminal cases does not mean that the state is never involved (in other words, is never a party) in a civil case. It is possible for the state to be sued by a private individual/citizen. For example, the Minister of Safety and Security may be sued in a representative capacity by a member of the public for loss suffered as a result of negligence by the South African Police Service or on the basis of wrongful arrest and detention. Alternatively, the state may sue an individual for financial loss (damages) caused to state-owned property.

6.2.3 Overlap between civil and criminal cases

It is possible for the same set of facts to give rise to both a civil and a criminal case. Can you think of an example?

Let's consider the following newspaper article:

Alistair Twigge pleaded guilty to hitting man in road rage attack in Lewes Road, Brighton

A pharmacist who cut into a lane and crashed his car, punched a man in a road rage attack.

Alistair Twigge, 52, cut in front of another driver while changing lane at a set of traffic lights in Lewes Road, Brighton, but ended up crashing into the other vehicle. He then got out of his car and punched the driver on the head, before driving away on June 15. The registered pharmacist pleaded guilty at Brighton and Hove Magistrates' Court on Monday to assault.

The court heard Twigge had been at the traffic lights in Lewes Road, when he tried to squeeze his Vauxhall Zafira in to a gap in the right hand lane in the direction of Bear Road. But the driver he tried to pull in front of, Vitalijs Bedniks, sped up and Twigge hit his car. Mr Bednik's Vauxhall Astra suffered damage to its front headlight, bumper and wheel trim. Both drivers got out of their cars, but when Mr Bedniks turned his back to get his phone to exchange details, Twigge punched him. Martina Sherlock, prosecuting, told the court: "When Mr Bedniks turned his back, Twigge struck him on the back of the head with his hand. The force of this strike left Mr Bedniks feeling dizzy and seeing stars. "Twigge then got back in the car without exchanging his details." The court heard Mr Bedniks suffered painful headaches for two days as a result of the blow and reported the assault – which was recorded on his in-car camera – to the police.

In a police interview on July 4 Twigge, who previously worked at Kamsons in Preston Drove, admitted hitting Mr Bedniks and expressed remorse. He said he felt baited by Mr Bedniks and said he didn't stop as his car wasn't damaged, and he didn't think Mr Bedniks' was either. Twigge, of Brambletyne Avenue, Saltdean, also pleaded guilty to failing to stop after a road accident and failing to report the accident. Sentencing, chairman of magistrates Robert Macrowan said: "Your remorse, clean record and the fact you have recognised you have an anger problem on which you have taken action has gone in your favour in terms of punishment. But this was serious. You are a big man and hit somebody, and hits come out worse as head injuries. They can be quite problematic as you know from your line of work."

Twigge was ordered to pay £575 in fines, £85 in court costs and a £30 victim surcharge. He was also issued with five points on his licence.

Source: http://www.theargus.co.uk/news/15559120.Pharmacist_hit_man_in_road_rage_attack/

The above case will give rise to both a civil and a criminal case:

- a civil claim for damages in respect of the vehicle
- a criminal case for assault/assault to do grievous bodily harm.

6.2.4 Legal representation in court

We now consider the role-players in court proceedings. Currently, there is a so-called divided profession in South Africa, which allows for both attorneys and advocates. This is summarised as follows by Van Dijkhorst, J. in the title on Legal Practitioners in *The Law of South Africa (LAWSA),* Vol 14(2), 2nd edn, paragraph 111:

> "The South African legal profession is divided into two branches: advocates and attorneys. Although both serve the administration of justice, the professionals of advocate and attorney differ in several respects. The advocate is generally the specialist in forensic skills and in giving advice in legal matters, whereas the attorney has more general skills and is often, in addition, qualified in conveyancing and notarial practice. The attorney has direct links (often of a longstanding nature) with the client. The advocate has no direct relationship with the lay client and acts on brief in a particular matter … their

practical schooling is markedly different. Advocates and attorneys occupy themselves with different kinds of litigious work. The advocate generally prepares pleading and presents clients' cases to the courts whereas the attorney takes care of the investigation of facts, the issuing and service of process, the discovery and inspection of documents, the procuring of evidence and the attendance of witnesses, the execution of judgments and so on. Each applies his or her own skills for the benefit of the client."

As you will see, new legislation in the form of the Legal Practice Act 28 of 2014 sets out a new legal framework for the transformation and restructuring of the legal profession in South Africa.

An attorney usually represents each party to a case, unless a party acts for herself. An attorney is a qualified professional who deals with legal matters on behalf of clients. Attorneys are often general practitioners, but who may also appear in court to represent their clients. Unlike most attorneys, advocates are specialist litigators who specialise in court work and in arguing matters in court.

Professor says — Court etiquette – know how to behave

Legal practitioners should address the court correctly and appropriately. The court structure in South Africa is discussed in more detail in Chapter 10, but for now, please take note of the following:

- A magistrate in the Magistrates' Court is addressed as 'Your Worship'.
- A judge in the High Court is addressed as 'My Lord', 'My Lady', 'Your Lordship(s)' or 'Your Ladyship(s)'.
- The bench in the Supreme Court of Appeal is referred to as the 'Court' and an individual judge of appeal is addressed as 'Justice' followed by the surname of the judge. The same applies to the bench in the Constitutional Court.
- If the court is in session, a legal representative should not address the presiding officer as 'sir', 'mister', 'mrs' or 'madam'.

A legal representative must show the necessary respect to the court by, for example:

- introducing herself to the presiding officer in chambers before the case commences
- appearing in court on time
- switching off her cell phone
- wearing the prescribed black robe
- remembering that her highest duty is to the court.

6.2.5 Judgment

At the end of a court case, when the presiding officer has heard all the evidence and legal arguments presented to court by the different parties, she must make a decision, or, in other words, deliver her judgment.

When you read reported court cases or judgments, you will notice that the decision of a judge is in fact a reasoned explanation of the ruling that the judge gives in a particular case. These explanations consist of two aspects, or parts:

1. The facts: the judge gives her interpretation of the circumstances that caused the dispute.
2. The legal position: the judge states the law, gives her conclusions on the legal rules and principles that are relevant to the particular case.

After analysing the facts and legal position of a matter, the judge concludes by applying the legal principles to the facts of the case at hand and making an order. The order of the court appears at the end of the judgment – it sets out the conclusion, or decision, that the presiding officer reached in the matter. This can be, for example, that judgment is granted in favour or the plaintiff or that the application is granted or dismissed with (legal) costs.

Professor says — Question of fact versus question of law

A question of fact is a question that relates to what happened in a particular matter. This must be answered with reference to facts of the case, the available evidence, as well as inferences that can be drawn from the facts. The answer, in the form of a finding of fact, will depend on the particular circumstances or factual situation. This is different from a question of law. A question of law must be answered by applying relevant general legal principles. The answer will be in the form of a general legal principle/conclusion of law and this can be applied to a variety of situations, rather than being dependent on a particular factual situation.

Let's consider the following example of this important distinction by looking at a criminal case.

Be clear about the difference between the facts of a case and the legal principles involved. Focus on how the court applied the law to the facts and not simply on the facts themselves. For example, in the case of a matter involving a motor vehicle collision, it is not about remembering who the parties were, what the colour of the motor vehicle is or where the collision occurred. Instead, you should be able to identify the applicable law, for example, if it is a delict or unlawful action with reference to the elements of the delict (act; unlawfulness; fault; damage; causation) and understand why a party was found to be liable or not. The facts are useful in so far as they help you to remember a particular court case or to distinguish between different cases dealing with the same issue.

Case study — Mr Zolinga's attack

In or about July 2010, Mr Zola Zolinga was attacked by Mr Ben Banda at an international soccer match during the Soccer World Cup at Soccer City in Johannesburg. Ben had been threatening to kill Zola since the beginning of the year, when the parties met at a New Year's party and became involved in a heated argument about soccer players and their favourite sports teams. While standing in the queue in a crowded beer hall at the soccer stadium, Ben attacked Zola by stabbing him in the back with a knife. After a physical battle between the two, Zola produced a firearm and fired a shot at Ben, wounding Ben in the head. The shot was fatal. Ben died on the scene and Zola was subsequently charged with murder.

If this scenario is proved in court, it will make up the facts of the case. The court will then have to apply the relevant legal principles to the facts, in order to reach a conclusion as to whether Zola is guilty or not. The legal principles will include, for example, the requirement (for a finding of guilt) that all the elements of the crime of murder are present in this matter. These elements are the intentional, unlawful, killing of another human being. Zola's conduct would have to be considered to be unlawful for it to qualify as murder. Usually, it is unlawful to kill another person. In certain circumstances the killing might be justified and thus lawful. Before making its finding, the court will also ask itself whether the conduct could be justified on the basis that Zola acted in self-defence – in other words, that he resorted to reasonable force in an attempt to fight off a life-threatening attack and to save his own life. Our common law recognises certain grounds of justification, such as private defence (or self-defence). Legislation may also provide statutory grounds of justification.

6.3 Why are court cases reported?

What happens to a court's decision or judgment after it has been handed down or delivered in court? Is the judgment only available to the parties to the case or is it possible for other persons, such as law students, legal practitioners or even members of the public, to obtain a written record of what was decided in a particular court case? Is it important for people to know what has been decided in someone else's dispute?

We will consider the answers to these questions below.

6.3.1 What is a reported case?

A reported court case is the published or documented judgment of a particular matter decided by a court. Reported court cases are also referred to as case law. *Case law* is made up of the documented and published decisions of professional jurists (judges) who **try** disputes (civil cases) or prosecutions (criminal cases) in courts.

To **try** a case means to examine or judge a legal case, or someone who is thought to be guilty of a crime.

Not all court cases are reported. It would be impossible to report every court case that takes place in South Africa. Usually, only those cases that could contribute, or add, to the development of the law are reported. Examples of cases that are suitable for reporting include cases:

- involving an important legal principle
- that raise a new principle
- where an area of uncertainty in the law is clarified
- where an existing judgment is **set aside**.

A person may appeal against a decision of a court in which she lost a case. If the appeal court then changes the decision of the first court, it '**sets aside**' the first judgment and replaces it with a new order.

Even though not all cases are formally reported, court proceedings in high courts are usually recorded and a typed **transcription** of the proceedings should be available on request. Sometimes a fee (for example, R20 per page) to an independent transcription company must be paid for the preparation of a typed transcription.

A transcript or **transcription** of the proceedings is a written or printed copy of what was said in court.

Even if a case has not been formally reported (a so-called unreported case), it has the same authority, or importance, as a reported case. Unreported cases may not find their way into the formal sets of published law reports, but many of these cases are available online, as part of online case law databases provided by publishers, such as Juta and LexisNexis (South Africa).

6.3.2 Reasons to report court cases

Case law is a primary and binding source of our law. A written record of important court cases is therefore essential.

It makes sense to keep a written record of a case and to then publish or report the court judgment in writing. This ensures that information about court cases is available to law students, legal practitioners, the court and even laymen in the future. Written judgments enable the public but more importantly a specialised legal audience consisting of legal practitioners, presiding officers and law students to follow the court's reasoning and to be persuaded that the decision is in fact correct.

The publication of court cases is important not only for academic and research purposes, but also to inform all other courts of exactly how legal principles were applied in earlier cases. Without a written record of courts' previous decisions, we would not know how justice is administered on a daily basis. It would also be almost impossible to ensure that similar cases are treated in a similar way by the various courts – which is a basic requirement of fairness in our law. Reporting court cases therefore helps to minimise discrepancies between similar cases.

Professor says — Read court cases regularly

Case law is one of the most important tools the jurist needs to practise her trade successfully. Can you imagine the surgeon carrying out an operation without the necessary instruments or tools, or a builder having to construct a large commercial property without the necessary tools? It is simply not possible. In the same way, the jurist cannot advise clients, draft documents or opinions or appear in court without the proper and correct use of case law.

Legal practitioners must know how our courts apply legal principles. They need to be informed of the latest legal developments. Therefore, they need to read court cases regularly, as and when they are reported, in addition to following any legislative developments.

Professor says (continued) — Read court cases regularly

The law, as you will learn, is not cast in stone – it changes from time to time to meet the needs of a changing society. It is vital for any successful legal practitioner to remain informed of new or amended legal principles and, more importantly, of how such principles have been applied by our courts in actual court cases. Cases are available as part of online databases, such as Juta, LexisNexis and Saflii. Law reports refer to the actual books or journals in which court cases are reported. It is impossible to practise law without reading these law reports on a regular basis, whether in hard copy or online.

6.3.3 Case law as a source of South African law

It should be clear that presiding officers are not free to decide whatever they want in court cases. As a general rule, they have to follow what has been decided by higher courts in similar cases in the past. This explains why case law is one of the most important sources of our law.

Case law is a primary and binding source of the law. This means that it is not only a source, or place, where legal rules or ideas can be found, but that it is also a source that creates law.

Hundreds of cases are dealt with in the various courts in South Africa every day. In each of these cases, our courts apply and interpret the primary sources of our law, such as case law, legislation (the most important of which is the Constitution) and the common law. In this process, case law contributes to the development of our legal system.

Case law is a binding source of our law, but you should note that **foreign case law**, in other words, the decisions of courts in other countries do not create a binding precedent for South African courts. In addition, in terms of s 39 (the so-called interpretation clause) of the Constitution of the Republic of South Africa, 1996:

> "When interpreting the Bill of Rights, a court, tribunal or forum –
> a. must promote the values that underlie an open and democratic society based on human dignity, equality and freedom
> b. must consider **international law**
> c. may consider **foreign law**.
>
> When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

Foreign case law is referred to as persuasive authority.

International law refers to the set of rules generally regarded and accepted as binding in relations between states and between nations. It is established by custom or treaty.

Foreign law refers to the law of any particular foreign country.

It is possible to access foreign case law, including case law from many Africa jurisdictions, online at, for example, http://www.saflii.org/

Professor says — Old cases remain relevant

Case law is an evolving source of law, in which new cases build on old case law. Old cases are often still very influential sources of law today as the basic principles applied in these earlier cases may not have changed.

An **index of reported cases in southern Africa** is available from the very first reported cases in 1828 (in the Supreme Court of the Colony of the Cape of Good Hope) up to the end of 1946. From 1947 to date, cases are reported as part of the official South African Law Reports.

You will find these in:
Malan, F.R. and Van der Walt, J.C. 1983. *Index to the SA Law Reports 1828–1946*. Durban: Butterworths.

6.3.4 The doctrine of judicial precedent

A hierarchy, or a set order, of courts exists in South Africa, as in most other countries. This means that we distinguish between lower courts and higher courts. The decisions of higher courts carry more authority than those of lower courts and, as a result, lower courts have to follow the decisions of higher courts. Fairness requires that similar cases are treated in a similar way. This means that the decisions of higher courts create a precedent, or set example, that lower courts have to follow – it is authoritative binding authority and not merely persuasive in nature.

Stare decisis et non quieta movere means "let the decisions stand and do not disturb settled matters of law".

This is the basis of the doctrine – a set of principles – of judicial precedent, also known as the doctrine of *stare decisis*. The *stare decisis* doctrine is fully stated as: ***stare decisis et non quieta movere***.

The doctrine of judicial precedent, as we apply it today, was unknown to Roman-Dutch law. The doctrine originates from English law and was introduced to the Cape in 1827 by the Charter of Justice.

Examples of **civil law** jurisdictions include France, Germany, Switzerland and Sweden.

The consequence, or result, of this doctrine is that the decisions of judges form a very important part of our law. For that reason, reports of court cases are published frequently and jurists (and law students) need to read them regularly – case law is one of the most important tools available to a legal practitioner.

Examples of **common law** jurisdictions include Australia, Canada, England and South Africa.

Legal systems around the globe generally fall under one of two categories:

- **civil law** systems
- **common law** systems.

The difference between these two lies in the main source of law. In civil law systems, the core principles are set out in a code, which serves as the most important source of law. Legal precedent therefore does not play an important role. The code has been designed to cover all eventualities and the role or presiding officers is therefore more limited when applying the law to the facts of the case compared to common law jurisdictions.

In common law jurisdictions, legal precedent plays a significant role, but reference is also made to statutes and legislation.

In some countries, we have a mixture of the features of these two categories.

Keep in mind that some Muslim countries have adopted parts of Sharia law, for example, Saudi Arabia, Afghanistan, Iran, U.A.E., Oman, Sudan, Malaysia, Pakistan and Yemen.

Professor says — Check your sources

When reading a case, make sure that the case is still good law and that it has not since been changed or overruled by a decision of a higher court. You may use the *Butterworths Noter-Up to the SA Law Reports* or *Juta's Annotations to the SA Law Reports* to see if a case has been criticised, overruled or confirmed by courts in later cases. These are available online at www.lexisnexis.co.za and www.juta.co.za/law

The purpose of the doctrine is to enable the community to plan its legal affairs and transactions. It allows the community, and more specifically legal practitioners, to predict how the legal system will deal with a particular situation or problem – for example, what will happen when one party to an agreement breaches the contract in a particular way – what remedies will the court grant under particular circumstances. This doctrine supports legal certainty – in other words, certainty that the interpretation of the law will stand and will not readily and unnecessarily be changed by judicial officers (such as judges and magistrates).

The advantages of the doctrine are clear:

- certainty
- stability
- equality of treatment – like cases are treated in a like manner
- efficient administration and enforcement of justice.

In so far as disadvantages go, the doctrine can be criticised on the basis of:

- prejudice to individuals
- inflexibility
- unpredictability and uncertainty
- potentially stifling when it comes to legal development, etc.

As lower courts are bound by the decisions of higher courts, it is important to identify the courts that exist on various levels within our legal system.

Table 6.2 The hierarchy of courts in South Africa

Hierarchy of courts in South Africa		
Superior Courts	Constitutional Court (CC)	The court is located in Johannesburg (Constitution Hill, Braamfontein) and is the highest court in *all* matters.
	Supreme Court of Appeal (SCA) (previously known as the Appellate Division of the Supreme Court or the AD)	The court is located in Bloemfontein and deals only with appeal matters.
	High Court of South Africa (previously known as the Supreme Court)	Various divisions of the High Court of SA are situated across South Africa.
		There are also a number of specialised high courts that deal with matters of a specialised nature.
Lower Courts	Magistrates' Courts	Two types of Magistrates' Courts: 1. Regional 2. District Every region is made up of a number of districts. There are also a number of specialised lower courts.
	Other lower courts	Small claims courts and others

How does the doctrine of judicial precedent work in practice?

During court proceedings, a legal representative can use an earlier judgment as authority for her client's case. She does this in order to prove to the court that her client's case is better in law than her opponent's case and that her client should therefore win the case. The court is not interested in a legal representative's own opinion or view. A legal representative must support all her arguments in court with reference to authority or proof (in other words, the sources of law, such as case law or legislation).

Not everything in a high court judgment creates a binding precedent for lower courts. In this regard, it is necessary to distinguish between two important concepts:

1. The *ratio decidendi* refers to the part of a judgment that binds lower courts. These are the reasons for the court's decision and this is what creates a binding precedent for lower courts.
2. An ***obiter dictum*** refers to a remark made in passing by the presiding officer. This part of a court's judgment does not create a binding precedent. If for example, in stating the law, the judge goes beyond what is strictly necessary to help him arrive at his decision, the unnecessary statement does not form a binding precedent.

The plural is ***obiter dicta***.

Can you think of circumstances where a lower court will not have to follow an existing precedent set by the High Court, in other words, where a court does not have to follow a previous court case?

A court may deviate, or differ, from a previous decision when:

- the previous decision was clearly and manifestly wrong. In this case, the court may refuse to follow the previous decision and overrule it.
- the facts of the two cases are not materially the same.

Also, a court's finding on the facts – that is what the facts of the case were – does not create a binding precedent. Decisions on fact are not binding, legal consequences follow from certain facts, the decision will be binding when similar facts are raised in subsequent cases.

The practical operation of the doctrine of judicial precedent means the following:

- All courts in South Africa are bound by decisions of the Constitutional Court, as the highest court in all matters.
- The Constitutional Court is also bound by its own previous judgments, unless it is satisfied that the previous decision is wrong.
- The High Court and all lower courts are bound by decisions of the Supreme Court of Appeal.
- The Supreme Court of Appeal is bound by its own previous judgments, unless they are clearly wrong or if they have been overruled by the Constitutional Court.
- The High Court is bound to follow its own previous judgments, unless they are clearly wrong.
- One division of the High Court is not bound by another division. In other words, a division of the High Court in one province (provincial or local division) is not bound to follow the decisions of a division of the High Court in other provinces, as they are on the same level. This explains why, in some instances, there may be a difference between the application of legal principles in the various provinces.
- In the High Court, a matter can be heard by a single judge or by a full bench (which consists of two judges) or by a full court (where the matter will be heard by three judges). A single judge is bound to follow the decision of a full bench in the High Court in the same province.
- A Magistrates' Court is bound by a decision of the High Court in the same province.

Professor says — *Stare decisis* doctrine

Does it make sense to apply this doctrine? It certainly ensures that the law is applied uniformly. This helps citizens in planning their activities. It creates legal certainly. It also assists lower courts in deciding matters before them and ensures that presiding officers in these courts do not take arbitrary decisions. On the other hand, it may be said that the doctrine prevents courts from making a significant contribution to legal development. It is obviously difficult or impossible for a court to change the legal position or to create new legal principles when it is bound to follow existing judicial precedent.

Case study — Corporal punishment

Previously, s 294 of the Criminal Procedure Act 51 of 1977 entitled presiding officers to impose the sentence of whipping on male juvenile offenders. This sentence was carried out in a number of court cases where accused juveniles were found guilty of serious offences. In the case of *S v Williams and Others* 1995 (3) SA 632 (CC), the Constitutional Court changed the existing legal position by declaring that this form of punishment is inconsistent with the following rights in the Interim Constitution:

- "Every person shall have the right to respect for and protection of his or her dignity."
- "No person shall be subject to torture of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhuman or degrading treatment or punishment."

Since the date of the court order, this provision in the Criminal Procedure Act is invalid and the law no longer allows corporal punishment. In other words, in terms of the doctrine of judicial precedent, all courts in South Africa are now bound by the Constitutional Court's decision in *S v Williams and Others*. Courts are no longer allowed to sentence anyone to whipping.

6.4 Where and how to find a reported court case

Court cases are reported in various series of books called law reports. Law reports contain the judgments of the various courts, such as the Constitutional Court, the Supreme Court of Appeal and the various divisions of the High Court of South Africa. The decisions of Magistrates' Courts are not formally reported.

Most cases are reported in the *South African Law Reports* (*SALR* or *SA*) or the *All South African Law Reports* (*All SA*). These law reports contain cases concerning all areas of law. If the matter is of a specialised nature, it may be reported in a specialist law report, for example, the:

- *South African Criminal Law Reports* (*SACR*) (these only contain criminal cases)
- *Butterworths Constitutional Law Reports* (*BCLR*) (these contain matters of a constitutional nature)
- *Butterworths Labour Law Reports* (*BLLR*) (these contain labour law matters)
- *Butterworths Arbitration Law Reports* (*BALR*) (these contain matters that are decided using arbitration as a method of dispute resolution).

Sometimes the same case is reported in more than one set of law reports – this is referred to as parallel citation. The *Van Breda* case, referred to in Section 6.2, has been reported in both the SA law reports as well as the *All SA Law Reports*. A case may, for example, be reported in both the *SALR*, as well as the *SACR*. As a result, it will have two different citations. A citation is a particular reference to the name of the case. You can consult either of these law reports when looking for the case, because the content of the reported case will be the same.

Most of the law reports mentioned above should be available in the law library on your university campus. Apart from hard copies, by which we mean books, law reports are also available in electronic format. A variety of legal sources and law reports are available on the internet from legal publishers, such as Juta Law https://juta.co.za/law/ and LexisNexis http://www.lexisnexis.co.za. They allow **subscribers** to access this information in their **databases**. It will no doubt be available in your university library on campus. The publishers may also add various aids for locating relevant cases, such as different types of **indexes**. This makes it very easy to locate a case, even if you do not have the full citation or name of the case. These databases are essential tools in any legal research.

Subscribers are people who pay a fee to access the information.

A **database** is a large amount of information that is stored.

An **index** is an alphabetical list of, in this case, reported cases or statutes.

Activity 6.1

It is important that you know how to use the library and the internet to find reported cases. Familiarise yourself with the Juta and Jutastat, LexisNexis and Saflii databases as soon as possible. Use an electronic resource to locate at least one case, for example, dealing with statutory rape or rape, and one Act (a statute), for example the Constitution of the Republic of South Africa, 1996 or the Criminal Procedure Act 51 of 1977. You may also use these resources to find any of the cases referred to in the 'Further reading' section at the end of this chapter.

Find hard copies of the following reported court cases in the university library. Ask the librarian to help you if necessary. We will refer to these cases throughout our discussion of case law:

Case 1: *Commissioner, South African Revenue Service v Motion Vehicle Wholesalers (Pty)* Ltd [2007] 4 All SA 1207 (SCA)

- The full details are as follows:
  Commissioner, South African Revenue Service v Motion Vehicle Wholesalers (Pty) Ltd (names of parties to the case) [2007] (year of publication of case) 4 (volume of law report in which the case appears) All SA (particular set of law reports, in this case the All South African Law Reports) 1207 (page number of law report) (SCA) (reference to specific court, in this case the Supreme Court of Appeal)

Case 2: *Pillay v Pillay* 2004 (4) SA 81 (SE)

Case 3: *S v Maleka* 2001 (2) SACR 366 (SCA)

Activity 6.1 (continued)

Case 4: *S v Ferreira and Others* 2004 (2) SACR 454 (SCA)
Case 5: *Road Accident Fund v Mtati* 2005 (6) SA 215 (SCA)
Case 6: *Steyn v Hasse and Another* 2015 (4) SA 405 (WCC)
Case 7: *Lucky Star Ltd v Lucky Brands (Pty) Ltd and Others* 2017 (2) SA 588 (SCA)
Case 8: *BS v MS and Another* 2015 (6) SA 356 (GPD)
Case 9: *Primedia (Pty) Ltd and Others v Speaker of the National Assembly and Others* 2017 (1) SA 572 SCA

The *citation* or names of these cases appears in the correct format used to refer to, cite or describe a reported court case. In the citation of the *Commissioner* case, each component of the citation has been explained in brackets. This should make it easier for you to read and understand the citation of each of the other cases referred to in this chapter and to locate the cases in the library. If you struggle to find a reported case on your own at this stage, ask a librarian to help you.

Professor says Hard work and dedication

It takes time, practice and dedication to master the art of reading and understanding reported court cases. There is only one solution: take the time to sit down and read cases yourself.

It is very important that you read the cases that will be prescribed by lecturers during the course of your legal studies and that you make your own summary of a case – do not rely on someone else's notes.

When reading a case, make a clear distinction between the facts of the case on the one hand and the law/legal principles it relates to on the other hand. It will not help to only know the facts of a case. It is far more important that you are able to explain the reasons for the court's decision. While it may be interesting to know what the facts of a case are, you are only really able to read and understand a reported case properly if you are able to extract from the facts the legal question posed by the case, can identify the relevant legal principles and if you can explain the deciding arguments. This is what distinguishes the law student and legal practitioner from any other reader of the case.

6.5 How to make sense of a reported course case – reading a reported judgment

Being able to read and interpret court cases correctly is a critical skill for law students and legal practitioners. We will consider the different components or parts of court cases here.

6.5.1 General remarks on the structure of a reported case

Reported court cases usually follow a set or specific structural format. For example, the main paragraphs always appear in a particular order. The purpose of this part of the chapter is to provide you with guidelines on the visual structure (the set order in which paragraphs appear) of a typical reported court case, as well as on reading, interpreting and understanding a reported court case.

We will discuss the style and appearance of a printed court case. As all reported court cases follow the same structure, if you understand the basic structure, you should be able to read and interpret the most important components of any reported court case, regardless of what the case relates to and/or whether you are dealing with a civil or a criminal court case.

The art of reading a reported court case lies in eliminating the non-essentials, in other words, the information that is not strictly needed or relevant, and in focusing only on the important parts of the case – who, where, what and why.

- Who were the parties to the case?
- Who was the presiding officer?

- Which court heard the matter and where is the court situated?
- What is the case about (facts and legal principles)?
- Most importantly, why did the court come to a particular conclusion – in other words, what were the reasons for the court's decision? The reasons for the decision are important as they create a binding precedent.

After you've read the case in its entirety, ask yourself these questions:

- What are the facts?
- What legal question or issue the court is trying to answer?
- What is the decision?
- What are the reasons for the decision?
- Do I agree with the decision? Why?

Academics, such as law professors, typically write case notes or case discussions in **law journals** where they analyse the court's decision in a particular case with reference to the five main questions mentioned above. Case notes that deal with your prescribed cases is another useful tool to help you make sense of the court's decision in a particular matter.

There are various **law journals** in South Africa, for example, the SA Law Journal, De Jure, African Human Rights Law Journal, Journal of SA law, etc. Journal articles constitute a secondary source of law and are merely persuasive in nature.

6.5.2 Notes and commentary on the structure of an individual case

In order to analyse a court case, we will look at the decision in *Commissioner*, *South African Revenue Service v Motion Vehicle Wholesalers* (Pty) Ltd [2007] 4 All SA 1207 (SCA) (referred to as the *Commissioner* case below). A copy of this case, as it has been reported in the *All South African Law Report*s, appears below.

Structure of a reported court case

The structure of a reported court case has various components, or parts. For purposes of discussing the structure of the *Commissioner* case, we have numbered the various parts of the case with numbers 1–15. You will not find these numbers in an actual law report – they are only included here to help explain the various parts of the reported decision. Numbers 1–8 refer to the number used in this chapter to discuss the particular component of the case. Numbers 9–15 refer to the particular components that form part of a reported court case. The components of a case are numbered as follows:

1. Alphabetical markers
2. Name of the case
3. Relevant court
4. Presiding officers
5. Dates (of hearing and of judgment)
6. Catchword paragraph
7. Head note
8. Legal relief/remedy
9. Legal representatives
10. Heads of argument
11. Latin terms
12. Judgment
13. Order
14. Firms of attorneys
15. English translation.

The structure outlined above matches the usual structure of a reported case. We will now discuss and analyse the structure of a court case in detail. First, we state the general principles relating to each component of the case and then apply those principles to specific cases as examples.

Commissioner, South African Revenue Service v Motion Vehicle Wholesalers (Pty) Ltd

SUPREME COURT OF APPEAL

LTC HARMS, FDJ BRAND, TD CLOETE JJA, LV THERON AND A CACHALIA AJJA

Date of Judgment: 26 SEPTEMBER 2006 Case Number: 509/05

Sourced by: PR CRONJÉ Summarised by: D HARRIS

Customs and excise – Customs duty – Tariff classification of imported vehicles.

Editor's Summary

The respondent was an importer of vehicles manufactured in Japan as eight-seater vehicles. After manufacture, the vehicles were modified in Australia through the addition of two more seats. After customs clearance in South Africa, the extra two seats were returned to Australia for re-use in the same manner and the vehicles were sold locally as suitable for the transport of eight persons.

Although the appellant had initially issued a determination that the vehicles were classifiable under tariff heading 87.02, he subsequently changed his determination to the effect that the vehicles were classifiable under heading 87.03. The respondent's appeal to the High Court succeeded, and the present appeal was noted to the present Court.

According to the appellant, the vehicles were superficially modified in Australia in an attempt to bring them within the ambit of heading 87.02 thereby attracting a lower customs duty rate.

Held – The question was whether the vehicles were designed for the transport of ten or more persons or whether they were disguised as such as part of a scheme to limit the respondent's liability in respect of the payment of customs duty.

The Court referred to its exposition on the general principles applicable to tariff classification and the manner in which they are to be applied and interpreted in *Commissioner, SA Revenue Service v Komatsu SA (Pty) Ltd*.

In deciding on the appropriate tariff classification in this case, the Court focused on the purpose for which the vehicles were designed. It found on the evidence before it, that the vehicles were designed and sold as eight-seater vehicles. The respondent had attempted to disguise vehicles designed for the transport of eight persons as vehicles designed for the transport of ten or more persons, solely for the purpose of evading higher customs duty.

The appeal was upheld.

Cases referred to in judgment

Autoware (Pty) Ltd v Secretary for Customs & Excise 1975 (4) SA 318 (W) 1210

Commissioner for Inland Revenue v Conhage (Pty) Ltd (Formerly Tycon (Pty) Ltd) [1999] JOL 5363 (1999 (4) SA 1149) (SCA) 1210

Judgment

THERON AJA:

[1] The sole question in this appeal is whether the vehicles imported by the respondent are, for purposes of customs duty, to be classified as vehicles for the transport of either less than ten persons or of ten persons or more.

[2] The respondent is an importer of Toyota Land Cruiser 100 Series vehicles. The vehicles are manufactured by the Toyota Motor Corporation ("TMC") in Japan as eight-seater vehicles comprising two bucket seats in the front row and two bench seats for the second and third rows, with the latter two rows each providing seating for three persons. The third row is attached to the base of the vehicle, by being clipped onto brackets, which are built into and form part of the base of the vehicle. Behind the third row is a luggage compartment. The third row is optional and can be removed. It is common cause that the vehicles, as described, fall to be classified under tariff heading 87.03.[1]

[3] After being manufactured in Japan, the vehicles are modified in Australia. Two additional seats are added in the luggage compartment at the rear of the vehicle, each facing the other. The vehicles are presented, on importation, with these two additional seats. It is common cause that the two additional seats are removed after customs clearance, returned to Australia for re-use in the same manner and the vehicles are sold as suitable for the transport of eight persons.

[4] On 21 March 1998 the appellant, acting in terms of section 47(9)(*a*)(i) of the Customs and Excise Act 91 of 1964,[2] issued a determination that the vehicles were classifiable under tariff heading 87.02.[3] Since that date the

1 Heading 87.03 read at the time:
"Motor cars and other motor vehicles principally designed for the transport of persons (other than those of heading 87.02), including station wagons and racing cars."

2 The relevant portion of s 47(9)*(a)*(i) provides:
"The Commissioner may in writing determine–
(aa) the tariff headings, tariff subheadings or tariff items or other items of any Schedule under which any imported goods, goods manufactured in the Republic or goods exported shall be classified."

3 Heading 87.02 read at the time:
"Motor vehicles for the transport of ten or more persons, including the driver."

respondent has imported more than 580 vehicles all of which have been classified under heading 87.02. On 28 November 2003, the appellant revoked the determination and issued a new determination to the effect that the vehicles were classifiable under heading 87.03.

[5] The respondent, in terms of section 47(9)(*e*),[4] appealed to the High Court against the new determination. Claassen J found that the goods are to be classified under heading 87.02 and set aside the determination. The appellant appeals to this Court against such classification with the leave of this Court, the court *a quo* having refused leave to appeal. 12.3

[6] The appellant's case is essentially that the vehicles were superficially modified in Australia in a transparent attempt to bring them within the ambit of heading 87.02 thereby attracting a lower customs duty rate. It is common cause that for each vehicle classified under heading 87.02 instead of under heading 87.03, the respondent saved an amount of R135 000 in customs duties and VAT. 12.4

[7] The question to be answered is whether the vehicles were designed for the transport of ten or more persons or whether they were disguised as such as part of a scheme to limit the respondent's liability in respect of the payment of customs duty?

[8] In the accompanying judgment in *Commissioner, SA Revenue Service v Komatsu SA (Pty) Ltd*,[5] I discussed the general principles applicable to tariff classification and the manner in which they are to be applied and interpreted. I do not intend to add to what was stated therein. 12.5

[9] Chapter 87, under which the disputed headings resort, covers various types of vehicles, including tractors, passenger vehicles, goods vehicles and special purpose vehicles. The different types of vehicles are grouped together under their respective headings according to their purpose. It is clear from the Explanatory Notes to heading 87.03[6] that all vehicles designed for the transport of persons reside thereunder, but for the exclusions. The exclusions relate

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4 S 47(9)*(e)* reads:
"An appeal against any such determination shall lie to the division of the High Court of South Africa having jurisdiction to hear appeals in the area wherein the determination was made, or the goods in question were entered for home consumption."

5 [2006] SCA 118 (RSA). [Reported at [2006] JOL 18350 (SCA) – Ed].

6 The Explanatory Notes to heading 87.03 reads:
"This heading covers motor vehicles of various types (including amphibious motor vehicles) designed for the transport of persons: *it does not, however, cover the motor vehicles of heading 87.02.*
…
The heading also includes:
1 Motor cars (eg saloon cars, hackney carriages, sports cars and racing cars).
2 Specialised transport vehicles such as ambulances, prison vans and hearses.
3 Motor-homes (campers, etc), vehicles for the transport of persons, specially equipped for habitation (with sleeping, cooking, toilet facilities, etc.).
4 Vehicles specially designed for travelling on snow (eg snowmobiles).
5 Golf cars and similar vehicles.
6 Four-wheeled motor vehicles with tube chassis, having a motor-car type steering system (eg a steering system based on the Ackerman principle)."
(Emphasis added.)

to vehicles falling under heading 87.02.[7] All vehicles designed for the transport of ten or more persons fall to be classified under heading 87.02. The distinguishing factor between the two headings is the number of persons the vehicle was "designed" to transport. In other words, the design of the vehicle determining the classification of the goods in this instance.

12.5 [10] The respondent relies on *Autoware (Pty) Ltd v Secretary for Customs & Excise*,[8] for the contention that the intention of the manufacturer and designer, the modifier and the importer of the vehicles is irrelevant. That is generally correct, but it should be noted that *Autoware* (*supra*) dealt with the difference between a panel van and a station-wagon. There was no doubt that the vehicles, on importation, were panel vans. The only issue was whether the importer's intention to change them after import into station-wagons meant that they had to be classified as the latter. They were indeed constructed and designed as panel vans. In any event, Colman J, with reference to *Secretary for Customs & Excise v Thomas Barlow & Sons Ltd*,[9] accepted that depending on the headings under consideration, "purpose and intention" may be relevant.[10]

[11] Where a court is confronted with an alleged simulation,[11] it is entitled to take into account all the surrounding circumstances.[12] It has been accepted by this Court that a taxpayer may minimise his or her tax liability by arranging his or her tax affairs in a suitable manner. But a court, in considering whether the taxpayer has properly achieved a reduction of the tax, will give effect to the true nature and substance of the transaction and will not be deceived by its form.[13] The same considerations apply to the determination of customs classifications.

12.6 [12] It is common cause that TMC manufactures five, six, eight, nine and ten-seater Land Cruiser 100 Series vehicles. It is also common cause that the vehicles at the centre of this dispute are originally manufactured as eight-seaters. This court is enjoined to determine whether the vehicles are *designed* for the transport of ten or more persons and not merely whether they are *capable* of doing so, as contended by the respondent.

7 The Explanatory Notes to heading 87.02 reads:
"This heading covers all motor vehicles *designed for the transport of ten persons or more* (including the driver)." (Emphasis added.)
8 1975 (4) SA 318 (W).
9 1970 (2) SA 660 (A).
10 At 322A–B.
11 A simulation is "where parties to a transaction for whatever reason attempt to conceal its true nature by giving it some form different from what they really intend … It is important to emphasise that a transaction which is disguised in this way is essentially a dishonest transaction; the object of … which … is to deceive the outside world". (*Per* Scott JA in *Mackay v Fey NO and Another* 2006 (3) SA 182 (SCA) para 26.) [Also reported at [2005] 4 All SA 615 (SCA) – Ed.]
12 *Erf 3183/1 Ladysmith (Pty) Ltd and Another v Commissioner for Inland Revenue* 1996 (3) SA 942 (A) at 950I–952C [also reported at [1997] JOL 213 (A) – Ed]; *Maize Board v Jackson* 2005 (6) SA 592 (SCA) para 1 [also reported at [2006] 3 All SA 511 (SCA) – Ed]; *Mackay v Fey*, above fn 11, op cit.
13 *Commissioner for Inland Revenue v Conhage (Pty) Ltd (Formerly Tycon (Pty) Ltd)* 1999 (4) SA 1149 (SCA) para 1 [also reported at [1999] JOL 5363 (A) – Ed]. See the authorities cited in fn 12 above.

[13] The modification in question is effected in the following manner. The third row is removed from its original factory fitment points. A framework is attached to the middle brackets and another contraption is fitted. The additional seats are not attached or anchored to the vehicle but are kept in place by their base being placed under the framework. The third row is replaced; not onto its original attachment but further forward onto the framework. This results in the leg room between the second and third rows being reduced from 270mm to 90mm. The space between the two extra seats which face each other is 180mm. Counsel for the respondent conceded that if one of these extra seats is occupied it would be difficult and uncomfortable – if not impossible – to accommodate an adult person on the opposite seat.

[14] The allegation made on behalf of the respondent that the vehicles are "designed, through modification, for the transport of ten persons" is not supported by the evidence. The entire modification process takes no more that five minutes and the cost thereof is negligible. The two additional seats are cheap and are upholstered in material of an inferior quality, very different from the leather used for the rest of the vehicle and not in keeping with a luxury sport utility vehicle. No permanent changes are made to the vehicles enabling them ever to be sold or used as ten-seaters. After importation the whole framework and contraption accommodating the two extra seats is removed. The third row is moved back to its original factory position. The vehicles are sold as eight-seater vehicles, as designed and manufactured in Japan.

[15] It is clear from the objective evidence that the respondent, together with the modifier, has attempted, in a superficial and unsophisticated manner, to conceal the true nature of the vehicles by giving them a *temporary* different form. In other words, they have attempted to disguise vehicles designed for the transport of eight persons as vehicles designed for the transport of ten or more persons, solely for the purpose of evading higher customs duty. The vehicles were modified with the intention of circumventing the Act. The modification was clearly a sham.

[16] In the result the following order is made:

The appeal is upheld with costs, such costs to include those occasioned by the employment of two counsel. The order of the court *a quo* is set aside and the following is substituted:

> "The application is dismissed with costs, such costs to include those occasioned by the employment of two counsel."

(Harms, Brand, Cloete JJA and Cachalia AJA concurred in the judgment of Theron AJA.)

For the appellant:
CE Puckrin SC instructed by *T Khatri*, State Attorney

For the respondent:
AP Joubert instructed by *GTS Eiselen*, *Kriek & Van Wyk Attorneys*

Source: *Commissioner, South African Revenue Service v Motion Vehicle Wholesalers (Pty) Ltd* [2007] 4 All SA 1207 (SCA), LexisNexis Publishers (Pty) Ltd

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Number 1 Alphabetical markers

Look at the marked number '1' in the *Commissioner* case.

On each page of a case that is reported in the South African Law Reports, or the All South African Law Reports, the alphabetical letters **A–H** (or **A–J**) appear on the side margin of the text of the case. These letters function as paragraph markers. These markers help the reader move quickly through a specific page to pinpoint a certain section that is relevant to his particular purpose. This makes finding a specific section on a page easy.

Some law reports use **capital letters** here, while others use lower case.

When arguing a matter in court, the legal representative might, for example, say:

> "Your worship, in the case of *Commissioner, South African Revenue Service v Motion Vehicle Wholesales (Pty) Ltd* 2007 (4) All SA 1207 (SCA), the Supreme Court of Appeal, at 1208e, describes the nature of the motor vehicles which this case concerns – that is, the Toyota Land Cruiser 100 Series vehicles."

The reference by the legal representative to '1208e' indicates that he is referring to page 1208 of the *Commissioner* case at paragraph 'e'. It is then not necessary for the court to read the entire case – the legal representative has referred it to the relevant portion of the case.

Other examples of references to alphabetical markers are:

- In *S v Maleka*, the court discussed the facts of the case at **367G-J**.
- In *Road Accident Fund v Mtati*, the name of the case appears at **215A**.
- In *Primedia v Speaker, National Assembly*, the court discussed the jamming issue in Parliament at **589F**.
- In *BS v MS*, the court referred to a decision of the California Court of Appeals at **357D**.

Take a minute to consider some of these references by looking at the pages and paragraphs referred to above.

Number 2 The name of the case

Look at the marked number '2' in the *Commissioner* case.

When you refer to a court case, you refer to its name or citation. The name of a case is very important as it provides us with essential information. Each of the elements, or parts, appearing in the name of a case has a specific meaning and is necessary to help you look up a case in the library. The elements include:

- the parties to the case, from which one can gather whether it is a civil case or a criminal case
- the year in which the case is reported
- the volume of the law report
- the name of the publication in which the case is reported
- the page number at which the case will be found in the relevant volume
- the specific court that dealt with the matter.

We will now consider some of the important information you can obtain from the name of a case.

Parties to the case

A reported court case starts by stating the names of the parties who are the litigants in the case. If the name of the case is *A v B*, for example, 'A' and 'B', respectively, are the names of the parties and the 'v' means *versus*, which is Latin for against.

Let's look at some examples of actual case names and determine what information we can gather from the name of each case.

1. *Commissioner, South African Revenue Service v Motion Vehicle Wholesalers (Pty) Ltd* [2007] 4 All SA 1207 (SCA). (This matter deals with customs duty.)
   - The parties to this case are the Commissioner of the South African Revenue Service (SARS) and a private company known as Motion Vehicle Wholesalers (Pty) Ltd.
   - The 'v' stands for *versus* (against).

- The case was reported in the year 2007.
- The case was reported in volume 4 of the *All South African Law Reports* (abbreviated as All SA).
- The case appears on page 1207 of the relevant law report.
- The case was decided by a particular court, i.e. the Supreme Court of Appeal (abbreviated as SCA).

Compare the use of brackets in the All SA citations with those used in citations in the *South African Law Reports*. Different publications use different conventions.

2. *Pillay v Pillay* 2004 (4) SA 81 (SE)
(This matter deals with spousal maintenance following a divorce.)
   - The parties to this case are Mr Pillay and Mrs Pillay.
   - The 'v' stands for *versus* (against).
   - The case was reported in the year 2004 and in volume 4 of the *South African Law Reports* (not the *All South African Law Reports*).
   - The case appears on page 81 of the relevant law report.
   - The case was decided by the **South Eastern Cape Local Division of the High Court**.

The name of this court has since changed to the **Eastern Cape High Court, Port Elizabeth**.

3. *S v Maleka* 2001 (2) SACR 366 (SCA)
(This is a criminal matter.)
   - The parties to this case are the state (S) and Maleka.
   - The 'v' stands for *versus* (against).
   - The case was reported in the year 2001 and in volume 2 of the *South African Criminal Law Reports*.
   - The case appears on page 366 of the law report.
   - The case was decided by the Supreme Court of Appeal.
4. *S v Ferreira and Others* 2004 (2) SACR 454 (SCA)
(This is a criminal matter.)
   - The parties to this case are the state (S) and Ferreira (and certain others).
   - The 'v' stands for *versus* (against).
   - The case was reported in the year 2004 and in volume 2 of the *South African Criminal Law Reports.*
   - The case appears on page 454 of the law report.
   - The case was decided by the Supreme Court of Appeal.
5. *Road Accident Fund v Mtati* 2005 (6) SA 215 (SCA)
(This matter deals with the right to sue for prenatal injuries.)
   - The parties to this case are the RAF and Mtati.
     - The 'v' stands for *versus* (against).
     - The case was reported in the year 2005 and in volume 6 of the *South African Law Reports.*
     - The case appears on page 215 of the law report.
     - The case was decided by the Supreme Court of Appeal.
6. *Steyn v Hasse and Another* 2015 (4) SA 405 (WCC)
(This matter deals with a so-called universal partnership and the duty of support.)
   - The parties to this case are Ms Steyn and Mr Hasse (and Another).
   - The 'v' stands for *versus* (against).
     - The case was reported in the year 2015 and in volume 4 of the *South African Law Reports*.
     - The case appears on page 405 of the law report.
     - The case was decided by the Western Cape Division of the High Court, Cape Town.
7. *Lucky Star Ltd v Lucky Brands (Pty) Ltd and Others* 2017 (2) SA 588 (SCA)
(This matter deals with trade mark infringement.)
   - The parties to this case are two companies: Lucky Star Ltd and Lucky Brands (Pty) Ltd (and Others).

- The 'v' stands for *versus* (against).
- The case was reported in the year 2017 and in volume 2 of the *South African Law Reports*.
- The case appears on page 588 of the law report.
- The case was decided by the Supreme Court of Appeal.

8. *BS v MS and Another* 2015 (6) SA 356 (GPD)
   (This matter deals with the duty of property owners to protect visiting children from injury or harm on their property, following an incident where a child fell into a fishpond on the defendant's property.)
   - The parties to this case are the BS and MS (and Another). Note that the full names are not used here.
   - The 'v' stands for *versus* (against).
   - The case was reported in the year 2015 and in volume 6 of the *South African Law Reports*.
   - The case appears on page 356 of the law report.
   - The case was decided by the **Gauteng Division of the High Court, Pretoria**.

You will see that we have two divisions of the **High Court in Gauteng**, one in Pretoria and one in Johannesburg. The division in Johannesburg is referred to as a local division.

9. *Primedia (Pty) Ltd and Others v Speaker of the National Assembly and Others* 2017 (1) SA 572 SCA
   (This matter deals with an order declaring the use of a device jamming electronic signals in Parliament unconstitutional and therefore unlawful.)
   - The parties to this case are Primedia (Pty) Ltd (and Others) and the Speaker of the National Assembly (and Others).
   - The 'v' stands for *versus* (against).
   - The case was reported in the year 2017 and in volume 1 of the South African Law Reports.
   - The case appears on page 572 of the law report.
   - The case was decided by the Supreme Court of Appeal.

Please make your own copies of the cases referred to in numbers 2– 9 above. You will need to refer to these cases for purposes of the discussion below.

The nature of the matter before court: criminal or civil

You can also determine the nature of the matter before court from the case name – in other words, whether it is a *criminal* matter or a *civil matter*.

Let's look at the differences between these two types of cases.

Table 6.3 The differences between civil and criminal cases

	Civil case	Criminal case
Example of case name or citation	*Commissioner, SARS v Motion Vehicle Wholesalers (Pty) Ltd* *Pillay v Pillay* *Road Accident Fund v Mtati*	*S v Maleka* *S v Ferreira*
Parties involved	Individual/s vs individual/s Juristic person can also be party	State vs individual
Who is *dominus litis* (master of the suit), in other words, in whose hands does the matter rest?	The party who initiates or starts the case by taking it to court	The State
Who bears the onus (in other words the burden of proof)?	He who alleges – in other words, the party who initiates the case	The State
Standard of proof required?	Case must be proved on 'balance of probabilities'	Guilt of accused must be proved 'beyond reasonable doubt'
Interest being affected?	Private interests of an individual	The public interest

	Civil case	Criminal case
Regulated by?	Private law (that part of the law that regulates relationships between individuals on a horizontal level)	Public law (that part of the law that regulates the relationship between the state and individuals on a vertical level)
What happened to give rise to the matter?	A person has suffered financial loss as a result of something that someone else has done, for example, a motor vehicle collision. It may also entail one person wanting to enforce his rights against another.	A crime has been committed. In other words someone has done something that is illegal (prohibited by law) and is being prosecuted by the state.
Aim/purpose of the case?	To recover damages/money or to obtain a court order in terms of which a person is forced to do something/ not to do something	To punish the accused. The punishment can take various forms, for example, a fine or jail sentence.
Outcome of case/what order will the court make?	Claim may be granted or dismissed. If granted, it may mean the losing party is ordered to pay an amount of money to the other party, or a person is forced to do something or not do something.	The accused will be found guilty or not guilty. If found guilty, the accused will be sentenced. This means that the court will impose punishment.

- The cases referred to as number 3 and 4 above are criminal matters.
- All the other cases (numbers 1, 2, 5–9) are civil matters.

Let's now look at each of the two types of cases more closely.

In a criminal matter, a person (the accused) has committed a criminal (illegal) offence and is prosecuted by the state. There are many examples of conduct, or behaviour, that qualify as criminal offences under our law – for example, murder, culpable homicide, rape, treason, arson, theft, robbery, assault, indecent assault, money laundering, fraud, kidnapping, domestic violence, incest, corruption and so on.

The state is always the first party to a criminal case, and the letters 'R' or 'S' will appear in the case name – for example, *R v Nxumalo* and *S v Maleka* are both criminal cases. Before 31 May 1961, when South Africa became a Republic, criminal case citations used the letter 'R', which referred to Rex (King) or Regina (Queen). After 1961, the letter 'R' was replaced by the letter 'S', which stands for 'State', as in *S v Ferreira* or *S v Maleka*. This indicates that the state has brought a criminal charge against a certain Ferreira, who we refer to as the accused in the matter. If a court finds the accused guilty of a criminal offence, the accused will be convicted of a crime and the court will then sentence that person.

In a civil matter, the name of the case will consist of two different names separated by 'v'. In a civil matter, there exists a legal dispute between private individuals. Consider the following examples:

1. Mr A resides in a quiet residential area in Saxonworld, Johannesburg. He wants to force his neighbour, Mr G, to close down the shebeen that Mr B is running from his residence.
2. Mrs C is the victim of domestic violence. She wants to obtain a court order that will compel and order her husband, Mr C, not to abuse her verbally or physically.
3. Mr D and Mrs E were involved in a motor vehicle collision. The collision was caused solely by the negligence of Mrs E, who skipped a red light. The damage to Mr D's BMW amounts to R88 000. Mr D now wants to claim damages (R88 000) from Mrs E.

In examples 1 and 2, the appropriate relief that the party approaching the court will ask for, is referred to as an interdict. An interdict can be defined as a court order, in terms of which a person is ordered to perform a particular act or to refrain from doing a particular act.

Example 2 is an example of a civil case as well as a criminal case. Mrs C may lay a criminal charge against her husband with the South African Police Service, but she may also apply to court for an interdict to stop him from assaulting her in the future. It is therefore possible for one set of facts to give rise to both a civil case and a criminal case.

In the event of it being a civil matter, there are two different procedures that can be used:

1. The first procedure is called the action procedure (trial procedure).
2. The second procedure is called the application procedure (motion procedure).

Do not confuse the difference between a civil case and a criminal case, with the differences between the two civil procedures mentioned here: action vs application.

The choice between the two procedures depends on various factors and circumstances.

Table 6.4 The differences between the two types of civil procedure

	Civil case Application procedure	Action procedure
Also known as	**Motion procedure**	**Trial procedure**
Typical examples	Application to liquidate (wind up the affairs of) a juristic person such as a company Application to sequestrate (take temporary possession of a debtor's estate) an individual if her liabilities exceed her assets Application to be admitted as an attorney or advocate of the High Court Application for an interdict	Claim for damages following a delict (i.e. motor vehicle collision) or breach of contract Divorce matter
Parties to the case	Applicant and respondent The applicant brings the application to court against the respondent, who may oppose the application.	Plaintiff and defendant The plaintiff institutes action against the defendant, who may defend the action
Name of the case	*Applicant/s v Respondent/s* The names of the litigants also form the case name, i.e. *University of Johannesburg v Ally* or *Ex parte* Ally (if Ally is the only party to the case – there is no respondent)	*Plaintiff/s v Defendant/s* The names of the litigants also form the case name, e.g. *Commissioner, SARS v Motion Vehicle Wholesalers, (Pty) Ltd* *Pillay v Pillay* *Road Accident Fund v Mtati* Note: The case name does *not* always reflect the full name of a litigant. This is because it is sometimes necessary to protect the identity of a person, either because of the age of someone affected by the proceedings (e.g. a child), or the sensitivity of the proceedings (e.g. *W v W*)
When to use	When there is no material dispute of fact between the parties When prescribed	When there is a material dispute of fact between the parties

	Civil case Application procedure	Action procedure
Also known as	**Motion procedure**	**Trial procedure**
Description of what happens in court	All the relevant facts are brought before the court by way of affidavit, which is a sworn statement/statement under oath.	Oral evidence is presented. This means that a party calls witnesses to the stand to testify – and that these witnesses are questioned as part of examination in chief, cross-examination and re-examination
	The matter is resolved by the court after it has heard legal argument from the parties' legal representatives	
Pleadings/nature of documents before the Court	Three sets of affidavits: 1. Notice of motion and founding affidavit attached to it (notice of application with first affidavit attached to it) 2. Answering affidavit (second affidavit in which respondent answers to founding affidavit) 3. Replying affidavit (third affidavit in which applicant replies to answering affidavit)	Pleadings consist of: 1. Summons (with particulars of claim attached to it). The summons is the first legal document that the plaintiff sends to the defendant informing the defendant of his claim. It must be served by the sheriff of the court. 2. Plea. This is the second document in which the defendant sets out his answer or defence to the plaintiff's claim. 3. Replication. This is the third document in which the plaintiff replies to the defendant's plea.
What is required from the Court?	To grant or dismiss the application If granted, it means that the applicant has been successful with her application.	Judgment in favour of the plaintiff or in favour of the defendant
How resolved?	The matter is resolved on the papers before the court – usually no oral evidence is necessary. Oral evidence is only allowed in certain exceptional circumstances.	Because there is a material dispute of fact, the matter cannot be resolved on the papers and oral evidence is necessary. The only way in which the court can properly assess and evaluate the facts of the case is to hear oral evidence.

The role-players

By looking at the name of the case, one can also see who the parties to the matter are. Let us now enter the court arena and see who the role-players are in civil court proceedings. The litigants (parties to the case/parties to litigation or court proceedings) include: *Plaintiff v Defendant*, and *Applicant v Respondent*.

Let's consider each of these in more detail.

- Plaintiff: This person **sues** another individual. The plaintiff issues the summons that starts the action or proceedings. This is the person who approaches the court and who commences proceedings against another.
- Defendant: The litigant against whom the plaintiff institutes an action is called the defendant. He has to answer to the plaintiff's case.
- Applicant: Where a litigant makes use of application proceedings, she is called an applicant. This is the party making application to court.
- Respondent: The applicant usually has to give notice to other interested parties that he is bringing his application to court, or some party may decide that he wishes to **oppose** the application. Such a litigant is referred to as a **respondent**. The term 'respondent' however, can also have a second meaning, namely, where an appeal is

To **sue** someone is to start legal proceedings against someone for payment of an amount of money.

To **oppose** something is to be against it. The party will therefore oppose an application in court. One defends an action but opposes an application. Therefore, the **respondent** opposes an application but the **defendant** defends an action.

lodged, the parties are referred to as the appellant and the respondent. We will learn more about appeal proceedings later in this chapter.

In a civil case, the name of the case indicates the **plaintiff** (or the **applicant**, as the case may be) as the first party to the case. The person against whom the action is instituted is indicated as the second party. Take note that the name of the plaintiff always appears first in the case name, before the 'v', and is followed by the name of the defendant – that is, *Plaintiff v Defendant* or *Applicant v Respondent*.

In the *Pillay* case, Mr Pillay is the plaintiff and therefore the first party to the case, and Mrs Pillay is the second party referred to in the name of the case, as she is the person against whom her husband has instituted legal action.

In the *Commissioner* case, the Commissioner of SARS is the appellant (the party taking the matter on appeal to a higher court), and Motion Vehicle Wholesalers (Pty) Ltd is the respondent.

The parties to the case that are given in a reported case may therefore also give you some information about the role-players in a matter that goes on **appeal**.

If it is the former defendant who appeals, he is now cited as the appellant, and his name appears first in the case name, while the former plaintiff is now cited as the respondent, and his name now appears last in the case name. For example, in the case of *A v B*, B is the defendant. B loses the case and takes it on appeal. In the appeal matter, B will now be cited as the appellant, and the former plaintiff (A) becomes the respondent. The correct name of the appeal case will therefore be as follows: *B v A*.

If it is the former plaintiff who lodges an appeal, he now becomes the appellant and the former defendant becomes the respondent. If in the example above, A (the plaintiff) had lost the case and appealed against the decision, he becomes the appellant and B the respondent. The name of the case will remain as *A v B* in the appeal case.

Apart from the names of the litigants, certain other terms/words sometimes appear in the name of a case. Where the words *and Others* appear in the name of a case, as in *S v Ferreira and Others*, it means that, apart from the person specifically named, there are also other **litigants** involved in the matter. The words *and Another* indicate that there was one other party to the case, apart from the party who has been named. The words *and Others* mean that there are numerous litigants (as plaintiffs or defendants or applicants or defendants).

The **plaintiff** or **applicant** is the party who starts the court proceedings. In other words, she is the party who brings the other party to court and asks the court for assistance/legal relief/ a remedy.

If a party has taken a matter to court or has been taken to court by someone else and is dissatisfied with the outcome, he may **appeal** to a higher court. The parties to an appeal are known as the appellant and the respondent. The party taking the matter on appeal is the appellant and the party against whom the appeal is brought/ who opposes the appeal, is referred to as the respondent.

There can be more than two parties to a court case. There is no limit on the number of **litigants** who may be parties to a case.

Case study The rugby team's case

The Springbok rugby team recently played a rugby match at Kingspark stadium in Durban. Let's assume that, as a result of the negligence of the Durban Rugby Club (DRC), the rugby gear (clothes and equipment) of the entire South African team was stolen from the change rooms. The DRC is responsible for looking after the stadium and should have ensured that the necessary measures are put in place to protect the lives and possessions of visitors to the stadium. The team's financial loss amounts to R595 500 (five hundred and ninety five thousand rand).

The rugby team can institute a claim for damages against the Durban Rugby Club (DRC), but it would surely be impractical to cite the case with reference to the surnames of all twenty players in the squad *v* DRC, DRC Manager, DRC security personnel and so on.

The correct way to cite this particular case would be with reference to the name of the captain (i.e. Siya Kolisi) and Others *v* DRC and Others.

Certain other terms may also appear in the name of a case.

- The letters ***NO*** in the name of a case stand for *Nomine Officio*. These words mean 'in the name of his office' or 'in his official capacity' and are used where a litigant does not litigate in his personal capacity. He does so as a representative in an official capacity. For example, a father, as guardian of his minor child, may institute an action on behalf of his child and therefore represent the interests of his child. In a similar way, an executor or trustee may be cited in a representative capacity.

NNO is the plural. In other words, more than one person acting in an official capacity.

- You may also encounter the words 'in re' in some case names. This means 'in the matter of'. Case names featuring these words usually do not involve a dispute between the parties but rather the case clarifies a particular issue. For example, *Atlas Packaging (Pty) Ltd v Palierakis*: In re *Palierakis v Atlas Carton and Litho CC (in liquidation) and Others* (2016) 37 ILJ 109 (LAC). This is a decision of the Labour Appeal Court (LAC) reported in the *Industrial Law Journal* (*ILJ*).
- If a case name includes the words *ex parte*, there is only one party to an application before court. For example, *ex parte* Snooke 2014 (5) SA 426 FB.
- Case names sometimes include the words *amicus curiae*. This means a 'friend of the court' who is often an advocate (member of the bar), or another bystander, who advises the court regarding a point of law or a fact upon which information is required. For example:
(Commission as *Amicus Curiae*); *Association of Debt Recovery Agents NPC v University of Stellenbosch Legal Aid Clinic and Others*; *Mavava Trading 279 (Pty) Ltd and Others v University of Stellenbosch Legal Aid Clinic and Others* (2016) 37 ILJ 2730 (CC)

  and

  Laugh It Off Promotions CC v SAB International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as amicus curiae) 2006 (1) SA 144 (CC).

  Source: Claassen, RD Butterworths *Dictionary of Legal Words and Phrases* 1997 Vol 1, A-99

For some interesting decisions dealing with **class actions**, please refer to *Trustees for the Time Being of the Children's Resources Centre Trust and Others v Pioneer Food (Pty) Ltd and Others* 2013 (2) SA 213 (SCA) and *Mukaddam v Pioneer Foods (Pty) Ltd and Others* 2013 (5) SA 89 (CC).

There is one final concept to mention in this context. A **class action** refers to the situation where one person institutes proceedings on behalf of a group of persons who are affected in the matter, for example, all the residents in a particular area, or all learners in a particular school. It is therefore not necessary for each affected person to institute a separate action. This may relate to hundreds or even thousands of individuals. In terms of section 38(c) of the Bill of Rights **legal standing** is extended to 'anyone acting as a member of, or in the interest of, a group or class of person'. The name of the reported court case will therefore not necessarily refer to or include the names of *all* affected people.

Legal standing is known as *locus standi in iudicio* in constitutional matters.

> "A class action, an established feature of many common law jurisdictions, has finally found a home in South African law …The introduction of the class action for collective redress (commonly referred to as 'class actions') into South African law provides a vehicle whereby larger numbers of victimised 'Davids' may collectively obtain justice from a misbehaving 'Goliath', in circumstances where the institution of individualised lawsuits would not be economically practical".
>
> **Source:** Du Plessis, M. (ed.) 2017. *Class action litigation in South Africa*. 1st edn. Cape Town: Juta and Co. (Pty) Ltd, page 1 quoting from: Anderson, B. and Trask, A. 2015. T*he Class Action Playbook*. LexisNexis (South Africa).

Appeal cases

When a litigant is unsuccessful in a matter (loses the case) and feels dissatisfied with the outcome or feels that the court has erred in its decision or judgment, the litigant might decide to lodge an appeal against that decision. This applies to both civil and criminal matters.

In the court of appeal, the dissatisfied litigant who lodges the appeal is called the appellant. The party in whose favour the decision in the court *a quo* ('from where') went, and who is therefore the person against whom the appeal is made, is called the respondent.

The status of the court in the judicial hierarchy where the case was first heard affects the court where you lodge the appeal or to which you appeal. The court from which you appeal is referred to as the court *a quo* and the court to which you appeal is the court of appeal, with the ultimate court of appeal being the Constitutional Court. The Constitutional Court is the highest court in all matters.

Figure 6.1 matches different courts *a quo* to relevant courts of appeal.

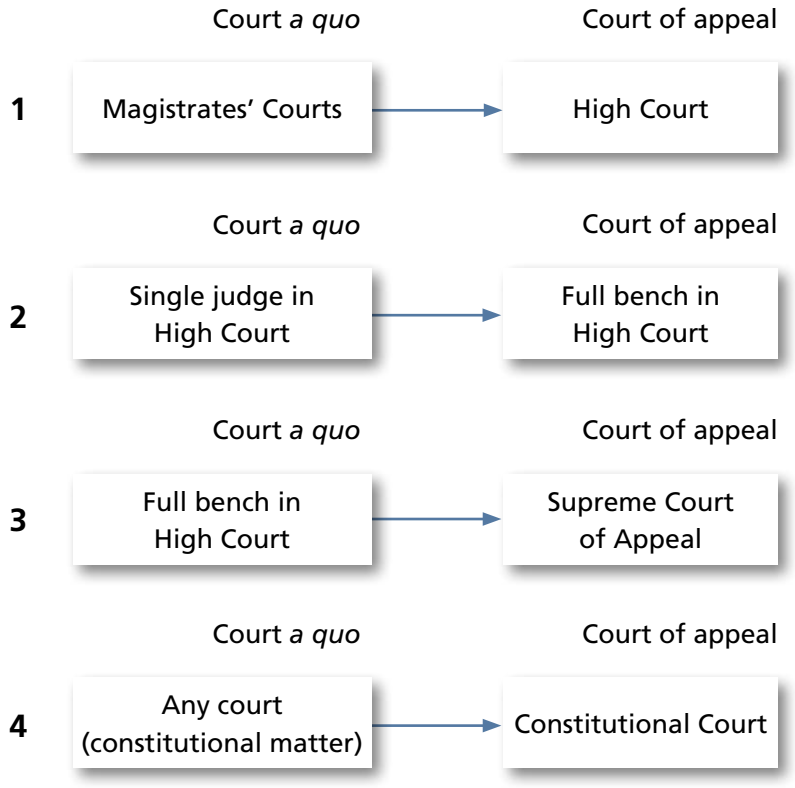

Figure 6.1 Different courts *a quo* matching relevant courts of appeal

Which set of law reports?

Before 1947, the judgments of each provincial division of the High Court (previously known as the Supreme Court) of South Africa, were reported separately, each in its own set of law reports. For example, a judgment given in the Transvaal Supreme Court (now High Court) would have been reported in the Transvaal Law Reports, a judgment given in the Natal Supreme Court (now High Court) would have been reported in the Natal Law Reports and a judgment given in the Cape of Good Hope Supreme Court (now High Court) would have been reported in the *Cape Law Reports*.

Since 1947, all reported cases of the divisions of the High Courts (as well as the Supreme Court of Appeal, the Labour Appeal Court and the Competition Appeal Court of South Africa), including Namibia, Zimbabwe and the former TBVC-states have been reported in one consolidated set of law reports known as the *South African Law Reports*, abbreviated as *SA* or *SALR*. The abbreviations are used to distinguish these reports from the reports of other specialised courts. Even cases of the High Court of Lesotho have been reported in *South African Law Reports*, for example *R v Sole* 2004 (2) SACR 599 (Les).

Location of case in a law report

From the citation of a case you can also see in which year and in which volume a particular case has been reported.

Publishing a whole year of reports in one volume would make a very large book. Therefore, reported cases are published monthly and usually bound and referred to in quarter years. This means that the

cases reported in the first quarter of 2017 (that is, cases reported in the months of January, February and March 2017), are, for example, cited as 2017 (1); cases reported in the second quarter (April, May and June 2017) are cited as 2017 (2); and cases reported in the third and fourth quarter, are cited as 2017 (3) and 2017 (4) respectively.

Number 3 The relevant court

Look at the marked number '3' in the *Commissioner* case.

The *Commissioner* case was decided by the Supreme Court of Appeal.

At the end of the name of the case, you will find a reference, in abbreviated form, to the court in which the matter was heard.

The jurisdictional area of the court is indicated for divisions of the high court. We will deal with the various courts in more detail below. The standard abbreviations are given in Table 6.7.

There have been important new developments as far as the High Court of South Africa is concerned, and in particular, the names used to refer to the various courts.

Before 2009

Previously the names of each of the divisions of the High Court were determined by the Supreme Court Act 59 of 1959. In terms of this Act, there were six provincial divisions of the Supreme Court (now known as the High Court), three of which had local divisions attached to them. This Act has now been **repealed**.

Another word for **repealed** in legal terms is 'replaced'.

The courts *were* as set out below:

Table 6.5 Abbreviations of court names before 2009

	Name of court	Seat of court	Abbreviation
1	Appellate Division of the Supreme Court of South Africa	Bloemfontein	AD
2	Cape of Good Hope Provincial Division of the Supreme Court of South Africa	Cape Town	C
3	Eastern Cape Division of the Supreme Court of South Africa	Grahamstown	E
4	Northern Cape Division of the Supreme Court of South Africa	Kimberley	NC
5	Natal Provincial Division of the Supreme Court of South Africa	Pietermaritzburg	N
6	Durban and Coast Local Division of the Supreme Court of South Africa	Durban	D
7	Orange Free State Provincial Division of the Supreme Court of South Africa	Bloemfontein	O
8	Transvaal Provincial Division of the Supreme Court of South Africa	Pretoria	T
9	Witwatersrand Local Division of the Supreme Court of South Africa	Johannesburg	W
10	South Eastern Cape Local Division of the Supreme Court of South Africa	Port Elizabeth	SE

In addition, the Supreme Court Act provided for the following courts:

- The Ciskei High Court (Ck)
- The Transkei High Court (Tk)
- The Venda High Court (V)
- The Bophuthatswana High Court (B).

From 2009 to 22 August 2013

The names of the various divisions changed with effect from March 2009 in terms of the *Renaming of the High Courts Act 30 of 2008.* Again, this Act has now been repealed.

In terms of this Act, the courts were referred to as follows:

Table 6.6 The renaming and abbreviations of the High Courts from 2009 to 22 August 2013

	Name of High Court	Seat of High Court	Abbreviation
1	Eastern Cape High Court	Bhisho Grahamstown Mthatha Port Elizabeth	ECB ECG ECM ECP
2	Free State High Court	Bloemfontein	FB
3	Gauteng High Court	South Gauteng, Johannesburg North Gauteng, Pretoria	GSJ GNP
4	KwaZulu-Natal High Court	Pietermaritzburg Durban	KZP KZD
5	Limpopo High Court	Thohoyandou	LT
6	Northern Cape High Court, Kimberley	Kimberley	NCK
7	North West High Court	Mafikeng	NWM
8	Western Cape High Court	Cape Town	WCC

The two (old) pieces of legislation referred to above are still important as you will find references to the old/previous names of the High Courts in South Africa in many previously reported cases. Both pieces of legislation have since been repealed. Even though they are therefore no longer in force, cases reported prior to 2009, still make reference to the old names of the various courts, or divisions, of the High Court.

Most importantly, the names of the courts have changed again in terms of new legislation in the form of the Superior Courts Act 10 of 2013. This legislation is important as it determines the new names of the various divisions of the High Court of South Africa and these are the names that you should be familiar with. Don't confuse the new names with the previous/old names that existed under the previous legislation!

From 23 August 2009

In terms of the (new) Superior Courts Act 10 of 2013 we now have a single High Court of South Africa, which consists of a number of divisions and in some instances, local seats of a division.

Sections 6 and 50 of the Superior Courts Act determine that The High Court of South Africa consists of the following divisions shown in the table below.

Table 6.7 Divisions, seats and abbreviations of the High Court

	Name of court	Seat of court	Abbreviation
1	Eastern Cape Division	Main seat in Grahamstown Local seat in Bisho Local seat in Mthatha Local seat in Port Elizabeth	ECG ECB ECM ECP
2	Free State Division	Main seat in Bloemfontein	FB
3	Gauteng Division	Main seat in Pretoria Local seat in Johannesburg	GP GJ
4	KwaZulu-Natal Division	Main seat in Pietermaritzburg Local seat in Durban	KZP KZD
5	Limpopo Division	Main seat in Polokwane Local seat in Thohoyandou	LP LT
6	Mpumalanga Division	Main seat in Nelspruit	MN

	Name of court	Seat of court	Abbreviation
7	Northern Cape Division	Main seat in Kimberley	NCK
8	North West Division	Main seat in Mahikeng	NWM
9	Western Cape Division	Main seat in Cape Town	WCC

Let's have a closer look at the various courts:

1. Constitutional Court:

This court is the highest court in *all* matters.

A reference to a decision of the Constitutional Court is cited in the South African Law Reports, for example, as *S v Pennington and Another* 1997 (4) SA 1076 (CC). The abbreviation 'CC' is used to indicate that the case was heard by the Constitutional Court. Cases of the Constitutional Court are also reported in the Butterworths Constitutional Law Reports – for example, *Soobramoney v Minister of Health, KwaZulu-Natal* [1997] 12 BCLR 1696 (CC).

2. Supreme Court of Appeal

A reference to a decision of the Appellate Division (now known as the Supreme Court of Appeal) reported prior to 1947, is cited as follows: *R v Mahomed* 1938 AD 30 (the abbreviation is therefore AD, and there is no volume number – only the year and page number). Any reference to a reported Supreme Court of Appeal case cited in the *South African Law Reports* (since 1947) is cited in the usual *South African Law Reports*' way with the abbreviation 'A' or 'SCA' (as the case may be) being used to show that it is a decision of the Supreme Court of Appeal (as the Appellate Division is now called) – for example, *Road Accident Fund v Mtati* 2005 (6) SA 215 (SCA).

3. High Court

In terms of schedule 6 of the Constitution of the RSA, 1996, all courts, including their structure, composition, functioning and jurisdiction, had to be rationalised with a view to establishing a new judicial system suited to the requirements of the new Constitution, as soon as practically possible after the new Constitution took effect. It was undesirable to retain and use the former names of certain high courts, as some of the names still reflected their apartheid origins. As a result, the Renaming of High Courts Act 30 of 2008 renamed the high courts. This act has therefore been replaced with the Superior Courts Act 10 of 2013, which once again changed the names of the various divisions of the High Court. While many of the cases you will read were decided in the former high courts and include references to the previous names of the high courts. It is important that you familiarise yourself with the new names of the high courts and their new abbreviations, as these abbreviations are now being used for purposes of reporting cases.

Number 4 The presiding officer in the court

Look at the marked number '4' in the *Commissioner* case.

A reported case indicates who the presiding officer/s or the judge/s in the case were.

The *Commissioner* case was decided by a full bench (consisting of five judges) in the Supreme Court of Appeal in Bloemfontein. The judges were Harms, Brand, Cloete (judges of appeal, abbreviated as JJA), Theron and Cachalia (acting judges of appeal, abbreviated as AJJA).

Some cases take place before a single, in other words, one judge, while in others there may be two or even three judges. A court consisting of three judges is referred to as a full bench. Usually, only one judge gives/writes the judgment, and the rest concur (agree). If one or more judge disagrees, we say he dissents and he will write a dissenting judgment to explain his problem with the majority's opinion. It is also possible for there to be a majority judgment (which means the majority of the judges who heard the matter agree), and a minority judgment (which means a minority of the judges agree). A minority

judgment does not create a binding precedent. In a separate judgment, a judge, who agrees with the conclusion of the majority, but who wishes to emphasise or add a particular aspect, sets out his decision and reasons. It is possible for a judge to concur in part and dissent in part.

As you may have noticed, certain letters appear behind the names of judges, such as: J, JA, AJ, CJ, AJA, JP and AJP. These letters do not represent the initials of the judges, but are title abbreviations. Table 6.8 will provide an explanation of each title.

Table 6.8 Abbreviations of titles

Abbreviation	Full title
J or R	Judge/Regter
AJ or WnR	Acting Judge/Waarnemende Regter. An advocate may be appointed as an acting judge for a period of time while another judge may be absent.
JA/AR	Judge of Appeal/Appèlregter
AJA/Wn AR	Acting Judge of Appeal/Waarnemende Appèlregter
CJ/HR	Chief Justice (of South Africa)/Hoofregter
JP/RP	Judge President (of a province)/Regter President

You will notice that the Afrikaans abbreviations are given in the table as well. Some court cases were only reported in Afrikaans with a brief summary in English. As you will see from Chapter 10, English will be in the only language of record in our courts in future.

In the Pillay case, we can see that the judgment was handed down by acting judge Huisamen ('Huisamen AJ').

Have a look at some more examples.

- In *S v Maleka*, the matter was heard by a full bench (three judges, namely Olivier, Zulman and Farlam).
- In *S v Ferreira and Others*, the matter was decided by five judges in the SCA.
- In *Road Accident Fund v Mtati*, the matter was decided by five judges in the SCA.
- In *Steyn v Hasse and Another*, the matter was decided by two judges, Goliath J and Schippers J.
- In *Lucky Star Ltd v Lucky Brands*, the matter was decided by five judges in the SCA.
- In *BS v MS and Another*, the matter was decided by a single judge, Kollapen J.

Number 5 The date(s) of the hearing and of judgment

Look at the marked number '5' in the *Commissioner* case.

The date or dates that you see below the name of the case do not refer to the date of publication – a court case is only reported some time after it has been decided by a court. The first date that appears directly below the name of the court is the date on which the matter was argued in court or the date of hearing. The second date, if any, refers to the date on which the court delivered its judgment – the date of judgment.

Judgment is not usually delivered on the same day that a matter is argued in court. The court usually has first to consider its finding and prepare a written judgment with reasons for its decision. This explains why a judgment will only be delivered on a later date.

Sometimes the reported case refers to the date of judgment only (and not to the date of the hearing). In the *Commissioner* case, we can see that the judgment was delivered on 26 September 2006. The law report makes no reference to the date of the hearing.

Look at your own copy of the *Pillay* case and note the dates: on 13 June 2003, the matter was initially brought before court and on 8 July 2003 the judgment was handed down (given) by the court. The judge did not give his judgment on the same day that the action was brought, but decided that he would reserve judgment and deliver his judgment at a later date.

You may also want to look at these examples:

- In *S v Maleka*, the matter was argued on 26 September 2000 and the court delivered its judgment on 28 November.
- In *S v Ferreira and Others*, the matter was argued on 22 March 2004 and the court delivered its judgment on 1 April.
- In *Road Accident Fund v Mtati*, the matter was argued on 17 May 2005 and the court handed down its judgment on 1 June.
- In *Steyn v Hasse and Other*, the matter was argued on 9 May 2014 and the court delivered its judgment on 15 August.
- In *BS v MS and Another*, the matter was in court on 16, 17 April and 17 June 2015 whilst the court delivered its judgment on 10 September.

Number 6 The catchword paragraph

Look at the marked number '6' in the *Commissioner* case: *Customs and Excise – Customs duty – Tariff classification of imported vehicles*.

The catchword paragraph is usually a short paragraph that is printed in italics. It contains only key words and no full sentences. The purpose of this paragraph is to make it possible for the jurist to see easily what the case is about, and whether the case is relevant for his purposes, without reading the entire head note or the entire reported case. It provides a high level overview, or snapshot, of the main issues of the matter.

This is an important part of the pre-reading of a case, where you can get an overview of what the case is about and decide if it is relevant or not.

Number 7 The head note

Look at the marked number '7' in the *Commissioner* case.

The next paragraph in a reported case is the head note, which provides a detailed summary of the case. It summarises the main issues and findings of the court, and, again, can give you an overview of what the case is about. This forms an important part of the pre-reading of a case, where your aim is just to get a high level overview of what the case is about and to determine whether it is relevant or not.

While useful as a summary, the head note can be misleading as it is sometimes very brief and may not always reflect the true or complete decision reached by the judge. You cannot rely only on the head note of a case. You will have to read the entire case if the case is relevant to your research. In the *Commissioner* case, we don't find a head note as such, but instead a summary of the case by the editor of the law report.

You may also want to look at the head note in the *Pillay* case:

> In this action for divorce, the defendant sought, inter alia, an order for maintenance for herself in the amount of R1 000 per month for a period of six months or until she obtained employment, whichever was the sooner. The parties had married on 1 August 2001 and the plaintiff had instituted divorce proceedings on 13 November 2003. The defendant was currently unemployed as she was in the process of completing a six-month course to become a care-giver. She was living with her parents, to whom she paid a rental. The plaintiff disputed the defendant's need for maintenance on the basis, inter alia, that she ought to be maintained not by him, but by her parents, by virtue of the reciprocal duty of support between them. One of the consequences of that duty, he contended further, was that there was no obligation on the defendant to pay rental to her parents.

From the head note we can see that the case relates to an action for divorce. The head note explains what each party is asking the court to order. It then goes on to set out the findings of the court, with reference to paragraph markers.

Not all head notes follow the same pattern, but usually, a summary of the essential facts is given, followed by the decision of the judge. The judge's decision follows after the use of the word 'Held', (or *Beslis* in Afrikaans). You should therefore locate the word 'Held' as this will be followed by the findings of the court, for example:

Held, that the defendant had established a need for maintenance in the very reasonable sum of R1 000 per month until such time as she obtained employment as a carer. (At 85I)

Held, further, that there was no merit in the argument that, because of the common-law duty of support between them, there was no obligation on the defendant to pay rental to her parents. The defendant's parents were not wealthy and, most certainly, in dire need of a contribution towards their expenses of providing the defendant with accommodation. From the moment the parties married, the obligation to maintain the defendant fell, in the first instance, on the plaintiff. Only if the plaintiff were unable, or under no legal obligation, to support the defendant, would this duty have reverted to her parents. (At 85I-86B)

Held, further, that the concept had been recognised that maintenance might be payable to an ex-wife, for a limited period post-divorce, while she trained or re-trained for a job or profession. (At 86C/D)

Held, further, that a woman's ability to earn an income, post-divorce, did not per se disqualify her from an award of maintenance because the reasonableness or otherwise of her decision not to work had to be considered. (At 86G/H.)

Held, further, that, although there were cases which ran counter the trend, the tendency of the Courts was to award little or no maintenance to an ex-wife where one or more of the following factors were present: (a) the woman was young or reasonably young; (b) she was well-qualified; (c) she had no children or no young children; (d) she had worked throughout her life and/or was working at the time she applied for maintenance; (e) she was in good health; (f) the marriage had not been of a long duration. (At 86H/I and 87B)

Held, further, that, on a careful consideration of the factors enumerated in s 7(2) of the Divorce Act 70 of 1979 – namely, the existing or prospective means of the parties; their respective earning capacities; their respective financial needs and obligations; their ages; the duration of the marriage; their standard of living during the subsistence of the marriage; their conduct insofar as it might be relevant to the breakdown of the marriage; any order for the division of assets; and any other factor which, in the Court's opinion, should be taken into account – the defendant was clearly entitled to be maintained post-divorce on the basis sought. (At 87D/E- 8A)

Held, accordingly, that the plaintiff be ordered to pay maintenance to the defendant in an amount of R1 000 per month for a period of six months post-divorce or until the defendant obtained employment, which occurred first. (At 88E)

Many of your prescribed cases follow this pattern. In other instances, however, the head note simply sets out the legal position without going into specific factual detail. Apart from the word 'Held', there are sometimes other technical words used in the head note that need some clarification.

When a paragraph in the head note starts with the word *quaere*, it means that the legal principle that follows the word *quaere* is still subject to some uncertainty, a query, question or doubt. It is an indication that the principle that follows is still open to question as it has not in fact been decided yet.

Another word you may find in the head note is *semble*. A simple translation of this word would be 'apparently' or 'it seems'. This means that a certain legal point or principle was not directly decided by the judge, but could apparently be inferred from the judgment.

The head notes in the *Pillay*, *Ferreira and Mtati* cases are all quite long and detailed.

In *Steyn v Hasse and Another*, the head note consists of three paragraphs and provides a useful summary of the main issues and the court's finding.

In *BS v MS and Another*, the head note consists of only two paragraphs and summarises the facts, as well as the court's finding on a particular legal question. By simply reading the head note, you will have a clear idea of what the case is about and whether it is relevant for your research. If so, you need to read the case in its entirety in order to understand the reasons for the court's decision.

You will find an example of a very short head note in the case of *Pinchin and Another, NO v Santam Insurance Co Ltd* 1963 (2) SA 254 (W).

Number 8 The nature of the legal relief or remedy sought

Look at the marked number '8' in the *Commissioner* case.

In every judgment, the nature of the **legal relief**, or remedy, asked for (in other words what the party wants from the court) is set out immediately after the head note. Remember, one of the parties has approached the court in an attempt to obtain certain relief – otherwise it would not make any sense to institute legal proceedings. The relief or legal aid sought by a party may include, for example, an award of damages, a declaratory order, the granting of an interdict, a decree of divorce or, in a criminal case, a conviction. In the *Commissioner* case, we see that it concerns an appeal matter.

In *BS v MS and Another*, the **legal relief** appears at 357B, an action for damages. From the relief in *Primedia v Speaker, National Assembly* (575J) and *Lucky Star v Lucky Brands* (589J) you will see that it involves appeals from other courts.

In the *Pillay* case, we find the legal relief at 83D of the report: 'an action for divorce in which maintenance was in issue.' The plaintiff is therefore seeking a decree of divorce from the court and also wants the court to make an order on whether maintenance must be paid or not.

Under this subheading, we usually also find the statement that 'the facts appear from the judgment of judge ...'. This is especially useful where there are judgments of more than one judge reported in the case. These days, the facts are usually set out in only one judge's judgment. Previously, each judge often set out the facts of the case, resulting in rather lengthy reported judgments.

Number 9 The names of the parties' legal representatives

Look at the marked number '9' in the *Commissioner* case.

This is where the names of the legal representatives usually appear. In this case, however, as it has been reported in the *All SA Law Reports* and not in the *SA Law Reports*, the names of the advocates who represented the respective parties appear right at the end of the reported case.

In the *SA Law Reports*, you will see the name of the legal representatives below the nature of relief. These representatives include attorneys and advocates.

Advocates are specialist litigators and are normally instructed or briefed by attorneys to appear in the High Court on behalf of the clients of attorneys. Previously, attorneys could only appear in lower courts – the position has however been amended in terms of the Right of Appearance in Court Act 62 of 1995, which entitles attorneys to appear in the High Court.

Note the spelling of **counsel**. 'Council' refers to an administrative body of people, such as a school or church council. Note that the plural of counsel is also counsel.

You will see that in the *Pillay* case, J Potgieter acted for the plaintiff and J Urban for the defendant. These names refer to the advocates, or **counsel** as they are also known.

Some other examples include:

- In *BS v MS and Another*, GB Botha SC (advocate) appeared for the plaintiff and A de Vries (attorney) for the defendants – see 367B.
- In *Lucky Star v Lucky Brands*, AR Sholto-Douglas SC (with GD Marriott), in other words a senior advocate together with another/junior advocate, appeared for the appellant and M Seale for the respondents – see 589I.
- In *Primedia v Speaker, National Assembly*, S Budlender (with M Bishop and M Maenetje), in other words three advocates one of them being a senior, for the appellants; JJ Gauntlett SC (with MR Townsend) for the first to third respondent and JF van Zyl SC (with DJ Jacobs SC) for the fourth respondent – see 575I.

Professor says C and SC

The letters 'QC' and 'SC', which are often included after the names of advocates, need some explanation. The letters 'QC' refer to 'Queen's Counsel'. The title QC comes from the bar in the United Kingdom. The South African counterpart is 'SC', referring to 'Senior Counsel'. In ordinary language, it is also said that advocates have taken 'silk'. As the names indicate, these are the most senior members of a society of advocates. A great number of these senior counsel later become judges.

Usually, a client will only appoint senior counsel to work on a matter if it involves intricate, complex legal or factual problems or a legal question that has not previously come before a South African court.

It is usual practice when senior counsel is briefed (given instructions) for another advocate to be assigned to him to help him with the preparation of the case. The other advocate is called junior counsel.

It is possible for the court to appoint a person to look after a child's best interests during any litigation. Such a person will be an attorney or advocate and is called a *curator ad litem* (curator for litigation). You may see references to a curator ad litem in some reported cases. Provision is also made for a so-called *curator bonis*, who is appointed to look after property or manage the estate of a person who is unable to do so.

Number 10 Heads of argument

Look at the marked number '10' in the *Commissioner* case.

Sometimes, you will find a summary of the advocates' heads of argument here. This is not always included.

The legal representative of each litigant has to put forward her arguments in court. This means that she must explain her reasons or arguments for asking the court to arrive at a particular conclusion. For each argument put forward, she must refer to authority – either primary sources of the law (legislation, case law or common law) or secondary sources (for example, textbook writers, journal articles and foreign law). The primary sources will be binding authority whereas secondary sources will be persuasive only. Because many factors may be relevant to a client's case, it is common practice to set out the arguments in a document under specific heads. This document is called the heads of argument, or *heads*. In the High Court, it is compulsory for a legal representative to hand in written heads of argument to the court when arguing the matter. This is not so in the Magistrates' Courts.

Heads of argument are drawn up in a very concise manner, and generally contain difficult or complex legal arguments. Do not worry if you find it difficult to follow/understand this aspect of a case yet. As time goes by, and your knowledge of substantive law increases, you will find that heads of argument become very useful as a source reference.

You will note that, for example, in the *Commissioner, Pillay, Maleka, Ferreira and Mtati* cases, the heads of argument are not reported.

Number 11 The meaning of some Latin phrases

Look at the marked number '11' in the *Commissioner* case.

You will often find the Latin phrases *cur ad vult* and *postea* appearing in reported court cases. These words are not used in the *Commissioner* case. If they had been, they would have appeared under number 11.

Look at your own copy of the *Pillay* case. You will see that both these terms appear at 83E.

Cur ad vult is an abbreviation of *curia advisari vult*, meaning that the court reserves or holds back judgment and wants to consider the matter before the judge commits himself to a decision.

Postea literally means 'at a later stage'. In other words, the judge has considered the matter, and thereafter (at a later date) he gives a ruling in the matter.

In the *Pillay* case, we see that the matter was heard on 13 June 2003. The court did not give judgment immediately, but first considered the matter (*cur ad vult*) as indicated at 83E. After considering the matter, the court gave its judgment *postea* (at a later date) – on 8 July.

It is possible for both the hearing of a matter and judgment to occur on the same day. This type of judgment is referred to an *ex tempore* judgment.

Number 12 Judgment

Look at the marked number '12' in the *Commissioner* case.

In the judgment we see how the judge reached a decision.

12.1 The name of the judge who delivers the judgment appears in bold before the judgment, and just after his name, his title appears. In the *Commissioner* case, the judge is Theron AJA.
12.2 The judge sets out all relevant facts of the case at 1208d-h.
12.3 The judge refers to the decision of the court a quo at 1209b.
12.4 The judge summarises the nature of the appellant's case at 1209c.
12.5 The judge refers to applicable case law (*Komatsu* and *Autoware* cases) at 1209e and 1210b–d.
12.6 The judge identifies the facts that are common cause at 1210f.
12.7 The judge deals with the evidence presented to the court at 1211c–g.

In each case that comes before a court, the presiding officer must come to a conclusion based on the evidence and arguments presented to her. This is not a scientific exercise and each case, for a number of reasons, is unique.

Compare the judgment in the *Pillay* case with the *Commissioner* judgment.

Here the acting judge, Huisamen AJ, sets out all relevant facts of the case at 83F–J. The judge then summarises the defendant's evidence at 84C–85C. The plaintiff's evidence is summarised at 85D. At 85E–H, the court deals with the legal arguments presented by each party's legal representatives. Next, at 85I–86A, the judge sets out his findings with regard to the legal representatives' arguments.

In the next section (86B and further), the judge sets out the existing or current legal position and legal principles. This means the court refers to various other previously reported court cases dealing with the issue of maintenance between parties after divorce such as the *Standard Bank* case (at 86B), the *Grasso* case at (at 86F) and the *Pommerel* case (at 86H). The court analyses these decisions in detail. The court also refers to applicable legislation, such as the Divorce Act 70 of 1979 (at 86C).

After the court has discussed and stated the legal principles involved, the court then applies these principles to the matter at hand. It decided that, when taking the factors listed in other cases into account, Mrs Pillay is entitled to maintenance.

Number 13 The order of the court

Look at the marked number '13' in the *Commissioner* case.

After the court has made its findings on the facts, and on the law, it makes an order with regard to the legal relief claimed. The order dictates the consequences of the case, for example, whether the defendant has to make payment to the plaintiff and if so, what the amount is, or whether the accused is guilty or not and if so, what the sentence is. Without the order, a judgment would not serve much purpose, as it would not have any consequences or practical effect and there would be nothing to enforce against any other person.

Usually an order as to costs is made at the conclusion of the judgment (see Number 13.1). This means that the court says who is liable, that is required, to pay, the legal costs of the litigation.

In the *Commissioner* case, the court ordered that the applicant's application be dismissed and that the applicant pay the costs of the respondent's two counsel (and not only that of one advocate).

In the *Pillay* case, the court ordered that there should be a decree of divorce, and that the parties' joint estate should be divided.

Number 14 The firm(s) of attorneys

Look at the marked number '14' in the *Commissioner* case.

At the end of the reported case, the names of the law firms (in other words, firms of attorneys) that represented the various litigants appear. The references to the firms of attorneys usually appear at the very last line of the reported case.

In the *Commissioner* case, we find a reference not only to the firms of attorneys but also to the advocates who argued the matter on behalf of the parties, that is, Adv. Puckrin SC for the appellant and Adv. Joubert for the respondent. In so far as the attorneys are concerned, the State Attorney represented the appellant and GTS Eiselen, Kriek and Van Wyk Attorneys represented the respondent.

Some additional examples include:

- In the *Pillay* case, the firms of the plaintiff's and the defendant's attorneys respectively appear at the end of the case: Gedult Petersen and Vandayar were on record for the plaintiff and MP van Zyl for the defendant.
- In the *BS vs MS and Another* case, the plaintiff's attorneys were GP Venter Attorneys and the Defendant's attorneys were Klagsbrun Edelstein Bosman De Vries Inc – see 363H.
- In the *Primedia v Speaker, National Assembly*, the legal representatives were: Webber Wentzel (Johannesburg) and Honey Attorneys Inc (Bloemfontein) for the first and second appellants; Legal Resources Centre, Cape Town and Honey Attorneys Inc (Bloemfontein) for the third and fourth appellants and State Attorney (Cape Town and Bloemfontein) for the first to fourth respondents – see 592 F.

In the case of an appeal, we find that as many as four sets of attorneys or firms are used and these are all listed at the end of the reported case. For example, you may see:

- the plaintiff's attorneys in Johannesburg (the court *a quo*)
- the plaintiff's attorneys in Bloemfontein (the Supreme Court of Appeal)
- the defendant's attorneys in Johannesburg
- the defendant's attorneys in Bloemfontein.

Professor says — Why so many attorneys?

Why are there four, and not just two, sets of attorneys? In every case, a party is required to provide an address for service, in other words a party must appoint an address at which she will accept service of court documents/processes. This address must fall within a certain distance of the court in which the matter was started and in which court documents were issued. This is why, in addition to having instructed attorneys in the city where she resides, a party may also have to instruct attorneys who have their offices within the prescribed distance of the court in which the matter will be heard, to act as so-called correspondents in the matter. The prescribed distance is 15 km. In terms of the so-called 15-kilometre rule, the address appointed for service must be within 15 km of the court building in which the matter will be heard.

Number 15 English translation

Look at the marked number '15' in the *Commissioner* case.

We usually find an English translation here if the case is reported in Afrikaans. This does not apply in, for example, the *Commissioner* or *Pillay* cases as they have been reported in English.

When the judgment is delivered and reported in Afrikaans, it has become common practice to supply an English translation of the catchword paragraph and head note at the bottom of the page where the reported case starts. In doing so, it is accessible to jurists worldwide. Most cases, however, are reported in English. As far as the future is concerned, English will be the only language of record in our courts.

You have now considered the structure of a reported court case in its entirety. This knowledge should help you when searching for a reported court case. Search with reference to any of the follow search criteria:

- case name, or year
- volume
- page
- case number
- court
- judge
- hearing date
- judgment date
- counsel
- flynote, or headnote.

What do you think?

Consider the decision of the court in *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others,* which has been reported in *three separate sets of law reports* highlighted below:

- 1999 (1) SA 6 (CC)
- 1998 (2) SACR 556 (CC)
- [1998] 12 BCLR 1517 (CC).

Find the definition of sodomy in a dictionary. In the above reported case, the court declared the common-law offence of sodomy to be inconsistent with the Constitution and therefore invalid. It concluded that the criminalisation of sodomy in private between adult consenting males unfairly breaches their right to, for example, **sexual orientation**, equality, dignity and privacy.

Sexual orientation refers to the choice people have in deciding whether they want to have sexual intercourse with men or women.

These rights are guaranteed in the Bill of Rights, which form part of our Constitution.

Do you agree with the court's decision? Consider your answer with reference to the most important reasons or arguments the court provided for its conclusion in this matter.

Chapter summary

In this chapter, we learned the following about case law:

- Case law is one of the most important sources of South African law. Case law, together with legislation, is a primary source of South African law – it is therefore one of the first places to look for legal rules.
- The decisions of our courts are reported in what we refer to as law reports.
- Not all court cases in South Africa are formally reported.
- Case law refers to reported court decisions. A reported court case is also known as a judgment. It consists of a reasoned explanation of the presiding officer's decision in the particular case.
- A judgment consists of a reasoned explanation of a presiding officer's decision in the particular case.

- The written judgment usually deals with the facts of the case first, and then sets out the relevant legal principles. It concludes with an application of the legal principles to the facts of the case and finally, the court order. The order appears at the end of the judgment – it sets out the conclusion, or decision, that the presiding officer reached in the matter and will inform you which party won the case.
- A reported court case is a written and published record of the judgment delivered in a particular matter decided by a court. Reported judgments make up case law.
- A court case is an event that occurs when one person or entity takes another person or entity to court and asks the court to resolve a dispute between the parties. Both natural persons (individuals) and juristic persons (for example, companies) can be parties to a court case.
- We distinguish between various types of cases:
  - A civil case refers to a matter where one party is claiming damages from or enforcing his rights against another. The parties to a civil case are the plaintiff and the defendant or the applicant and the respondent.
  - A criminal case refers to a matter where the state prosecutes the accused for having committed a crime. The parties to a criminal case are the state and the accused.
  - An appeal case refers to a matter where a party is not satisfied with the decision of the court *a quo* and he then takes the matter to a higher court (the court of appeal) to reconsider the matter. The parties to an appeal are the appellant and the respondent.
- In terms of the *stare decisis* doctrine or the doctrine of judicial precedent, lower courts are bound to follow the decisions of higher courts. This means that there exists a hierarchy of courts in South Africa.
- If a higher court makes a clear statement of the law relevant to the facts before that court, then that statement of the law becomes law and is binding on all courts of equal or lower rank.
- A statement of the law that arises from the reasons for a court's finding is called the *ratio decidendi* and is binding precedent.
- Statements that are not necessary for a court's finding are *obiter dicta* and are not binding on other courts.
- Court decisions are published in various sets of law reports in accordance with a specific structure, which consists of the following components:
  1. alphabetical markers
  2. name of the case
  3. relevant court
  4. presiding officers
  5. dates (of hearing and of judgment)
  6. catchword paragraph
  7. head note
  8. legal relief/remedy
  9. legal representatives
  10. heads of argument
  11. Latin terms
  12. judgment
  13. order of the court
  14. firms of attorneys
  15. English translation.
- Each of these components is important.
  - The alphabetical markers make it possible to refer to a specific paragraph in a reported court case.
  - The citation of a case includes the names of both parties, the year, the abbreviation of the law report series, the volume in which the case appears, the page reference, as well as an abbreviation of the court where judgment was given.
  - The name of a case contains an abbreviation of the name of the specific court in which the matter was heard.
  - The dates appearing below the name of a reported court case refer first to the date of hearing and next to the date of judgment.
  - The names of the judges and their titles appear after the dates.
  - The catchword paragraph provides a very brief summary of the case, using key words only.
  - The head note is longer and more detailed than the catchword paragraph. It usually provides a detailed summary of what the case is about as well as the finding of the court.
  - The relief sought, which is the assistance that the plaintiff or applicant is asking for, appears underneath the head note of a reported case. Reported court cases contain a reference to the legal practitioners (attorneys or advocates) who argued or presented the particular matter in court.

- A reported court case sometimes contains a summary of the parties' heads of argument, which is a written summary of the oral arguments that the legal practitioner intends to present to the court and also lists the various authorities (sources of the law) which he intends to rely on in support of each argument.
- *Curia advisari vult* means that the court reserved judgment – the finding was not delivered immediately after the case.
- *Postea* means that the court gave its judgment 'at a later stage'.
- The judgment itself forms the biggest part of a reported court case and sets out the reasons for the court's decision. In other words, it gives a reasoned explanation of why the court came to a particular conclusion with reference to the relevant sources of the law (authorities).
- The court order is the very last part of the judgment in a reported court case. In a sense this is the most important part of the judgment as it contains the court's conclusion.
- At the end of a reported court case, there is a reference to the attorneys who acted on behalf of the various parties. This enables the reader to contact the relevant attorneys if necessary.
- Cases that are reported in Afrikaans include a summary of the catchword paragraph and head note in English.

- The judgments in many court cases are reported so that various legal professionals, academics and the general public can have access to them.
- It is vital for law students and practitioners to read new reported court cases regularly.

Review your understanding

1. Find the case of *Media 24 Ltd and Another v Grobler* 2005 (6) SA 328 in the library and answer the following questions about this case:
   a) What type of case is this – civil or criminal? Explain your answer.
   b) Who are the parties to this case?
   c) What does *and Another* as it appears in the case name refer to?
   d) In which court was the matter heard? You should also explain the difference between this court and the Appellate Division.
   e) When was the matter heard?
   f) On which date did the court deliver its judgment?
   g) Who was/were the presiding officer/s in this case?
   h) How would you address a judge in the SCA?
   i) Do the reasons for the court's decision appear from the head note?
   j) What kind of relief is the first party seeking?
   k) Identify the firm of attorneys who were acting on behalf of Media 24 Ltd.
   l) Distinguish between *cur ad vult* and *postea*.
   m) How many judges did the bench consist of in this matter?
   n) Did any of the judges on the bench disagree with the presiding officer who wrote the judgment in this case?
   o) What order did the court make?
2. Find the case of *Road Accident Fund v Mtati* 2005 (6) SA 215 in the library and answer the following questions about this case:
   a) What type of case is this – civil or criminal? Explain your answer.
   b) Who are the parties to this case?
   c) In which court was the matter heard?
   d) When was the matter heard?
   e) On which date did the court deliver its judgment?
   f) Who was/were the presiding officer/s in this case?
   g) How would you address a judge in the SCA? How is this address different from the form of address in the High Court?

h) Who are the advocates that appeared on behalf of the appellant?
i) Distinguish between *cur ad vult* and *postea*.
j) How many judges did the bench consist of in this matter?
k) Did any of the judges on the bench disagree with the presiding officer who wrote the judgment in this case?
l) What order did the court make?
m) Indicate whether the court applied or deviated from the decision in *Pinchin and Another NO v Santam Insurance Co Ltd* 1963 2 SA 254 W.

3. Complete the following table with reference to the decision in *Mnyandu v Padayachi* 2017 (1) SA 151 KZP:

The matter was decided in the following division of the High Court of South Africa:	
The bench consisted of two judges, namely:	
This was an appeal against a decision of a Magistrate's Court. The parties to an appeal are generally referred to as the _____ and the _____:	
From 151H it is clear that the advocate who appeared for the appellant is:	
The judgment was delivered by Judge _____, with the second judge concurring:	
To concur means to:	
The court refers to foreign case law at 151F. An example of one of these cases is:	
The order appears at 171E and is as follows:	
The appellant's attorneys are:	

4. Complete the following table with reference to the decision in *Masango v Road Accident Fund* 2016 (6) SA 508 GJ:

The matter was decided in the following division of the High Court of South Africa:	
This court is a local/provincial (choose one) division of the High Court of South Africa:	
The court has its seat in: (identify the relevant city)	
The bench consisted of one judge, namely:	
This case deals with so-called contingency fees. See if you can find a definition of contingency fees and include it here:	
Summarise the definition of contingency fees as given by the court at 513C:	
From 510E is clear that the advocate who appeared for the first *amicus curiae* is:	
The meaning of *amicus curiae* is:	
The defendant's attorneys are:	

5. Complete the following table with reference to the decision in *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty)(Ltd)* 2012 (1) SA 256 CC:

The matter was decided in the following court:	
The apex court in South Africa, in other words, the highest court in all matters is the following court:	
The bench consisted of a total number of _____ judges:	
Cur adv vult and *postea* at 258I mean:	
The first judgment was delivered by Yacoob J, with which three judges concurred/ agreed. These three judges are:	
The second judgment was written by Moseneke DCJ, with which six other judges concurred. These six judges are:	
DCJ in relation to Moseneke refers to:	
The court refers to the concept of ubuntu at 256H. What does this concept entail?	

6. Please refer to page 1 taken from a reported court case.

   Complete the empty blocks by inserting the relevant description – what does each block relate to/indicate?

   THUKWANE V LAW SOCIETY, NORTHERN PROVINCES ← 8.1) ?

   Gauteng Division, Pretoria ← 8.2) ?

   Rabie J, Makgoba J and Kubushi J ← 8.3) ?

   2013 January 30; August 23 ← 8.4) ?

   Case No A 207/2011

   8.5) ?

   ↓

   Attorney – Articles of clerkship – Registration – Fitness – Law Society's discretion – Standards to be applied – Law Society to consider fitness of applicant on usual grounds – Person convicted or murder and robbery inherently unfit – Law Society's refusal to register articles in order – Attorneys Act 53 of 1997, s 4(b)

7. Compare civil and criminal cases by listing the main differences between the two. Provide an example of a civil case and a criminal case.
8. Write a short summary of the *stare decisis* doctrine.
9. Your professor approaches you to present a short group tutorial to a group of seven non-law students. These students are studying accounting but have to do commercial law as one of their prescribed subjects. In the commercial law textbook, there are various references to reported court decisions. Your professor requests that you cover the following issues in your discussion:
   - what a reported court case is
   - why court decisions play such an important role in our legal system
   - where to find a reported court case
   - what the name (in other words, the citation) of a court case refers to
   - an example of criminal case as opposed to civil case.

   Also briefly explain what the structure of a reported court case looks like.
10. Match column A and column B.

A		B	
1)	Action procedure	a)	Parties are applicant and respondent
2)	Appeal	b)	My Lord/My Lady
3)	15 km – rule	c)	Parties are plaintiff and defendant
4)	Crime	d)	Advocate
5)	*Curator ad litem*	e)	Parties are appellant and respondent
6)	Judge	f)	Punish
7)	Application procedure	g)	Address for service of process
8)	Counsel	h)	Your Worship
9)	Magistrate	i)	Manage property
10)	*Curator bonis*	j)	Assist in litigation

Further reading

Some interesting cases:

Botha v Botha 2009 (3) SA 89 W
(In this case the High Court found that a spouse does not have an automatic right to maintenance upon divorce and that the court has a discretion to make a 'just' award or no award at all when it comes to maintenance.)

Checkers Supermarket v Lindsay 2009 (4) SA 459
(In this case the Supreme Court of Appeal found that the supermarket was negligent and liable as a result of a customer slipping on a patch of oil on the supermarket's floor.)

Hoërskool (High School) Ermelo and Another v Head, Department of Education, Mpumalanga, and Others 2009 (3) SA 422 SCA
(In this case the Supreme Court of Appeal concerned itself with a high school's language policy and confirmed that the governing body of the school is authorised to determine the language policy of that school.)

Johannesburg Country Club v Stott and Another 2004 (5) SA 511 SCA
(In this case the Supreme Court of Appeal had to deal with a matter concerning a member who of the club who was struck by lightning while on the golf course.)

Penello v Pennello (Chief Family Advocate as Amicus Curiae) 2004 (3) SA 117
(In this case the Supreme Court of Appeal had to deal with the unlawful removal of a child from the RSA and the country's obligations in this regard in terms of international conventions.)

Strydom v Nederduitse Gereformeerde Gemeente (Dutch Reformed Congregation), Moreleta Park 2009 (4) SA 510 T
(In this case the Equality Court found that a particular church unfairly discriminated against its music teacher on the basis of the teacher's sexual orientation.)

Chapter 7

Common law

The main ideas

- Three different meanings of the term common law
- Roman-Dutch law as the common law of South Africa
- English law as a source of South African common law
- Development of common law by the courts
- How the Constitution influences the development of common law

The main skills

- Explain the different meanings of common law.
- Understand what common law means for South Africa.
- Explain the nature of the South African legal system by referring to its European roots.
- Explain the main differences between English common law and European *ius commune.*
- Understand when the courts will refer to the rules of the common law and where to find common law.
- Understand the position of common law today.
- Understand how the Constitution influences the development of common law.

Apply your mind

In terms of Roman-Dutch common law, children born to unmarried parents could not claim financial support from their paternal grandparents. Children whose parents were married to each other could bring claims of this kind. In *Petersen v Maintenance Officer* 2004 (2) SA 56 (C), the Cape High Court held that the common law rule preventing claims by extramarital children violated the constitutional right to equality. How did the court develop the common law in this case?

This chapter looks at the common law of South Africa, which is one of the important sources of law in our uncodified legal system. You will learn what the term 'common law' means in different contexts. You will also learn more about Roman-Dutch law as common law and how the courts continue to develop our common law.

Before you start

When you are reading a piece of legislation, you may come across a provision like section 91 of the Electronic Communications and Transactions Act 25 of 2002, which reads as follows: "This chapter does not affect criminal or civil liability in terms of the common law. What does common law mean? Where do you find it? How important is it?" In this chapter, these questions will be answered.

7.1 Three different meanings of the term common law

The term 'common law' can be confusing. The term could mean something different depending on the context. The three different meanings of the term common law are:

1. the law that is used by the whole country
2. law that does not originate from legislation
3. English common law.

7.1.1 Law used by the whole country

The first meaning that we give to the term 'common law' is the law that is common to a country as a whole. South African common law applies to everyone in South Africa. There are also various systems of customary law which may apply in particular communities, where this is appropriate. This applies primarily to areas of law such as family law, succession, or customary land tenure. In other contexts, members of traditional communities are subject to the common law.

7.1.2 Law that does not come from legislation

Common law also refers to law that does not come from legislation. We can refer to this as **non-enacted law**. The reference to common law in s 91 of the Electronic Communications and Transactions Act (quoted above) uses this meaning of common law. In other words, it refers to the law that does not form part of that particular Act or of other legislation.

Non-enacted law means law that does not come from an Act or any other legislation.

South Africa's common law, in this second sense, refers predominantly to Roman-Dutch law as set out by the **institutional writers** and later, developed through decided cases heard in South Africa. We discussed the role of the institutional writers in the creation of Roman-Dutch law in Chapter 2. The law of the Netherlands was codified in 1809 and the Roman-Dutch law that we inherited from the Dutch refers to the Roman-Dutch law that existed before this codification. Of course the South African common law has had to develop far beyond its roots in 17th and 18th century Europe. The development of the South African common law since 1809 has been through **judicial precedent**. The earliest reported South African judgments come from the Cape Supreme Court in 1828.

The term **institutional writers** or old authorities refers primarily to the scholars who wrote about the *ius commune* (particularly Roman-Dutch law) in the 17th and 18th centuries.

After the British colonised the Cape in 1806, English law began to influence South African common law. Today, our common law contains rules from both the European ***ius commune*** and from the English common law. For this reason, our legal system is described as a hybrid, or mixed, legal system.

Judicial precedent refers to the system of abiding by the rules set out and relied upon in decided cases.

The hybrid nature of South African common law can be seen in individual rules and legal principles that we inherited from either Roman-Dutch law or from English law. The vast majority of common law rules have roots in Roman-Dutch law: for example, our common law concepts of ownership, property, and transfer of ownership all come from Roman-Dutch law, while the common law concept of the trust comes from English common law.

However, the differences between Roman-Dutch law and English common law go beyond particular rules and principles. Roman-Dutch law was part of the European *ius commune*. Like other European legal systems, it has roots in Roman law. The European *ius commune* was partly developed through scholarship at European universities from the Middle Ages to the 18th century. Much of this scholarship was based on the ***Corpus Iuris Civile***. The scholarship of the institutional writers tends to be highly organised and systematised because the scholars wanted to create a logical system of law. As mentioned, the law of the Netherlands was codified in 1809 and most European *ius commune* countries also codified their legal system around this time.

European ***ius commune*** was based mainly on Roman law and was called European common law because it was practised by most of the countries in Western Europe from about the 14th century onwards. Countries whose legal systems are based on the *ius commune* are also referred to as 'civil law' systems.

The **Corpus Iuris Civile** literally translates as the Body of the Civil Law. This is the codification of law ordered by Justinian.

South African law has not been codified. Instead, our legal system still uses the uncodified rules set out in the works of the institutional writers. We also continue to rely on the logical underlying structures of the law that they identified.

Modern South African common law also differs from European civil law in other ways. Our common law is developed through judicial precedent. Cases in South African court cases are usually adversarial in nature. This means that court proceedings are seen as a battle between two parties with the presiding officer (the judge or magistrate) acting as a passive referee. The adversarial court proceedings are modelled on English practice. As in England and other common law jurisdictions, South African

judges produce lengthy reasoned judgments which establish judicial precedent. The cases are reported and published. This is an important aspect of common law systems – judges create law through decided cases. This is also true of the South African common law, which develops and changes through the cases. In contrast, in civilian legal systems, court cases are **inquisitorial**, which means that in court, the judge or other presiding officer plays an active role in fact-finding; court decisions tend to be very brief; and they do not create judicial precedent. Because European countries have codified their law, they also do not follow the system of consulting the institutional writers.

Because of the hybrid nature of the South African legal system, we also use **inquisitorial** procedures in some contexts.

It is very important to note that the entire system of common law is now subject to the Constitution. This was made clear in the case *Pharmaceutical Manufacturers of Association of SA: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) where the Constitutional Court held as follows:

'There are not two systems of law, each dealing with the same subject matter, each having similar requirements, each operating in its own field with its own highest court. There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.' [para 44]

7.2 English common law

The term 'common law' is also sometimes used to refer to English common law. In the United Kingdom, English lawyers use the term 'common law' when they wish to refer to the laws of the whole kingdom (law common to everyone in the United Kingdom), as opposed to laws that only apply in certain parts of the kingdom (for example, Scotland). This English common law forms the foundation of Anglo-American legal systems and is therefore the foundation of the legal systems of the United States, Australia, Canada, New Zealand, India and other **Commonwealth** states.

The Commonwealth of Nations (also known as the **Commonwealth**) is a voluntary association of fifty-four independent sovereign states, almost all of which are former British colonies.

Unlike the European *ius commune*, English common law was not much influenced by Roman law. Instead, the English common law was based on English customs, together with the decisions of the courts in specific cases. The rules that developed from court decisions were known as judge-made laws. The English doctrine of ***stare decisis*** requires that courts follow the decisions of earlier courts. English common law, like South African common law, is uncodified.

Stare decisis means abide by the rules of decided cases.

Professor says — A South African perspective

It is important to note that common law, from a South African perspective, refers to Roman-Dutch law and not to English common law (despite its influence). Roman-Dutch law applies to the whole of South Africa and does not form part of legislation. The system of judicial precedents is a good example of an English law doctrine that has infiltrated our common law heritage and now forms part of it.

The following table contains a comparison between the two systems that have influenced South African law.

Table 7.1 Comparison between the European *ius commune* and English common law

	European *ius commune*	English common law
Roman law influence	To a large extent, the product of Roman law	Limited use of Roman law
Foundation	Universities: legal science	Lawyers and courts
Judicial precedents	No	Yes
Codified	Yes	No

	European *ius commune*	English common law
Characteristics	■ Legislation – usually the important source of law ■ No *stare decisis*, reference to Code articles ■ Judicial activity – inquisitorial ■ At trial, the judge uses dossier or file on investigation as a means to decision-making	■ Court decisions – the most important source of law ■ *Stare decisis* for continuity ■ Adversarial ■ Judicial passivity ■ Trial as the site of contest

7.3 Roman-Dutch law as the common law of South Africa

We have looked at the different meanings of common law. We have also indicated possible meanings within a South African context. In this part of the chapter, we will focus more on how the common law (the second meaning discussed above, which refers predominantly to Roman-Dutch law) is used in our system.

As we have seen, the South African common law is an uncodified system of laws with Roman-Dutch law at its foundation, but with English law as a strong influence. The South African legal system can be compared to a three-layer cake. The base is Roman law, the centre Dutch law and the top English law. The icing compares to our legislation and judicial precedents aimed at rectifying the shortcomings and needs of the different systems

Figure 7.1 Comparison of South African legal system to a three-layer cake

7.4 When is common law applicable?

Roman-Dutch law is consulted when legislation does not govern or answer a particular legal question. It should be clear from this that legislation has the power to change the principles of common law.

Pending litigation refers to a court case that has not yet been heard or decided.

Professor says — A change to the common law

We can look at an example of how legislation has changed the common law. In terms of our common law, contingency fee agreements were considered to be illegal. A contingency fee agreement is an agreement between a legal practitioner and a client to the effect that the legal practitioner will only claim legal fees if there is a successful outcome to the client's **pending litigation.** Section 2 of the Contingency Fees Act 66 of 1997 reads as follows:

> "Notwithstanding anything to the contrary in any law or the common law, a legal practitioner may, if in his or her opinion there are reasonable prospects that his or her client may be successful in any proceedings, enter into an agreement with such client …".

The passage quoted clearly indicates that the legislature has changed the common law.

The English influence on our common-law heritage has already been noted. English sources will therefore also be consulted in certain areas of law where legislation does not govern a particular question. In company law, for example, many English law doctrines have infiltrated this system. The 'common law' definition used here therefore also includes a reference to English legal principles that have infiltrated our law and have been accepted by our courts

7.5 What happens if institutional writers clash?

As indicated in Chapter 2 the work of the institutional writers forms the backbone of Roman-Dutch law. A number of different authors might be consulted in an attempt to determine the contents of the common law. The institutional writers produced textbooks comparable to the academic textbooks of today. Sometimes these sources contradict each other, which is not surprising in more than three hundred years of legal science. But how do South African courts decide on what the common law position is if there is a difference of opinion or where the sources contradict each other? Our courts have indicated that they will follow the position that is in line with reason, equity and modern notions of justice and utility in these circumstances. Preference should also first be given to Dutch authors and only then to other authors of the European *ius commune*.

The ***societas universorum bonorum*** is a universal partnership in terms of which the parties agree to put in common all their property, present and future. This can be contrasted with the more usual form of universal partnership, the *societas universorum quae ex quaestu veniunt*, which is limited to commercial dealings.

Case study When sources contradict each other

In *Butters v Mncora* 2012 (4) SA 1 (SCA) the Supreme Court of Appeal was faced with conflicting views expressed by the institutional writers. Mr Butters and Ms Mncora had lived together for more than 20 years, but had never married. By the time their relationship ended, Mr Butters had become extremely rich. Ms Mncora had looked after the home and children instead of working for money and she had no assets at the end of the relationship. Ms Mncora argued that she and Mr Butters had formed a universal partnership of the form ***societas universorum bonorum*** and that she was therefore entitled to half of the partnership assets. In other words, she was entitled to half of Mr Butters' fortune. Before the Butters case, South African courts had followed the rules set out by the important Roman-Dutch writers Grotius and Voet, who wrote that universal partnerships of this kind could only be formed by married couples or by couples in a **putative marriage.** This meant that it was impossible for Mr Butters and Ms Mncora to have formed a universal partnership of the form *societas universorum bonorum* and Ms Mncora had no claim. Fortunately for Ms Mncora, the Supreme Court of Appeal was able to consult another Roman-Dutch source that contradicted Grotius and Voet. This source had been translated and made available only six years before the Butters case came to court. The source is known as the *Felicius-Boxelius Tractatus de Societate*. It consists of the scholarship of Italian jurist Hector Felicius as annotated by Dutch jurist Hugo Boxelius. It was first published in 1666. In terms of this source, universal partnerships of the form *societas universorum bonorum* could also be formed by people who were not married or in a putative marriage. The court decided to rely on the newly discovered source written by Boxelius because this would lead to a fairer outcome in the Butters case.

7.6 Can a Roman-Dutch rule fall away?

Our common law relies on a system (Roman-Dutch law) that developed in the Netherlands during the 17th and 18th centuries. The doctrine of abrogation allows common law rules to be discarded if they are not used. For example, adultery was a crime in terms of Roman-Dutch law. In the case of *Green v Fitzgerald* 1914 AD 88, the court could not find a single judgment reported after 1828 showing the prosecution of offenders for adultery. The court decided that the crime had therefore been abrogated by disuse. It is clear that the courts

A **putative marriage** exists where a couple believes that they are validly married even though the marriage is not valid for some reason.

have the power to **abrogate** parts of our common law inheritance, if it is irrational and out of pace with modern notions.

The doctrine of **abrogation** means that a rule of the common law is repealed by disuse and that the whole of the community tacitly (silently) consents to it.

7.7 English law as a source of South African common law

As discussed, Roman-Dutch law is an important source of common law. Now we look at the lesser role of English law as a source of common law. The occupation of the Cape by the English did not end the use of Roman-Dutch law in this territory. But it did mark the start of a gradual English influence on legal development at the Cape and also in southern Africa more broadly. These influences are reflected in English rules and doctrines adopted here. The influence is also reflected by South African legislation that was based on English legislation. For example, lawyers and judges today still refer to English law in areas such as company law, patents, copyright, evidence, criminal and civil procedure, and criminal law.

Professor says — The English influence

Think about the following example of how South African law was influenced by English law. In 1827, the following was said about the law of evidence used at the Cape:

> "… with regard to the examination of witnesses in criminal trials, we deem it no injustice to those concerned to observe that the plainest rules for conducting it are either unknown or neglected".

The judges appointed at the Cape were trained in the English tradition and they therefore drafted an ordinance to regulate the law of evidence at the Cape. Here, an ordinance refers to a regulation enacted by the Governor of the Cape. This ordinance was based or modelled on the law of England. As a result, the South African legal system has followed the English rule that excludes the use of hearsay evidence, which refers to statements that a witness has read or overheard.

Source: Extract from Theal, George McCall. (1793-1831). 'Records of the Cape Colony' Volume 33 Aug–Oct 1827, page 90, https://archive.org/details/recordsofcapecol00thea_14<https://protect-za.mimecast.com/s/uXVqC66x59tG2nNATmjcgd>

The procedural systems used at the Cape were also modelled on the law of England, since the judges were used to these systems of criminal and civil procedure. The other territories in southern Africa, for example the Free State and the South African Republic also adopted this model.

This quote comes from the Report of the Commissioners of Enquiry to Earl Bathurst upon Criminal Law and Jurisprudence [15th August 1827], found in Theals' 'Records of the Cape Colony'.

7.8 Development of common law by the courts

Traditionally, senior judicial officers, such as judges of the **High Court** and the **Supreme Court of Appeal**, were allowed to make small incremental changes to the common law in order to fill a gap or to address an inconsistency within our legal system. This usually occurred when the common law did not keep pace with requirements of modern or changing conditions. In doing so, the courts always had to keep in mind that legal development is the primary function of the legislator (Parliament) and not the courts.

Before 1996, these courts were known as the **Supreme Court** and the **Appellate Division**.

However, with the introduction of section 39(2) of the Constitution, there is now an added duty on the courts. The section provides that:

> "when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

In *K v Minister of Safety and Security* 2005 (6) SA 419 (CC), the Constitutional Court ruled that section 39(2) has extensive application whether development of the common law is dramatic or merely subtle and incremental. The section's role is to ensure that the common law is infused with constitutional values. As put by O'Regan J in the *K* case:

"The overall purpose of s 39(2) is to ensure that our common law is infused with the values of the Constitution. It is not only in cases where existing rules are clearly inconsistent with the Constitution that such an infusion is required. The normative influence of the Constitution must be felt throughout the common law. Courts making decisions which involve the incremental development of the rules of the common law in cases where the values of the Constitution are relevant are therefore also bound by the terms of s 39(2). The obligation imposed upon courts by s 39(2) of the Constitution is thus extensive, requiring courts to be alert to the normative framework of the Constitution not only when some startling new development of the common law is in issue, but in all cases where the incremental development of the rule is in issue" (Para 17).

Case study Constitutionally-informed development of common law: the adultery cases

In a 2014 case, *RH v DE* 2014 (6) SA 436 (SCA), the Supreme Court of Appeal decided to abolish the common law delictual action for adultery. The court decided that the act of adultery could no longer be regarded as wrongful in the legal sense, because, according to the legal convictions of the community, a person who committed adultery should not be liable for damages. The court also decided to abolish the delictual action on policy grounds: In terms of the no-fault divorce system (introduced in 1979), adulterous spouses are no longer punished for adultery, and it seemed very unfair to punish the third party when the spouse was not punished. The court also noted the negative impact of the publicity associated with an adultery case (particularly on the children of the parties); the infringement of privacy and dignity arising from detailed cross-examination on sexual matters; and the enormous costs associated with defending an adultery matter in the high court.

Mr H appealed against the judgment to the Constitutional Court. In *DE v RH* 2015(5) SA 83 (CC), the Constitutional Court confirmed the final decision of the Supreme Court of Appeal, but was very critical of the Supreme Court of Appeal's reasons for abolishing the adultery action. The Constitutional Court noted that the Supreme Court of Appeal had failed to follow section 39(2) of the Constitution when it abolished the common law action. The Supreme Court of Appeal had not explicitly promoted the spirit, purport and objects of the Bill of Rights. The Constitutional Court set out some of the reasons why the common law delictual action for adultery did not conform to the Constitution and the Bill of Rights. The action infringed the following constitutional rights of the adulterous parties: their right to privacy; freedom of intimate association; and freedom and security of the person. The mere fact that a relationship is adulterous does not mean that the parties involved forfeit these important constitutional rights.

The Constitutional Court has ruled that:

> "wrongfulness ultimately depends on a judicial determination of whether – assuming all the other elements of delictual liability to be present – it would be reasonable to impose liability on a defendant for the damages flowing from specific conduct".

Roux v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae) 2011 (3) SA 274 (CC) (para 122).

Activity 7.1

1. Find copies of the court cases discussed in the case study above: *RH v DE* 2014 (6) SA 436 (SCA) and *DE v RH* 2015 (5) SA 83 (CC).
2. Summarise in your own words the Supreme Court of Appeal's reasons for abolishing the common law action for adultery.
3. Summarise in your own words the Constitutional Court's misgivings about the Supreme Court of Appeal's decision.
4. Now find copies of the following journal articles that discuss the *DE v RH* matter and answer the questions that follow:
   - Barratt, A. 'Teleological Pragmatism, A historical History and Ignoring the Constitution – Recent Examples from the Supreme Court of Appeal' (2016) 133 *South African Law Journal* 189–221
   - Barnard-Naudé, J. 'The Pedigree of the Common Law and the "Unnecessary" Constitution: A Discussion of The Supreme Court of Appeal's Decision' in *RH v DE*' (2016) 133 *South African Law Journal* 16–27.

   a) Why does Barnard-Naudé criticise the Supreme Court of Appeal Decision?
   b) Why does he use the phrase 'the "unnecessary" Constitution' in the title of his journal article?
   c) Does Barnard-Naudé agree that reference to the Constitution was unnecessary when developing the common law with regard to adultery?
5. One of Barratt's criticisms is that the Supreme Court of Appeal misunderstood the common law roots of the adultery action.
   a) Where does the Supreme Court of Appeal believe that the adultery action originated?
   b) Why is Barratt critical of this conclusion?
   c) What does Barratt identify as the common law roots of the adultery action?

What do you think?

When do you think the courts should develop the common law rather than waiting for the legislature to change legislation?

Chapter summary

In this chapter, we have learned the following about South African common law:

- The foundation of South African common law is Roman-Dutch law.
- Roman-Dutch law is not found in legislation. It is found in the institutional writers.
- Roman-Dutch law forms part of the European *ius commune*.
- English doctrines and legal principles have also infiltrated our common law to some extent.
- The South African legal system is rooted in both the European *ius commune* and English common law.
- The common law is consulted when legislation does not govern or answer a particular legal question.

- Our common law system gives the courts the discretion to develop the principles of common law so that the common law does not become irrelevant to modern conditions.
- Since the advent of the Constitution in South Africa, courts are obliged to develop the common law in accordance with the spirit and purposes of the Bill of Rights.

Review your understanding

1. What are the differences between South African common law and English common law?
2. Explain the different meanings of common law.
3. What does common law mean in South Africa?
4. Explain the nature of the South African legal system by referring to the European traditions in which it is rooted.
5. Explain the main differences between English common law and European *ius commune.*
6. When will the courts refer to the rules of the common law?
7. Where will the courts find the rules of the common law?
8. Explain the meaning of the doctrine of abrogation.
9. What will the courts do where institutional writers contradict each other?
10. Why is it important for the courts to refer to the Constitution when they develop the common law?
11. The South African common law is not a dinosaur frozen in the past, but a living legal system that continues to grow and develop. When will the courts develop the principles of the common law?

Further reading

K v Minister of Safety and Security 2005 (6) SA 419 (CC) (This case discusses the importance of section 39(2) of the Constitution when developing the common law.)

Thomas, P.H. (2005). The South African common law into the twenty-first century. *Tydskrif vir Suid-Afrikaanse Reg* 2:292–298 (This article touches upon the very important different meanings of common law and the reasons for these differences.)

Customary law

Chapter 8

The main ideas

- What is customary law?
- The history of customary law
- Official customary law and living customary law
- Legal pluralism
- Customary law and the Constitution
- Is customary law a source of law?
- Custom as a source of law
- Functions of customary law as a source of law: General
- Functions of customary law as a source of law in contemporary Africa: Protection of indigenous knowledge

The main skills

- Understand what is meant by customary law.
- Trace the history of customary law in South Africa.
- Differentiate between official customary law and living customary law.
- Understand legal pluralism and its relevance to South Africa.
- Summarise how the Constitution mandates the use of customary law.
- Understand how courts resolve conflicts between customary law and the Bill of Rights.
- Understand customary law as a source of South African law.
- Understand how to research customary law.

Apply your mind

What do you understand by the term 'customary law'? In the case *Bhe v Magistrate Khayelitsha* 2005 (1) SA 580 (CC,) the Constitutional Court held that courts should apply rules of 'living customary law'. Why did the court think that this was important and necessary? Did the Constitutional Court apply rules of living customary law in the *Bhe* case?

Another source of law in South Africa is customary law. Before discussing how it functions as a source, we will explore a number of important questions, such as: What is customary law? What is the difference between official customary law and living customary law? How does the Constitution accommodate customary law? We conclude the chapter by looking specifically at customary law as a source of law and, as such, how it is applied generally and specifically amongst contemporary indigenous peoples.

Before you start

In many African communities, it is usual for the groom's family to pay *lobolo* to the bride's family. This is an important legal requirement for the marriage – the couple will only be legally married if the *lobolo* is paid. The payment of *lobolo* is a rule of customary law.

Social practices are the things that people do – their actions and behaviour. Social practices that are common or widespread in a community are called **customs**.

8.1 What is customary law?

Customary law grows out of the things that people do. It is based on the **social practices** and **customs** of a particular group of people.

For a social practice, or a way of doing things, to become part of customary law, members of this community must regard it as legally obligatory. In other words, the social practice becomes necessary or compulsory because it is a rule of law. The law provides that you must behave in a certain way.

You should take note of two important elements in this definition of customary law.

1. People in a community behave in particular ways. They do certain things (or avoid doing certain things).
2. People behave in these ways and do these things because they believe that they have a legal obligation to do so. In other words, people in the community have a particular attitude toward the social practice concerned – they regard it as legally obligatory.

These two characteristics together (the 'doing' and the sense of legal obligation prompting the doing) make up the legal system. The legal system is created through the social practices of a group of people, prompted by their belief that these practices are legally obligatory.

According to **Hamnett** customary law emerges from what people do, or – more accurately – from what people believe they ought to do … the ultimate test is … "what do the participants in the law regard as the rights and duties that apply to them?"

From page 10 of **Hamnett's** book, *Chieftainship and Legitimacy.* The reference details are in the 'Further reading' section at the end of the chapter.

Professor says Meeting the elements of customary law

You are probably familiar with some of the popular social practices that happen when people get married. In some communities it is common (and sometimes even expected) for a man to give a woman a diamond engagement ring. Brides often wear white dresses and veils on their wedding day. Wedding guests give the bridal couple wedding presents and throw rice or confetti at the couple after the ceremony. Then everyone goes to a wedding reception at which people make speeches and eat a special wedding cake.

Can these widespread social practices be regarded as a form of customary law for the community that practises these customs? If you think about it, these marriage customs only meet one of the elements of customary law: there is practice ('doing') but the people concerned do not regard these practices as legally obligatory, and so they are not rules of law.

The payment of *lobolo* however is not only a widespread social practice, but it is also regarded as a legal requirement for a valid customary marriage. This social practice meets both the requirements for a rule of customary law: there is the practice (the 'doing') and the community concerned regards this practice as legally obligatory.

Activity 8.1

1. Define customary law.
2. In terms of this definition, why can payment of *lobolo* be regarded as a rule of customary law?

8.2 The history of customary law

In order to understand the role that customary law plays in South Africa, it is helpful to know something of its history. In this section, we look briefly at how customary law operated in the time of the early white settlers in South Africa. We also examine the steps taken after 1910 to control the application of customary law under the broader legal system operating at that time.

8.2.1 Customary law and the early white settlers

In the earlier chapter on South African legal history you learned that the first Dutch settlers brought with them their own legal system, the Roman-Dutch law that was then in force in Holland, a province of the Netherlands. When the English conquered the Cape in the early 1800s, they decided that Roman-Dutch law should remain the legal system in the South African colonies, although some English law was gradually imported anyway.

At the time Dutch and English settlers arrived in South Africa, the local African people already had their own legal systems. These were customary law systems – systems of unwritten rules arising from the social practices of those communities, and which members of those groups regarded as legally obligatory.

Before the Union of South Africa in 1910, the authorities in the Cape, Natal, the Orange Free State and the Transvaal Republic had slightly different approaches to the customary law practised by African communities. On the whole, however, it suited the authorities to allow local chiefs and headmen to apply and enforce customary law in their communities.

Professor says — Using the term 'indigenous law'

In legal texts, you will sometimes see references to indigenous law. Indigenous means 'belonging to a place' or 'born in that place'. Proteas, for example, are plants that are indigenous to South Africa – they have always grown here. Oak trees, on the other hand are alien plants because they were imported from somewhere else (from Western Europe). In the same way, indigenous law is the law that is local to South Africa, whereas our Roman-Dutch and English common law have come from somewhere else. In South Africa, the term 'indigenous law' is often used instead of the term 'customary law' when referring to the law of indigenous African communities. In this book, however, we will refer only to 'customary law', since this is the term used in the Constitution.

8.2.2 Customary law after 1910

After Union in 1910, the new South African government had to adopt a uniform approach to customary law. It did this by passing the **Native Administration Act 38 of 1927**. This Act confirmed that traditional African leaders would be responsible for applying and enforcing customary law in their communities, especially with regard to marriage, succession, ownership of certain kinds of property, and other civil matters between the members of their communities. The Act provided that customary courts, headed by chiefs and headmen, could hear disputes, based on rules of customary law, between members of their communities. The Act specifically provided that rules of customary law would only be valid if they were compatible with the white authorities' ideas about morality, justice, good order and public policy. This provision was known as the 'repugnancy clause'. It has now effectively fallen away, because customary law must be applied 'subject to the Constitution' itself.

The **Act's** name has changed over time. It was most recently called the Black Administration Act and was finally repealed by the Repeal of the Black Administration Act and Amendment of Certain Laws Act 28 of 2005.

For other areas, for example serious criminal offences, the general South African criminal or civil law would apply.

Activity 8.2

The Constitutional Court has referred to the Native Administration Act 38 of 1927 as an 'an egregious apartheid law,' as 'part of a demeaning and racist system,' 'obnoxious' and as 'not befitting a democratic society based on human dignity, equality and freedom'.

Discuss, in groups, the court's reasons for these views with reference to the judgment of Ngcobo J in *ex parte Western Cape Provincial Government and Others: In re DVB Behuising (Pty) Ltd v North West Provincial Government and Another* 2001 (1) SA 500 (CC); [2000] 4 BCLR 347 (CC) at paras. [1–2]; and the judgment of Sachs J in *Moseneke and Others v The Master and Another* 2001 (2) SA 18 (CC); [2001] 2 BCLR 103 (CC) at paras [21–26].

The Act also provided for **Native Commissioners Courts**. These were similar to Magistrates' Courts, except that they applied customary law. This system of courts was

The **Native Commissioners Courts** also had discretion to apply common law if this seemed more appropriate.

headed by the **Native Appeal Courts**. Ordinary Magistrates' Courts and the Supreme Court could not apply customary law, unless the particular rule of customary law was proved in court. In terms of the Law of Evidence Amendment Act 45 of 1988, all courts were mandated to **take judicial notice** of customary law and were allowed to apply it, provided that the customary law rules were 'not opposed to the principles of public policy or natural justice'. As we shall see later, the Constitution now provides that all courts must apply customary law when that law is applicable.

Native Appeal Courts were later called 'Bantu Appeal Courts', then 'Black Appeal Courts', and finally just 'Appeal Courts'.

Professor says — Benefits of traditional courts

The Constitution retains the traditional customary law courts presided over by chiefs and headmen. These courts offer several significant benefits and advantages.

- Accessibility: Almost every village in South Africa has a traditional court, which means that people do not have to travel long distances to reach them. The courts are also socially accessible – people know the local chief or headman and feel less intimidated than they might do in the Magistrates' Courts.
- Cost: The courts are either free or charge only minimal fees. Also, people don't have to pay transport costs to reach them.
- Language: Proceedings are in the language used in the local community and there is an absence of legal jargon.
- Simplicity and informality: Court procedures are swift and informal, and there are few delays. The existence of these courts is based on community values such as reconciliation and the restoration of peace in the community, and they have an important role to play both in the administration of justice and in cementing the entire social fabric.

Activity 8.3

Analyse the important aspects of the Native Administration Act 38 of 1927 and indicate what aspects have since been repealed and how that repeal was implemented.

8.3 Official customary law and living customary law

Taking judicial notice meant that rules of customary law no longer needed to be proved in the Supreme Court or in ordinary Magistrates' Courts.

Official customary law consists of those rules of customary law that have been written down in customary law codes or other legislation, in precedents from cases heard in the Native Appeal Courts or in the Supreme Court and Appellate Division, and in certain textbooks.

Some of the cases were heard a long time ago. The various codes are also old. The Natal Code, codifying rules of Zulu customary law, for example, was drafted in 1932, based on two previous codes that were drafted in 1878 and 1891. The Natal Code was updated in 1967 and most recently in 1987, over thirty years ago.

Earlier, we defined customary law as consisting of those social practices that people regard as legally compulsory. Social practices in a community may change as society changes – for example, when people move from rural to urban areas, or when they start working for wages rather than tending their fields and animals. In many traditional rural communities, the transfer of cattle from the groom's family to the bride's family was an important legal element in the conclusion of a customary marriage. This practice is called ***lobolo*** in many Nguni-speaking communities. This is also the term used in the Recognition of Customary Marriages Act 120 of 1998. Some communities had particular rules about the number of cattle that should be transferred, while in other communities the number of cattle was negotiated between the families. These customs changed, however, when people started earning wages and more people began living in the cities permanently. It became difficult or impractical to base marriage on the transfer of cattle, and it thus became acceptable to conclude marriages through the transfer of cash instead.

Other communities use different words to describe the practice of ***lobolo***, including *bogadi, bohali, xuma, lumalo*, *thaka, ikhazi, magadi*, and *emabheka*.

When social practices change and people begin to regard new customs as legally binding, customary law changes. This is because customary law consists of those social practices that the members of a particular community regard as legally compulsory. Social practice is flexible; it responds to changing social, economic and political circumstances.

Official customary law on the other hand is far less flexible. It is written down and it can be difficult to change or rewrite the codes to adapt to changing circumstances.

What happens when social practice changes but nobody rewrites the codes and precedents? Social practices change all the time, but official codes are only revised occasionally. So, of course, it is quite possible that the rules of official customary law written down in the official codes and other written sources don't accurately describe social practice anymore.

In fact, most writers say that official customary law is so old-fashioned that it no longer reflects the social practices of the communities concerned. Most writers agree that official customary law never accurately reflected the social practices of the communities concerned – not even when it was first written down. Many of the codes were written by outsiders. They may have misunderstood the nature or meaning of the social practices that they observed. At times, they may have deliberately changed the rules to suit colonial interests, or may have been misled by certain individuals in the communities who gave a version of the rules that suited themselves. The Constitutional Court has also expressed the view that official customary law is unreliable.

We can say that there is a dichotomy – an important difference – between written, or official, customary law and the social practices of people in their communities. The flexible and ever-changing customary law that is in fact practised by people in their communities is called **living customary law**. It is alive in the sense that it grows and changes as the people who make this living customary law change their social practices. The living customary law corresponds to our first definition of customary law – it consists of the social practices of a particular group of people, who regard the practices as legally obligatory.

Some writers call **living customary law** 'people's law' or 'folk law' or even 'unofficial customary law'.

Activity 8.4

Explain why the living customary law might differ from official customary law.

8.4 Legal pluralism

The word 'plural' means 'two or more', and so, as you might expect, the term 'legal pluralism' has something to do with two or more legal systems.

We say that legal pluralism exists if there are two or more valid legal systems operating in the same place at the same time. In South Africa, both common law and customary law are recognised as valid legal systems. Legal pluralism is therefore a feature of the South African legal system.

Sometimes it is difficult for a court to decide whether common law or customary law should apply to a case before it. In *Sawintshi v Magidela* 1944 NAC (C&O) 47, for example, there was a dispute concerning the sale of mielies. Mr Magidela had delivered six bags of mielies to Mr Sawintshi about ten years earlier, but Mr Sawintshi had not yet paid for the mielies. According to the rules of Roman-Dutch law, Mr Magidela's claim had expired, and the Native Commissioners Court, which first heard the case, dismissed Mr Magidela's case. In other words, the court held that Mr Sawintshi did not have to pay for the mielies. Mr Magidela then appealed to the Native Appeal Court, arguing that the mielies had been sold in terms of the rules of customary law and that prescription of debts was unknown in the customary legal system. The Appeal Court looked more carefully at the question of whether common law or customary law should apply to the matter. The court noted that the **transaction** would be governed by the system of law that the parties had in mind when the mielies

The **transaction** here is the sale.

were bought and sold. The court decided that since both parties lived in a rural part of the Transkei, and the sale concerned local home-grown produce, it must be assumed that they intended customary law to apply to the sale. According to the rules of customary law, debts did not prescribe. Therefore, Mr Sawintshi still had to pay for the mielies.

You should also bear in mind that there are several customary law systems in South Africa. Many communities practise customary law, but there are some important differences between them. Rules of Zulu customary law, for example, may differ from those in Pedi or Venda law. In addition, in most of these communities, we will find both official and living versions of **customary law rules**. All this can make it even more difficult for a court to decide which system of law should apply to a dispute.

These **rules** require the court to apply the **customary law** that operates in the place where the parties reside, carry on business, or are employed.

As a general rule, the court will examine the intention and general lifestyle of the parties, as well as the nature and circumstances of the transaction, when deciding which legal system to apply. If these guidelines fail to settle the choice of law question, the court can apply the rules set out in s 1(3) of the Law of Evidence Amendment Act 45 of 1988.

8.5 Customary law and the Constitution

The Constitution protects the right to culture. Section 30 provides that:

> "everyone has the right to … participate in the cultural life of their choice', but adds that they may not do so 'in a manner inconsistent with any provision of the Bill of Rights'. Similarly, s 31 provides that people who belong to a cultural community have the right to 'enjoy their culture".

Section 31 also adds that this right may not be exercised in a manner inconsistent with the Bill of Rights.

It is very difficult to define the words 'culture' or 'cultural life'. This means that it is not entirely clear what 'the right to culture' entails. It appears, however, that use of a customary legal system should be regarded as an aspect of 'culture' or 'cultural life,' and that it is therefore protected by ss 30 and 31. The Constitution accordingly gives people the right to practise and use their customary law, provided, of course, that the rules of customary law are not 'inconsistent with any provision of the Bill of Rights'.

Section 211(3) of the Constitution provides that:

> "The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law".

This section is very important for understanding how customary law fits into the modern South African legal system. To properly understand this section, we will discuss it in three parts.

8.5.1 'Courts must apply customary law'

Courts 'must' apply customary law. This means that the Constitution itself recognises customary law as part of the South African legal system. It is clear that application of customary law is not optional, but is compulsory.

8.5.2 'When that law is applicable'

Secondly, the section also provides that the courts must apply customary law 'when that law is applicable'. From our discussion of *Sawintshi v Magidela*, we can see that it is not always clear whether or not customary law is applicable to a particular dispute. We noted that a court will examine the intention and general lifestyle of the parties, as well as the nature and circumstances of the transaction, when deciding whether or not customary law should be applied. Section 211(3) of the Constitution does not say whether a court should apply official customary law, or living customary law. But the recognition that customary law is linked to the right to culture suggests that the courts should apply the living customary law that people actually practise.

Case study Applying the rules of living customary law

The courts have not only acknowledged the existence of living customary law, but have also been willing to apply rules derived from living customary law. In *Mabena v Letsoalo* 1998 (2) SA 1068 (T), there was a dispute about whether or not a valid customary marriage had been concluded. According to the rules of official customary law, the father of the bridegroom had to negotiate the payment of *lobolo* with the father of the bride. In this case, the bridegroom had negotiated the lobolo himself. Furthermore, he had negotiated with the bride's mother rather than with her father. According to the rules of official customary law, there was no valid marriage. The court examined evidence of current social practice, and found that these days it is regarded as acceptable for bridegrooms to negotiate and pay *lobolo* without the consent of their fathers, and for bridegrooms to negotiate *lobolo* with the bride's mother instead of her father. Young, independent men with money of their own can choose to negotiate and pay lobolo on their own, without their fathers' assistance or consent. This is an adaptation of customary law to meet changing social circumstances: today, many households are headed by women. In this particular case, the bride's father had abandoned his family, and it would have created significant hardship if the bride's mother had not been able to negotiate on her behalf. The court decided to develop the rules of customary law by taking the rules of living customary law into account. It held that according to the rules of developing living customary law, the parties were validly married.

Activity 8.6

Find a copy of *Mabena v Letsoalo*. What did the court have to say about the recognition of a rule of customary law and the development of customary law in accordance with the Bill of Rights? Look particularly at 1075B-C.

8.5.3 'Subject to the Constitution'

Thirdly, you should note that the section explicitly provides that the courts must apply customary law 'subject to the Constitution'. The Constitution is the supreme law. No rule of law, whether a statutory rule, a rule of ordinary common law, or a rule of customary law, is allowed to conflict with the Constitution. Rules in violation of the Constitution must either be scrapped, or developed and changed so that they do not violate any constitutional rights. Section 39(2) mandates the courts to develop rules of customary law in a way that promotes 'the spirit, purport and object of the Bill of Rights'.

The Constitution introduces a completely different approach to law in South Africa. We now have a Bill of Rights and no other law may conflict with it. There are many rules of customary law that do not conflict with the Bill of Rights. However, there are some particular concerns with certain customary law rules regarding women. Women and men were treated differently in traditional African society. Usually, women could not be the heads of households, could not own property, and indeed were unable to attain legal majority status. They were under the **perpetual** guardianship of a man such as their father or husband. The Constitution forbids unfair discrimination on the grounds of sex or gender. Can customary law rules regarding women withstand constitutional scrutiny?

Perpetual means never-ending.

With the Constitution in mind, we will now look more closely at one rule of customary law, namely the male primogeniture rule, which prevented women from inheriting property. In traditional African society, inheritance and succession were based on male primogeniture. **Primogeniture** means 'first born'. In a system of inheritance based on male primogeniture, the first-born son usually inherits everything.

Primogeniture comes from the Latin words 'primus' (meaning 'first') and 'genitura' (meaning 'birth' or 'descent').

For example, Mr Goniwe, a widower, has four children. The eldest, his daughter Yoliswa, is 37. The next child is a son, Thabo, who is 34. Then there is Sandile, another son, who is 33, and then

the youngest, Busisiwe, a daughter, who is 29. According to the male primogeniture rule, the eldest son, Thabo, will inherit everything when Mr Goniwe dies. Yoliswa, Sandile and Busisiwe will inherit nothing. If Mr Goniwe had no sons, and his only children were his daughters, Yoliswa and Busisiwe, they would still inherit nothing according to the rules of male primogeniture. Instead, the eldest male in Mr Goniwe's family would inherit everything. This eldest male might be Mr Goniwe's father. He would inherit everything, if he were still alive. If Mr Goniwe's father were already dead, then Mr Goniwe's eldest living brother would inherit everything. If there were no surviving brothers, then a male nephew, uncle or cousin would be found. According to the official customary law rules of male primogeniture, women are not allowed to inherit under any circumstances.

Intestate means 'without a will'.

We say that people 'inherit' property, but '**succeed to'** positions in the family and to family responsibilities.

This rule might seem unfair to daughters like Yoliswa and Busisiwe. And indeed, this rule has been challenged, as we shall see in the following case study.

Case study Male primogeniture

In the leading case *Bhe v Magistrate Khayelitsha* 2005 (1) SA 580 (CC); [2005] 1 BCLR 1 (CC), Ms Bhe brought an application on behalf of her two young daughters, Nonkululeko and Anelisa Bhe. Their father, Mr Vuyo Mgolombane, had died without leaving a will. His most important and valuable property was a plot of land and an informal shelter in Khayelitsha, Cape Town. Ms Bhe had lived with Mr Mgolombane for twelve years, together with their daughters once they were born. Ms Bhe argued that her daughters should inherit this property since they were their father's only children. She pointed out that this was the girls' home, and that they had nowhere else to live. Mr Mgolombane senior, the deceased's father, argued that he was entitled to the property. He pointed out that in terms of the customary law of **intestate** succession, based on male primogeniture, the eldest male relative of the deceased inherited all the property. Since the deceased had no sons, he, the father, was the eldest male relative and entitled to inherit everything. He planned to sell the property and use the proceeds to pay for the funeral expenses.

Ms Bhe argued that the male primogeniture rule discriminated against women and girls and that this violated the right to equality as set out in s 9 of the Constitution. Section 9 forbids unfair discrimination on a number of grounds, including sex and gender.

The court pointed out that in traditional African society, the eldest son or the eldest male relative inherited all the property. However, he also **succeeded** to all the family responsibilities of the deceased. This meant that he had to care for and support all those people that the deceased had been responsible for. In effect he 'stepped into the shoes' of the deceased, and used the property as it had been used previously – to support the family.

The court then examined the present-day situation, and found that the tradition of the male heir supporting the descendants of the deceased was no longer uniformly practised. Male heirs were often absent or otherwise unable or unwilling to support the families of the deceased, and so in practice, they did not always take on these traditional family responsibilities. Under these circumstances, strict application of the official customary law rules might result in 'anomalies and hardships'.

The court ruled that the male primogeniture rule was unconstitutional. It discriminated unfairly against women and girls and therefore violated s 9, which forbids discrimination on the grounds of sex and gender. The court held further that the rule violated s 10 of the Constitution, which protects the right to human dignity. The male primogeniture rule was based on old-fashioned patriarchal ideas, in terms of which women were perceived as needing to be taken care of, and as unable to take on certain family responsibilities. They always retained their minority status, were automatically placed under the control of male heirs, and were prevented from inheriting or controlling property. This view and treatment of women violated their dignity.

Case study (continued) Male primogeniture

The court only examined the male primogeniture rule as set out in official customary law. The court noted that it was probable that the living customary law had changed in response to the fact that male heirs were no longer taking on traditional family responsibilities. The court acknowledged that living customary law was a source of law, but the court had insufficient evidence about new rules of living customary law, and so it was unable to assess these 'living rules' or their constitutionality. Because the court did not know enough about the relevant rules of living customary law, it was unable to develop them in a way which would promote the spirit, purport and object of the Bill of Rights, as mandated in s 39(2) of the Constitution. The court also noted that case-by-case development of customary law rules would be very slow, would prolong uncertainties about customary law rules, and might lead to different solutions for similar problems. For these reasons, the court held that Parliament was better placed to make the necessary reforms. As a temporary measure, until Parliament could pass new legislation, the court ordered that the Intestate Succession Act 81 of 1987 should replace the customary rules of intestate inheritance.

Find a copy of the case *Mayelane v Ngwenyama* 2013 (4) SA 415 (CC). The case was also reported as *MM v MN* 2013 (4) SA 415 (CC). Then read the following case study related to the *Mayelane* case and answer the questions that follow.

Case study Polygynous marriages

In *Mayelane v Ngwenyama* 2013 (4) SA 415 (CC), the Constitutional Court considered some previously unanswered questions about polygynous marriages. Customary marriages are regulated in terms of the Recognition of Customary Marriages Act 120 of 1998. The Act provides for polygyny, but is silent on the question of whether a man must consult his existing wife (or wives) before concluding an additional marriage with a new wife.

In the *Mayelane* case, Ms Mayelane sought the posthumous registration of her marriage to Mr Hlengani Moyana. The couple had married in 1984 in terms of Xitsonga customary law. When Ms Mayelane tried to register this marriage, she discovered that Mr Moyana had entered into a second customary marriage with Ms Ngwenyama. Mr Moyana and Ms Ngwenyama had married in 2008. Ms Ngwenyama also sought to register her marriage. Ms Mayelane argued that the marriage between Mr Moyana and Ms Ngwenyama should be declared void and of no effect. Ms Mayelane claimed that in terms of Xitsonga customary law, a man must obtain the consent of his first wife before he is permitted to take an additional wife. She argued that since Mr Moyana had not consulted her before marrying Ms Ngwenyama, the second marriage was void.

The Constitutional Court noted that the Recognition of Customary Marriages Act does not require the consent of the first wife before the husband can conclude additional marriages. However, the Recognition Act does require that customary marriages be concluded 'in accordance with customary law' (s 1b). The court thus needed to decide whether Mr Moyana's second marriage had been concluded in accordance with Xitsonga customary law. In particular, the court had to establish whether Xitsonga customary law required the consent of the first wife before the husband could marry a second wife. Evidence presented during the case suggested that Xitsonga law requires that a husband inform his first wife before marrying a second wife. The consent of the first wife is important to ensure harmony in the family, and husbands are expected to try to persuade their first wife to agree to a proposed second marriage. The facts showed that Mr Moyana had not informed Ms Mayelane before marrying Ms Ngwenyama. The court thus concluded that the second marriage (to Ms Ngwenyama) did not meet the requirements of Xitsonga customary law and it was therefore invalid.

Case study (continued) Polygynous marriages

The Constitutional Court went on to comment on the constitutional development of Xitsonga customary law. It held that:

"Xitsonga customary law must be developed to the extent that it does not yet do so, to include a requirement that the consent of the first wife is necessary for the validity of a subsequent customary marriage. This conclusion is in accordance with the demands of human dignity and equality." (para 85)

1. The court based its decision on the constitutional rights to human dignity and equality. Read paragraphs 82–84 of the judgment. Why does the court conclude that failure to obtain the consent of the first wife to an additional marriage would infringe her right to equality and dignity?
2. The Mayelane case was specifically about Xitsonga customary law. Does the decision apply to marriages concluded in terms of other customary law systems? Read paragraphs 82–86 of the judgment.
3. What does the court conclude about the status of a second marriage that is concluded without the consent of the first wife?
4. The court decided that the ruling will apply only 'prospectively' and will not apply with 'retrospective' effect. What do these terms mean?
5. Why does the court decide against retrospective application of the new consent requirement? See paragraphs 85–86.
6. Some legal commentators have been critical of parts of the Mayelane judgment. How could you conduct some independent research to discover what legal commentators have said? As a starting point, find a copy of the journal article: Himonga, C. and Pope A. (2013) *Mayelane v Ngwenyama and Minister for Home Affairs*: a reflection on wider implications. Acta Juridica 318–338. You could also conduct research by visiting appropriate scholarly websites. A good example is the website called Custom Contested which you can find at http://www.customcontested.co.za/ See if you can find the comment by Prof. Chuma Himonga on the Mayelane case.

Activity 8.7

1. Summarise the position of customary law under the South African Constitution with reference to ss 31, 32, 39(2–3) and 211(3).
2. Find a copy of *Bhe v Magistrate Khayelitsha*. This case is reported as 2005 (1) SA 580 (CC) and as [2005] 1 BCLR 1 (CC). You can also find reliable versions of the judgment on the internet at http://www.constitutionalcourt.org.za and http://www.saflii.org/
   a) Which South African legislation did the court find to be in conflict with the Constitution and, therefore, to be invalid?
   b) The court noted that the Constitution provides that customary law should be 'accommodated as part of South African law', provided that 'particular rules or provisions are not in conflict with the Constitution' (para. 41). Which sections of the Constitution did the court mention in this regard? Look up these sections in the Constitution and note the ways in which they provide for the recognition of customary law subject to the provisions of the Constitution.

Activity 8.7 (continued)

c) What did the court say about the contrast between official customary law and living customary law? Look particularly at paragraphs 86–87 and 82–83.

d) What evidence of living customary law did the court discuss? Read paragraphs 80–85 in particular.

8.6 Is customary law a source of law?

We are now in a position to examine the question of customary law as a source of South African law. As indicated at the beginning of this section of the book, the term 'source of law' can be used in various ways. Sometimes, we use it to mean a source of legal rules. Is customary law a source of some of the rules that make up South African law?

8.6.1 The quick answer

On a superficial level, this may seem an easy question to answer: we know that customary law is part of the South African legal system (and thus a source of legal rules) because the Constitution tells us so. Section 211(3) expressly provides that the courts must apply customary law where applicable. As discussed earlier, this section recognises customary law as part of South African law.

8.6.2 The real answer

When we look at the question more closely, we realise that the situation is more complicated. What does the Constitution mean by 'customary law'? Does it mean official customary law or living customary law? We have seen that there is often a difference between living and official law. Which of these systems should the courts apply?

In practice, courts tend to apply **official customary law**. This is because the rules of customary law are written down in codes, regulations, textbooks and case precedents. It is easy to find these rules, and the courts are used to working with written laws.

Even if the courts do not apply the rules involved, they will still examine the **official customary law** rules. This is what happened in the Bhe case.

On the other hand, the Constitutional Court has acknowledged that living customary law exists alongside official customary law. The court has implied that living customary law is the true customary law. It has described official customary law as 'a poor reflection, if not a distortion, of the true customary law'. We also noted earlier that the constitutional recognition of customary law is linked to the right to culture. This implies that people have a right to practise living customary law. The problem for the courts is that it is extremely difficult to discover the rules of living customary law. They require evidence of the actual social practices of people in their various communities. This evidence needs to be assessed. Do these customs meet the requirements for legally binding rules and do the people practising these customs regard them as legally obligatory?

Is there an institution with the legal power to lay down rules of customary law? This doesn't seem to make much sense in the case of living customary law, since the living law grows out of the day-to-day social practices of the community. The source of living customary law is social practice that is accompanied by the required sense of legal obligation. It is clear, however, that the courts have the authority (and indeed the duty) to develop rules of customary law. Similarly, the Constitutional Court has noted Parliament's authority and duty to reform customary law so as to make it consistent with the Bill of Rights. In both cases, these institutions will probably try to base their efforts on living customary law that is practised in the communities concerned. But you should note that the result of these efforts will then become part of official customary law – that inflexible, written record of customary law.

The term 'source of law' can also be used in the sense of 'source of information about the law'. Statutes and reported cases tell us what the law is. They are useful written sources of law. In the case of customary law, we have already seen that official customary law refers, by definition, to those rules of customary law in written sources such as codes, other legislation, case precedents and textbooks.

The most important sources of information about living customary law are the people who practise this law. In theory, those who practise living customary law can appear before the court and give evidence about customary law rules. This can be impractical, however. An alternative might be for researchers to conduct fieldwork in communities practising living customary law and to publish their findings. Rigorous and reliable reports could provide the courts with important information about the rules of living customary law currently being practised.

Activity 8.8

Prepare a short essay on when and why courts apply rules of official customary law and when they apply the rules of living customary law respectively. Give your opinion on which customary law the courts should apply. What are the advantages and disadvantages of applying each of these?

8.7 Custom as a source of law

In this chapter, we have examined customary law as a source of law. We noted that the Constitution recognises customary law as a source of law; that customary law is based on social practices; and that customary law takes the form of official customary law as well as living customary law.

Customary law is not the only kind of law based on social practices. Our legal system also recognises 'custom' as a source of law.

When can customs be regarded as legally obligatory? A custom will only be regarded as a legally binding rule if it meets certain criteria.

These criteria were spelled out in the Appellate Division case, *Van Breda v Jacobs* 1921 AD 330, a case which concerned another 'custom of the sea'. Mr Van Breda and Mr Jacobs were fishermen based in Simonstown. One morning in early September, both men and their crews piled into their fishing boats and followed a shoal of fish swimming from Simonstown to Glencairn. Mr Van Breda's boat overtook the fish first, and his crew laid their nets ready to intercept and catch the fish as they swam past. But before the fish reached them, Mr Jacobs arrived, and positioned his boat and nets immediately in front of Mr Van Breda. Mr Jacobs was then able to catch all the fish before they could swim into Mr Van Breda's nets.

Mr Van Breda took Mr Jacobs to court for 'stealing' his catch. He sued him for the value of the fish that 'should have been his'. He claimed that there was a local custom in terms of which, once a group of fishermen had set their nets with the aim of catching a shoal of fish, no other fishermen were allowed to put up nets in front of theirs in the way that Mr Jacobs had done. Any other fisherman must lay his nets a 'reasonable distance' away.

The court held that a local custom could be regarded as a legally binding rule if it met certain criteria.

- The custom must have existed for a long time. The court did not specify how long exactly, but in this case, the custom had existed for at least forty-five years, and the court decided that this was long enough.
- The custom must be reasonable. In this case, the court decided that the custom had a reasonable purpose – to prevent quarrels and disputes among fishermen – and that it was also obviously fair.
- The custom must be uniformly observed. In this case, the court noted that the custom had been regularly and loyally observed by fishermen in the area. Those who had attempted to breach the custom had been stopped.
- The custom must be definite and certain, and must clearly regulate the rights and duties of the people concerned. The only possible uncertainty with this custom was the meaning of 'a reasonable distance' away. However, in this case the boats were so close together that their oars overlapped, and there was no doubt that the new fishermen were not at a reasonable distance.

Consider the following case study and answer the questions that follow.

Case study — Rule of custom

In the case *Lamprecht v Varkevisser* 1932 CPD 388 Mrs Varkevisser was a nurse. She consulted Dr Lamprecht on a medical matter. Some months later, Dr Lamprecht sent a bill for the consultation. Mrs Varkevisser claimed that she was not obliged to pay for the medicial consultation, because it is a long-standing custom that medical doctors do not charge other doctors or nurses for consultations.

1. With the above in mind, do you think that the following qualifies as a rule of custom?
2. What requirements must be satisfied?

8.8 Functions of customary law as a source of law: General perspectives

Understanding the nature and characteristics of customary law cannot be complete without understanding how it functions as a source of law in Africa in general and in South Africa in particular. There is a need to address the following topics:

- the functions of customary law as a source of law
- the functions of customary law as a source of law in contemporary Africa and South Africa
- understanding how to research customary law for its functional use.

Professor says — What are some of the emerging questions

You are probably familiar with the usual concerns raised by most scholars of customary law. They include whether customary law is still important in a modern constitutional democracy and whether customary law is compatible with and relevant to a democratised South Africa. Some of these concerns have been addressed in the earlier discussions. What we are concerned with here is to provide some understanding of how customary law functions, starting with its general function in any African society.

8.8.1 General functioning of customary law as a source of law in Africa

African societies are characterised by socio-economic and political challenges affecting the developments of different societies all over the continent. Issues of poverty, unemployment, inequality and many other social evils have raised questions of the role of law in development. For example, as far back as the 1980s conferences were organised to address this issue. These **conferences** dealt with the general role of law in development and the functions of customary law in meeting the needs of society in Africa.

The first **conference** was held in Harare in February 1989. Its theme was: 'The role of Law in a society in Transition'. This was followed by another conference on a 'New Jurisprudence for a future South Africa', which was held at the University of Pretoria in October 1989.

Customary **law** still exists and is recognised in the constitutions and legal provisions of most African countries. Customary law emerges from what people do, or, more accurately, from what people believe they ought to do – the ultimate test is: "What do the participants in the law regard as the rights and duties that apply to them?" (Hamnet 1975:10) Indeed, customary law results from the creation of repeated social practices (customs) of a particular group of people. Members of the group regard these practices as legally binding, which can be seen by way of constant repetition. This is precisely what African communities used to do before colonisation, during colonisation (and apartheid, as in South Africa) and post-independence until today. It has always been the 'living law' and was only degraded to a non-source of law during colonialism when customary law was believed to be primitive, backward, anti-democratic and in conflict with the notion of human rights. Any law can only continue as long as it has a role to play because if it no longer has any role to play, it simply dies a natural death.

Activity 8.8

Identify some critical areas of African societies where customary law is applied.

8.8.2 Functions of customary law: Protection of indigenous knowledge

Knowledge is critical in generating, articulating and developing ideas that are needed to transform societies for sustainable development. A knowledge-based economy is necessary to drive economic systems for sustainable socio-economic development and, therefore, knowledge has become the key for any socio-economic development in the world. Since the Convention on Biological Diversity (CBD) in 1992, there has been increased awareness of the value of indigenous knowledge (IK) associated with biological resources that are available in abundance and have been for generations in Africa. Fair and equitable sharing of benefits from the use of these biological resources needs to be developed and, more so, the protection of the associated indigenous knowledge and intellectual property needs to be ensured. Customary law protects and promotes Africa's indigenous knowledge, (IK), indigenous knowledge systems (IKS) and other intellectual property in terms of technology transfer and commercialisation of innovations arising from the indigenous knowledge of the indigenous African communities accumulated over generations of living in a particular environment. However, before we consider the functions of customary law in protecting and promoting that IK it is important to understand and differentiate between IK and IKS.

Professor says Important to understand words and phrases

Indigenous knowledge (IK) is a term that can be used synonymously with 'traditional', 'community' and 'local' knowledge as contrasted with different knowledge developed by a given community within the international knowledge systems. For example, there are 'western' or 'modern' or 'Eurocentric' knowledge systems generated through universities, government research centres and private industries.

Indigenous knowledge (IK) is, however, not synonymous with indigenous knowledge systems (IKS) as will be explained in this study.

8.9 Understanding IK and IKS

In South Africa, the terms 'Indigenous Knowledge' (IK) and 'Indigenous Knowledge Systems' (IKS) are the most common, official and generally used terms. There are many important official documents and discussions on IK and IKS. Some of these are:

- the Indigenous Knowledge Systems Policy of South Africa, 2004
- the Bill for the Protection, Promotion, Development and Management of Indigenous Knowledge Systems, 2014
- the Draft Regulatory Policy Framework for the Accreditation and Certification of Indigenous Knowledge Holders and Practitioners of 2014.

In the Constitution of South Africa, there is no clarity on the use of the term 'indigenous'. In one instance, there is reference to the term 'indigenous languages' (South African Constitution: 1996) and in another instance, there is reference to 'indigenous law' 'customary law' and 'traditional (not indigenous) leaders'.

Can the words 'indigenous' and 'traditional' be used interchangeably? Does the inconsistency suggest a distinct difference between 'indigenous' and 'traditional'? According to the South African

IKS policy, one gets the impression that these terms are generally used synonymously. There is a distinct differentiation between the knowledge that was developed by indigenous communities and the knowledge that was generated by Western universities and other Western institutions. Since the need for a clearer understanding of IK and IKS arises, let's look at the definitions and characteristics of IK and IKS.

8.9.1 Definitions and characteristics of IK and IKS

Given the above uncertainties about terminologies, one may conclude that there may be no universally accepted terms or definitions of IK and IKS because there are as many terms and definitions and the use of terminology seems subjective, rather than objective.

IKS is the basis for local community decision-making in all the activities in community livelihood. It is developed and adapted continuously to gradually changing environments and passed down from generation to generation and closely interwoven with the community's cultural values.

IK has the following important characteristics, namely, it is the knowledge that relates to those long-standing traditions and practices belonging to specific local indigenous communities who produce, develop and maintain the knowledge locally and traditionally from one generation to another; to the skills, innovations, experiences and insights of peoples in their respective communities; to the strategies for the livelihood when making decisions over livelihood activities whether for agriculture, health, natural resource management, conflict resolution and other community livelihood activities for their sustainable development.

One writer has highlighted the following as the special features or characteristics of IK which distinguishes it broadly from other knowledge. According to this writer, while citing and acknowledging other writers, IK is characterised by the fact that it is local and tacit knowledge, which is transmitted orally through imitation and demonstration; it is experiential rather than theoretical knowledge, learned through repetition, and is constantly changing. For greater detail on this, you can read Odora-Hopers citing other writers, such as the World Bank.

Indigenous knowledge systems (IKS), on the other hand, have been described as bodies of knowledge, skills and beliefs that are locally produced and orally transmitted from one generation to the next. They are also known as traditional or community knowledge systems and are characterised by bodies of knowledge, skills, beliefs and technologies/experiences used to give expression to the processing of knowledge which are also produced, developed and maintained locally and traditionally by indigenous communities.

Cultural and religious ceremonies, agricultural practices and health interventions are some of the areas that are part of this system of knowledge.

IKS, therefore, differ from culture to culture, from community to community and from profession to profession.

The South African IKS policy contextualised the point by itemising the drivers of IKS in South Africa as follows:

- the affirmation of African cultural values in the face of globalisation – a clear imperative given the need to promote a positive African identity
- practical measures for the development of services provided by IKS holders and practitioners, with a particular **focus** on traditional medicine
- underpinning the contribution of IK to the economy – the role of IK in employment and wealth creation
- interfaces with other knowledge systems, for example, IK is used together with modern biotechnology in the pharmaceutical and other sectors to increase the rate of innovation.

The **focus** also includes areas such as agriculture, indigenous languages and folklore.

Professor says Importance of linking customary law to IK/IKS

The above discussions on establishing how customary law functions as a source of law has generally led to considering how it functions in some specific areas. IK and IKS were chosen as the specific areas for the study. However, before engaging in how customary law functions as a source of law, it was considered necessary to first understand what indigenous knowledge (IK) is, particularly in terms of its nature and characteristics. The process of that understanding has now led us into distinguishing terms, closely associated with IK, types of IK and indigenous knowledge.

8.9.2 Application of customary law to IK and IKS

An important aspect of understanding IK is to acquire knowledge on how it is applied and regulated. This is a crucial concern as it leads to the question as to what methods of application have been put in place to regulate IK/IKS, not only during the pre-colonial but more so during colonial (and apartheid, in the case of South Africa) and post-colonial Africa.

In the pre-colonial period, the mechanism or system used to transmit indigenous knowledge within a community was what is now called customary law. It was not a formal system of law as known today, but a system of rules, rights and obligations – not written down, but it achieved enforceability by the community's consensus to be bound by those rules. Informal as they were, they were monitored and enforced by community leaders, such as chiefs and elders, and by specialised experts, such as traditional healers. Where disputes in the community arose, these community leaders settled them and decided which knowledge holders were eligible to practise and which knowledge systems should be used to protect, promote and manage.

Colonialism brought with it aspects of new knowledge to Africans. This different type of knowledge, as explained above, has since been referred to as 'western' or 'modern' or 'Eurocentric' knowledge with special emphasis on 'intellectual property'. Like African indigenous knowledge, it also refers to creations of the mind, including inventions, artistic works and symbols, names, images, and so on. However, unlike African indigenous knowledge, the new type of intellectual property is divided into two categories, namely:

- **industrial property**
- **copyright**.

Industrial property refers to patents, trade marks, industrial designs, etc.

Plays, novels, films, artistic works, etc. all require **copyright**.

Both industrial property and copyright have their own respective rules, rights and obligations.

The importance of this type of intellectual property was first recognised in the Paris Convention for the Protection of Industrial Property of 1883 and the Berne Convention for the Protection of Literary and Artistic Works of 1886. Today, not only these two treaties, but also other aspects of modern intellectual property are administered by the World Intellectual Property (WIPO). An efficient and equitable intellectual property system can help all countries to realise its potential as a catalyst for economic development and social and cultural wellbeing.

In the case of Africa, it was soon realised that when the economic interests of industries and consumers, on the one hand, and holders and practitioners of IK, on the other, came into contact, the modern legal systems could not protect the informal aspects of African indigenous knowledge. This was particularly evident in incidences of **biopiracy** and theft of indigenous genetic resources. The problem was eventually realised, and in 1998 and 1999, nine fact-finding missions (FFMs) were undertaken by WIPO

Biopiracy is the use of wild plants by international companies to develop medicines, without compensating the indigenous communities from which they are taken.

> "… to identify and explore the intellectual property needs and expectations on new beneficiaries, including the holders of indigenous knowledge and Innovations in order to promote the contribution of the intellectual property system to their social, cultural and economic development". (WIPO, 2002)

South Africa was the first African country to benefit from the report of those missions because in 2004 it finalised a national IKS policy. In the same year, the policy was approved by Cabinet heralding a significant breakthrough in the development, promotion and protection of IKS in South Africa. This illustrated its commitment to recognise the undisputable wealth of IK that survived the past centuries of repression.

In terms of the law, the first home-grown legislation to domesticate intellectual property laws, often referred to as '***sui generis*** protection law', was the enactment of the Intellectual Property Amendment Act 28 of 2013. The plan was to protect IKS rights. Unfortunately, critiques proved that it did not meet its objective even after the same Act was again amended in 2015. A more appropriate approach to a *sui generis* protection law for IKS rights was the introduction of the Protection, Promotion, Development and Management of Indigenous Knowledge System Bill of 2015. After lengthy discussions of the Bill, which led to fundamental changes, the final amendment was introduced in Parliament in early 2016. Among the many criticisms raised against this Bill was that not enough research was undertaken to consider the role of customary law in the protection of IKS. The question then was:

Sui generis means that which is the only one of its kind.

"If research is required, what then is the appropriate method of research to use in such a research?"

This question was raised in the context of whether the conventional western and scientific method would be appropriate.

Activity 8.9

1. Critically analyse the importance of IKS and the role of customary law in relation to IKS.
2. Discuss the need for a *sui generis* protection of IK/IKS.

8.9.3 Understanding how to research customary law regulating IK/IKS

It is a common view among scholars of IK/IKS and indigenous or customary law that most of the research undertaken is subjected to methodologies that are Eurocentric, inappropriate and culturally irrelevant. This thinking has been followed by the debate, referred to as the Africanisation, indigenisation and decolonisation of research methodologies – all of which are defined subjectively, and so differently, depending on who is defining and for what purpose. From the IK/IKS and customary law research perspectives, these terms imply the non-reliance on the 'status quo', and a move away from western, modern and scientific methodologies.

What is required is a radical shift – the utilisation of indigenous languages, and recognition coupled with accreditation of indigenous knowledge holders and practitioners whose socio-cultural protocols have to be observed during the research. Further, the research needs to contribute to the wellbeing of indigenous people and their communities, and research in communities should enhance poverty alleviation and sustainable community development.

Therefore, unless researchers are aware of, and act consistently, with the customary laws of indigenous peoples, any attempt to investigate or explain indigenous knowledge and heritage may be considered improper or irrelevant, unethical and illegitimate (Battiste and Henderson, 2000). Therefore, researching customary law in so far as it protects IK and IKS becomes a compulsory aspect of the curriculum for emerging researchers.

Activity 8.10

1. Discuss the rationale for Africanisation, indigenisation and decolonisation of research and what these terms mean?
2. What is the justification for training emerging researchers in indigenous methodologies of research?

What do you think?

How do you think customary law will develop in the future? Do you think that rules of living customary law are more or less likely to conflict with the Bill of Rights than rules of official customary law?

Chapter summary

In this chapter, we learned the following about customary law:

- Customary law is the set of rules arising from the social practices of a particular group of people who regard the social practices as legally obligatory.
- Official customary law consists of those rules of customary law that have been written down in customary law codes, other legislation, case precedents or textbooks.
- Living customary law consists of the social practices of a group of people who regard these practices as legally obligatory.
- There is often a significant difference between official customary law and living customary law, because social practices change. Living customary law changes as social practice changes. Official customary law is written down and is therefore less flexible.
- Legal pluralism exists if there are two or more valid legal systems operating in the same place at the same time – such as the common law and various customary law systems in South Africa.
- When deciding which system of law to apply to a dispute, the court will examine the intention and general lifestyle of the parties, as well as the nature and circumstances of the transaction. If these guidelines fail to settle the choice of law question, the court can apply the rules set out in section 1(3) of the Law of Evidence Amendment Act.
- Sections 30 and 31 of the Constitution protect people's right to practise their customary law, as long as this does not conflict with the Bill of Rights.
- Section 211(3) of the Constitution provides: 'The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law'.
- In the *Bhe* case, the Constitutional Court ruled that the male primogeniture rule of official customary law conflicts with the Bill of Rights.
- The courts have acknowledged the existence of living customary law, and have applied rules of living customary law (*Mabena v Letsoalo)*. In the *Bhe* case, the court acknowledged the existence of living customary law and noted that living customary law differed from official customary law. It noted further that because society and social practices have changed, strict application of official customary law might result in anomalies and hardships.
- In practice, courts tend to apply official customary law, which can be problematic as it is quite inflexible and sometimes even a distortion of reality. On the other hand, the living customary law can be difficult to confirm.
- It will be the task of future scholars and researchers to look at the application of living customary law in order that customary law may be reformed and made consistent with the Bill of Rights.
- To qualify as a legally binding rule, a custom must be long-standing, reasonable, uniformly observed and certain (*Van Breda v Jacobs* 1921 AD 330).
- Customary law as a source of law meets the past, present and future needs of African societies to ensure that, as any law, customary law is used as a tool of the socio-economic development of the indigenous peoples of Africa.
- In deciding how customary law should be used by African societies, it is important to know the indigenous peoples of Africa – their culture and cultural practices, and their indigenous knowledge (IK) and indigenous knowledge systems (IKS) as crucial catalysts for sustainable development.
- Lawyers need to understand how IK and IKS contribute to sustainable development and how they are regulated by customary law and how customary law is used to protect intellectual property.

- Many African countries and their governments, with South Africa as one such leading country, have taken the responsibility of developing *sui generis* legislation to protect, promote, develop and manage indigenous knowledge systems. The achievements of the responsibility differ from country to country. Africa's regional groupings and the whole continent are working on harmonising the protection of indigenous knowledge systems.
- One of the many criticisms raised in achieving the desired *sui generis* legislation was the role of customary law in the protection of IKS. The main question raised in that context was whether the conventional western and scientific methodologies would be appropriate.

Review your understanding

1. Compare the transfer of *lobolo* with throwing confetti and giving wedding presents. In doing so, say when you think social practices constitute rules of customary law? What particular attitude must people have toward the practices?
2. In *Mabena v Letsoalo,* the court took note of some changes in social practice. What were these? Why had social practices changed?
3. The court accepted that these changes in social practices reflected changes in 'living customary law'. Define 'living customary law'. In addition to changes in practice, what else must change before new social practices (customs) can be regarded as new rules of customary law?
4. Summarise the position of customary law in terms of the South African Constitution. With this in mind, explain why the court in *Bhe v Magistrate Khayelitsha* decided that the official customary law rule of male primogeniture should not be applied.
5. What is legal pluralism? With reference to *Sawintshi v Magidela*, explain how the choice of a particular legal system can completely change the outcome of a case. How did the court decide which legal system to apply in this case?
6. When will 'custom' be regarded as a source of law? What requirements must the custom meet? How does 'custom' as a source of law differ from 'customary law' as a source of law? In what ways are these two sources of law similar?
7. What is your understanding of IK/IKS?
8. Critically analyse what makes IKS so important as to merit the study of the role of customary law in relation to IKS.
9. Discuss the need for a *sui generis* law to protect IK/IKS.
10. Discuss what you consider to be the appropriate methodologies for research in customary law.

Further reading

Battiste, M.A. and Henderson, JY. 2000. *Protecting indigenous knowledge and heritage: A global challenge.* Saskatoon: Purich Press
(This book explains that approximately 500 million of the world's indigenous peoples need legal protection as they face similar fate in the hands of colonising powers.)

Bekker, J.C. et al. 2014. *Introduction to Legal Pluralism in South Africa.* 4th edn. Durban: LexisNexis South Africa
(This book is a useful source of information on various aspects of legal pluralism. The first half of the book looks at customary law, while the second half focuses on religious legal systems.)

Bennett T.W. 1998. *Human rights and African customary law.* Cape Town: Juta and Co. (Pty) Ltd
(This a useful book for understanding the role of customary on human rights issues.)

Bennett, T.W. 2004. *Customary Law in South Africa.* Cape Town: Juta and Co. (Pty) Ltd
(This is an indispensable book for understanding customary law in contemporary South Africa.)

Chanock, M. 1991. 'Law, state, and culture: Thinking about "customary law" after apartheid'. *Acta Juridica*, 52–70
(This article is useful in establishing what needs to be done to change the attitudes and policies of the past towards African customary law.)

Dlamini, C.R.M. 1991. 'The role of customary law in meeting social needs.' *Acta Juridica*, 71–85
(This article is a very good source for understanding the general role/function of customary law in African societies.)

Greed, L.J.F. 2006. 'The Indigenous Knowledge Systems Policy: Challenges for South African universities.' *Social Dynamics – A Journal of African Studies*, Vol. 33, 2007(1)
(This is where the author argues that indigenous knowledge is a major point of emphasis within contemporary South African Governance motivating for an extensive commitment to IKS and its use in relation to international debates around IK and its legal protection.)

Hamnett, Ian. 1975. *Chieftainship and legitimacy: an anthropological study of executive law in Lesotho*. London: Routledge and Paul
(This book is useful for understanding the nature of customary law as social practices which the community regards as legally obligatory.)

Himonga, C. 2005. 'The advancement of African women's rights in the first decade of democracy in South Africa: the reform of the customary law of marriage and succession'. *Acta Juridica*, 82–107
(This article is a plea for the reform of certain provisions of the customary laws of marriage and succession that are in conflict with the Bill of Rights.)

Himonga, C. and Pope, A. 2013. *'Mayelane v. Ngwenyama and Minister for Home Affairs:* a reflection on wider implications.' 2013. *Acta Juridica*, 318–338

Himonga, C. et al. 2014. *African Customary Law in South Africa: post-apartheid and living law perspectives.* Cape Town: Oxford University Press Southern Africa
(This book provides an excellent introductory overview of customary law in contemporary South Africa.)

Hund, J.1982. 'Legal and sociological approaches to indigenous law in Southern Africa.' *Social Dynamics: A journal of African studies*, Vol. 8, 1982(1)
(This is good reading on the topic.)

IKS Centre Document 2013 on IK, IKS and why they are important for sustainable development.
(This document is very relevant in providing a clear understanding of what is IK, IKS and why they are important for sustainable development.)

Iya, P.F. 2016. 'Indigenous knowledge (IK) as the key catalyst for poverty alleviation and sustainable development: New initiatives by North West University for the local communities of the North West Province.'
(Paper with the author. This article provides some in-depth into the understanding of IK and IKS.)

Karjiker, S. 2016. 'The protection, promotion, development of and management of indigenous knowledge systems Bill, 2016: Has the DST lost its resolve?'
(Paper with the author, who discusses some of the criticisms that have delayed the enactment of the IKS Bill.)

Kerr, A.J. 2005–6. 'The Constitution, the Bill of Rights, and the law of succession.' Part one published 2005. *Speculum Juris*, 19: 101–120. Part two published 2006. *Speculum Juris*, 20:1–16
(This article demonstrates how the right to equality is in conflict with some aspects of customary law.)

Kovach, M. 2009. *Indigenous methodologies: characteristics, conversations and contexts*. Toronto: University of Toronto Press
(This book explains the characteristics of indigenous research methodologies.)

Koyana, D.S. 1980. *Customary Law in a Changing Society*. Cape Town: Juta and Co. (Pty) Ltd
(This book provides additional literature on understanding how customary law is an important tool in African societies even as they keep changing due to pressure by global, regional and national factors.)

Lehnert, W. 2005. 'The role of the courts in the conflict between African customary law and human rights.' *South African Journal on Human Rights*, 21: 241–277
(You will learn more about the role of the courts in developing customary law. South Africa is used as a case study.)

Mqeke, Richman. 2003. *Customary Law and the New Millennium*. Alice: Lovedale Press
(This book has a detailed discussion of customary law as applied by the Xhosa and Zulu communities. It covers topics such as the place of customary law in the national legal system, the African legal tradition, traditional leaders, customary law and the Constitution, the application of customary law and specific areas like persons, family law, property, succession and the law of obligations. It would be of particular interest to those involved in land issues.)

Nhlapo, R.T. 1992. *Marriage and Divorce in Swazi Law and Custom*. Mbabane: Websters
(This book can provide a useful reading and deeper insight into the practices relating to marriage and divorce under Swazi Law and Custom, as Swaziland is a nation where customary law is a priority.)

Odora-Hopers, C. 2002. *Towards a philosophy of articulation: IKS and the integration of knowledge systems*. Cape Town: New African Education Publishers
(This book provides a useful reading on the nature and characteristics of IK and IKS.)

Ranger, T. 1992. 'The invention of tradition in colonial Africa.' In Hobsbawm, E. and Ranger, T. (eds). *The Invention of Tradition*, pp. 211–262. Cambridge: Cambridge University Press
(This essay makes for good background reading on customary law.)

Roberts, S. 1984 'Some notes of African customary law.' *Journal in African Law*, Vol. 8: 1–2
(The notes are good introduction to understanding what customary law is and how it functions in Africa.)

Saurombe, A. 2013. 'Towards a harmonised protection of Indigenous Knowledge Systems (IKS) in the Southern African Development Community (SADC): One step at a time.' *SARBICA Journal*
(The article analyses the possibility of harmonising the protection of IK in Southern Africa.)

Smith L.T. 2006. *Decolonising methodologies: Research and indigenous peoples*. Dunedin, New Zealand
(A book elaborating decolonisation of research about indigenous peoples of New Zealand.)

The World Bank Publication, 1998. Indigenous knowledge for development: A framework for action Washington DC Publication
(This publication gives a world overview relating to knowledge and economic development.)

WIPO Intellectual Property Handbook. Retrieved from: **www.wipo.int/edocs/pubdocs/en/intproperty/489/wipo_pub_489.pdf**

Chapter 9

Secondary sources

The main ideas

- The nature and value of secondary sources of law
- The different types of secondary sources of law

The main skills

- Distinguish between primary and secondary sources of law.
- Explain the difference between binding authority and persuasive authority.
- Distinguish between the different types of secondary sources of law.
- Distinguish between and identify the types of modern writings.
- Reference a book.
- Reference journal publications.
- Research legal journals.
- Identify foreign law.
- Identify whether an internet source is credible and reliable.

Apply your mind

In the judgment of *S v Baloyi and Others* (2000) 1 BCLR 86 (CC), the court refers to journal articles written about the subject of violence against women. Read this case carefully and take note of the way in which the court relies on secondary sources of law and incorporates them into the judgment. As you read, consider why secondary sources of law were regarded as being so important in this case.

You have been introduced to the concept of sources of law and its reference to where law comes from, including its history. As discussed South Africa has more than one source of law, and these sources are divided into primary sources and secondary sources. As explored the various primary sources of law, namely; the Constitution, legislation, judicial precedent, the common law and customary law. In this chapter, we provide an overview of the nature and value of secondary sources, and outline the different types of secondary sources.

Before you start

You may have encountered secondary sources of law without being aware that those sources are called secondary sources. Every law textbook that is prescribed and recommended by your lecturers, like this one, is a type of secondary source of law. From time to time, your lecturers may also make reference to additional reading in the form of academic articles published in law journals, as well as case law or legislation from other countries. All these sources constitute secondary sources of law. Your lecturer uses a combination of primary and secondary sources of law to prepare for class.

9.1 Distinguishing between primary and secondary sources of law

A source of law is the origin of the authority on which legal decision-making rests. In other words, sources of law are used to find the answer to a legal problem or question. In an uncodified legal system, like that of South Africa, each source of law has a unique role to play. The different sources of law constitute legal authority for the judge or magistrate presiding over a legal dispute, the lawyers working on a legal matter, as well as students studying the law.

Primary sources of law are original laws, and are therefore legally binding on our courts. As formal sources of law, primary sources carry the most weight in a legal matter. Primary sources are, however, supported by secondary sources of law. Secondary sources of law are not original sources of law, and they do not create new law. These sources are therefore regarded as being subsidiary or subordinate to primary sources of law.

9.2 The value of secondary sources of law

As outlined above, primary sources of law are legally binding on the courts. This means that primary sources govern all citizens and residents in a country, and therefore must be taken into account by a judge or magistrate in a legal matter.

In contrast to primary sources, secondary sources are not binding as legal authority as they do not create new law. These sources do, however, have a key role to play in our legal system. Secondary sources of law have persuasive value and are relevant and helpful to the Court in various ways:

- Courts make particular reference to secondary sources of law in areas of law where the jurisprudence is still developing.
- Secondary sources can be helpful in identifying and finding the most important primary sources on a specific legal issue. For example, modern writings are the most common secondary source of law, and are significant in that the authors, often experts in a particular area of law, explain, discuss and critically analyse the law. Sometimes, a judge or magistrate can even be convinced by the opinions and arguments of authors and legal researchers.
- Secondary sources provide much needed guidance to the court when a judge or magistrate is faced with a legal problem or question that cannot be answered with reference to primary sources.

9.3 The different types of secondary sources

The different categories of secondary sources include:

- modern writings
- books and textbooks
- South African legal journals
- foreign law
- internet sources.

Let's consider each of these sources in more detail and note how these sources can help in resolving a legal-problem, as well as help you in your legal studies.

9.3.1 Modern writings

Modern writings broadly refer to work published by law academics and other lawyers, such as attorneys, advocates and judges. Law academics engage in in-depth legal research and writing with a view to critically analyse the law from a theoretical perspective. This is an integral part of being an academic. Modern writings, as a source of law, include books and articles that are primarily published in legal journals.

In comparison to the writings of the old authorities on our common law, modern writings are not regarded as being a part of our common law, nor are they binding on our courts in a legal matter. Strictly speaking, modern writings were previously not regarded as a source of law for the simple reason that these writings do not create law; they merely described and discussed the law. The old approach of not citing living authors is one that was inherited from the old English legal system. This is no longer the approach that the South African courts adopt in respect of this source of law. In recent years, this source of law has gained more importance, and the courts, as well as legal practitioners and academics, now find these writings increasingly useful. The reason for this shift is that lawyers do not merely describe the law, but they:

- critically evaluate the law
- criticise the law

- highlight what the shortfalls in the law are
- make recommendations on how to improve the law.

In applying the above, lawyers develop cogent and compelling legal arguments on specific issues. For example, an author may critically analyse whether a particular piece of legislation is effective in fulfilling its objectives, or whether a court properly interpreted and applied a piece of legislation (or other source of law) to a legal dispute. Also, through years of research or practical experience, lawyers often become experts in their respective fields and modern writings add more weight to their views. These writings can, through their reflective recommendations, play a role in effecting legal reform.

Despite the increasing recognition that modern writings have gained, they remain only of persuasive value. Again, this is because they are not original laws, and they do not create laws. The level of persuasion that a particular modern writing holds depends on a range of factors. The quality of the work must be considered, how compelling an author's legal arguments are, the seniority or expertise of the author and, in certain instances, the date of the publication. For example, a publication by a well-known professor of law would carry more weight than that of a junior academic on the same topic. Another example is that a more recent publication may hold more value than an older publication in instances where the law has changed in that subject area. Lawyers, who research, write and publish in the same area of law, may present conflicting or opposing legal views and it would then be up to the court or legal practitioner to decide which view is more compelling. The above factors must be applied holistically when deciding how much weight to attach to a particular modern writing.

Books

When faced with a legal problem or question, a recent textbook on that subject is the most convenient and practical way to get a summary discussion of the legal principles that apply to that issue. The author (or authors) provides an exposition of the law with reference to relevant constitutional and statutory principles, the common law, judicial precedent, customs, customary law, international law and foreign law.

When deciding whether to consider a particular book, it is imperative to consider the date of the publication. As laws develop and change, books may become outdated and lose their relevance. This is why textbooks periodically have newer editions published. This is the only way to keep the publication relevant in that field of study.

The enactment of the Constitution of the Republic of South Africa, 1996, has resulted in many legal books that were published before 1996 being obsolete. The reason for this is that the Constitution has had a fundamental impact on all branches of law. For example, labour laws have developed extensively since the enactment of the Constitution. Section 9(4) of the Constitution states that national legislation must be enacted to prevent or prohibit unfair discrimination. The Employment Equity Act 55 of 1998 was the first piece of legislation that was enacted as a direct result of section 9(4) of the Constitution, and the Act has had a fundamental impact on labour laws. This means that all labour law textbooks written before this Act of Parliament have become outdated.

Professor says — Some important South African legal textbooks

In your legal studies, you will come across numerous titles by authors who have made an outstanding contribution to the development of the law through their writings. Here is a very small selection of some of these leading publications:

- Currie, I. and De Waal, J. 2013. *The Bill of Rights Handbook*, 6th edn. Cape Town: Juta and Co. (Pty) Ltd
- Grogan, J. 2014. *Workplace Law*, 11th edn. Cape Town: Juta and Co. (Pty) Ltd
- Hoexter, C. 2012. *Administrative Law in South Africa*, 2nd edn. Cape Town: Juta and Co. (Pty) Ltd
- Schwikkard, P.J. and Van der Merwe, S.E. 2016. *Principles of Evidence*, 4th edn. Cape Town: Juta and Co. (Pty) Ltd

Professor says (continued) Some important South African legal textbooks

- Sharrock, R., Van der Linde, K. and Smith, A. 2012. *Hockly's Insolvency Law*, 9th edn. Cape Town: Juta and Co. (Pty) Ltd
- Cassim, F.H.I. et al. 2012. *Contemporary Company Law*, 2nd edn. Cape Town: Juta and Co. (Pty) Ltd
- Snyman, C.R. 2014. *Criminal Law*, 6th edn. LexisNexis South Africa

Take note of the information provided in a book citation. It includes the name of the author/s or editor/s, the year of publication, the full title of the book, the edition, the place of publication and the name of the publishing house. Attention to detail is essential when referencing sources of law. There are many different **house styles** for legal referencing, and each house style has strict technical instructions in terms of format and punctuation, for instance.

There are many parts in a textbook that are useful research tools. For example, books usually have a table of contents, a **table of case law**, a **table of statutes** and an index which allows you to search through the book using key words and phrases. Apart from the table of contents, these tools are written in alphabetical order. Browse through one of your prescribed textbooks to see if you can find these features.

Look up the **house style** for the *South African Law Journal*.

A **table of case law** is a listing of all the cases cited and/or discussed in the book and the page numbers where they can be found.

A **table of statutes** lists the statutes cited in the book, as well as the page numbers where they can be found.

South African legal journals

Publishing a book takes time and is a costly exercise. Therefore, publishing one's work in a legal journal, or scholarly periodicals, is far more practical in that it is more time efficient and cost effective. Publishing one's work in a journal also allows an academic to write a piece that is much shorter in length, in comparison to a book, and is more focused in terms of the legal issue. Like books, journal publications can be co-authored.

Publications in journals are usually in the form of **articles** and **notes**. Technical and substantive requirements distinguish one from the other. Journals are usually published quarterly – four volumes are published annually. This means that these modern writings are up-to-date discussions on the law, usually by experts in a particular area of law. Hardcopies of many legal journals are housed in the Law Library. Many journals are also available electronically.

An **article** is lengthier than a note and it constitutes a more in-depth discussion of the topic.

A **note** is shorter than an article and it is written in a more succinct style, usually on a recent case law.

In terms of the subject matter, journals can either be general in nature – that is, academic papers on various areas of law are published in them – or subject-specific in that only academic papers in a particular area of law are published in them. Examples of the former are the *South African Law Journal* and *Tydskrif vir Suid Afrikaanse Reg*, and examples of the latter are the *South African Journal on Human Rights* and the *Industrial Law Journal*.

Not all journals are equal – some journals carry more weight in terms of the authority that we attach to it as a publication than other journals. Publications in the highest ranked journals usually go through a rigorous process called a **blind peer review**. When an article or note is published in a journal, it means that it was approved by two experts in the same subject area that is dealt with in the article.

Blind peer review means that the identity of the two experts is unknown to the author of the article or note.

Some journals are less theoretical in nature in that the articles published are aimed at legal practitioners. Examples of these journals include the *Advocate* and *De Rebus*. These publications are not peer-reviewed. They are nonetheless useful as they contain short articles on the latest legal developments making them easier for legal practitioners to read on the go.

Table 9.1 lists some of the leading law journals in South Africa, along with their **acronyms**.

An **acronym** is an abbreviation that is formed by using the initial letters of each word and pronounced as a word.

Table 9.1 A selection of South African law journals

Journal	Acronym
Comparative and International Law Journal of South Africa	CILSA
Industrial Law Journal	ILJ
Journal for Juridical Science	JJS
South African Journal of Criminal Justice	SACJ
South African Journal on Human Rights	SAJHR
South African Law Journal	SALJ
Tydskrif vir Hedendaagse Romeins-Hollandse Reg	THRHR
Tydskrif vir Suid Afrikaanse Reg	TSAR

When you type the reference for a journal article, the name of the journal must be in italics (see Table 9.2). You may use the acronym in the citation. Table 9.2 provides a quick guide on how to reference a law journal article or note.

Table 9.2 A quick guide on how to reference a journal article or note

Author	Title	Year	Volume	Journal	First page/pages
Pillay J. and Azriel J.	'Banning hate speech from public discourse in Canada and South Africa: A legal analysis of the roles of both countries' constitutional courts and human rights institutions'	(2012)	27	*SAPL*	259–291

9.3.2 Foreign law

Let us now consider foreign law as a source of law. Foreign law refers to the respective sources of law of another country, for example, the laws of Canada. The primary and secondary sources of law of a particular country may differ from that of South Africa's sources of law. There may also be similarities between South Africa's classification of sources of law and that of another country. When our courts consider foreign law, they usually make reference to that country's constitutional framework, legislation, judicial precedent and/or modern writings depending on the dispute and legal issues in question. The question that arises is when and to what extent do we consider foreign law as a source of law.

A good place to start is section 39(1)(c) of the Constitution, which provides that when interpreting the Bill of Rights, a court, tribunal or forum *may* consider foreign law.

This means that our courts may read and consider foreign law when trying to interpret and understand the scope and meaning of the provisions in the Bill of Rights. The use of the word 'may' in section 39(1)(c) of the Constitution indicates that, while courts can consider and apply foreign law when adjudicating on cases relating to the interpretation of the Bill of Rights, our courts are not compelled to do so. Our courts will only do so when they deem it relevant to do so. One example of when the courts will regard it as necessary to consider foreign law as a source of law is when the courts are faced with a legal issue on which South African law is silent, new or fairly undeveloped. In these instances, our courts refer to foreign law as a source of guidance for the interpretation of legislation or provisions of the Bill of Rights. For example, English law remains an important persuasive legal authority in South Africa, particularly in company law, the law of evidence and insurance law. Another example is that since parts of our Constitution were borrowed from other countries, such as Canada, our courts often refer to Canadian law in certain constitutional matters. Canadian law is also used as a source of guidance in media law since we have similar hate speech clauses.

As with other secondary sources of law, foreign law is not legally binding as a source of law – it merely holds persuasive value.

Case study A judgment discusses foreign case law

The case of *President of the Republic of South Africa and Another v Hugo* (1997) 6 BCLR 708 (CC) is an example of the manner in which the Constitutional Court used foreign case law in the judgment (pages 14–25). The facts were as follows. The president, acting in terms of his constitutional powers to pardon and reprieve offenders, had granted release to prisoners in certain categories. One of the categories was certain 'mothers in prison on 10 May 1994, with minor children under the age of twelve years'. The respondent, a single father of a child under twelve at the relevant date, challenged the constitutionality of the pardon in the court *a quo* on the basis that it unfairly discriminated against him and his son on the ground of sex or gender in violation of section 8 of the interim Constitution. The court *a quo*, the Durban and Coastal Local Division as it was then termed, held that the Act was unconstitutional and ordered its correction by the President within six months of the date of judgment. The President and the Minister of Correctional Services appealed against the judgment to the Constitutional Court.

One of the issues that the Constitutional Court had to consider was the nature of the powers of the president of the country – particularly, the prerogative powers of the president. The prerogative powers could be traced back to the period of the English monarchs – the era of kings and queens. Therefore, in trying to understand the nature and scope of the powers, the Constitutional Court, per Goldstone J, referred to several English cases as foreign law.

Further, the judge also discussed the manner in which various other countries – such as Trinidad and Tobago, Australia, New Zealand, Canada, Israel and the United States of America – have decided on prerogative powers. The inclusion of foreign case law in this judgment indicates that our courts will look at the manner in which various courts around the world have decided on certain legal matters. In so doing, foreign law becomes infused with judicial precedent as a source of South African law.

In considering these foreign sources of law, the majority of the Court held that while the Act discriminated against the respondent on the basis of sex, this discrimination was not unfair. In deciding whether or not the discrimination was unfair, regard had to be had to the impact of the discrimination on the people affected. In assessing whether the impact was unfair, it was necessary to look at the group who had been disadvantaged, the nature of the power used and the nature of the interest which had been affected by the discrimination. Regarding the impact upon fathers of young children who were not released, the majority of the Court held that, although the pardon may have denied men the opportunity it afforded women, it could not be said that it fundamentally impaired their sense of dignity and equal worth. The pardon merely deprived them of an early release to which they in any event had no legal entitlement, since the grant of a pardon is a matter purely within the discretion of the president. It was further held that the pardon did not preclude fathers from applying directly to the president for remission of sentence on an individual basis in the light of their special circumstances. Therefore, the pardon was not unfairly discriminatory.

Professor says Foreign legal journals

During your studies, you will be required to read articles from foreign legal journals. These are journals published by other universities or countries around the world. These articles are written by legal academics and will give you a global perspective on a particular legal issue. Similar to South African legal journals, foreign legal journals are either general in nature in terms of the subject matter or have a specific legal focus. Examples of foreign legal journals that are general in nature are the *Harvard International Law Journal*, *Hastings Law Review*, *Yale Law Review* and

Professor says (continued) — Foreign legal journals

the *American Journal of International Law*, and examples of foreign legal journals that are specific in terms of its subject matter are *Human Rights Brief* and the *Journal of International Economic Law*. Your law library houses a number of foreign journals. You will be able to access foreign journals through electronic databases.

9.3.3 Internet sources

The internet has revolutionised the way we access information. The World Wide Web continues to grow at an exponential rate, and provide a rich source of information. Research can be conducted electronically at the tips of our fingertips via our cellphones, tablets and laptops. A number of books, periodicals and journals are also available electronically. You can search relevant websites and databases for information, which makes electronic-based research far more time-efficient than book-based research. For examples of an online periodical and journal, see http://www.derebus.o rg.za/ and https://www.wits.ac.za/sajhr/.

However, the internet must be used cautiously when undertaking research. Anyone can make information available on the platform by creating a website or **blog**. Therefore, do not blindly rely on information that is sourced on the internet. Consider the following when determining whether the information sourced online is credible and reliable:

A **blog** is a personal informational website.

- *Authority of the authors*. Who is responsible for the information that is available on a web page? Has the information been written or gathered by a person who is an expert in the field?
- *Accuracy of the information*. Is the information accurate? Is the information consistent with information that you have found in other sources of law? Does it include a list of references to verify the information?
- *Date of the information*. When was the information compiled? Is the information still relevant? When was the information last updated?
- *Stability of the site*. How long has the site been in existence for?

While it is important to scrutinise the authority of a source before relying on the information, there are a number of reputable blogs that could be useful when doing legal research. One such blog is that of constitutional law professor, Professor Pierre de Vos (https://constitutionallyspeaking.co.za/).

A useful tip is to use official websites of well-established organisations depending on what the focus of your research is. For example, if you are doing research on international law, the website for the United Nations Organisation (www.un.org) will be a trustworthy source of information. If you are doing research on constitutional law and human rights in South Africa, then the website for the South African Human Rights Commission (https://www.sahrc.org.za/) and the Constitutional Court of South Africa (http://www.constitutionalcourt.org.za/site/home.htm) respectively would be reliable sites to include in your research.

An **interdict** is an order of court that may be sought by an applicant to enforce a right. The order may include a prohibitory interdict (an order which prevents the respondent from doing something) or a mandatory interdict (an order which requires the respondent to do something.

Case study — Local and foreign modern writings as secondary sources

The case of *S v Baloyi and Others* (2001) 1 BCLR 86 (CC) dealt with domestic violence, where a husband, an army officer, physically abused his wife, who was already in possession of an **interdict** that ordered him not to assault his wife or prevent her or their child from entering or leaving their home. He was convicted in the Magistrate's Court in Pretoria for violating the interdict, and he was found guilty and sentenced to twelve months' imprisonment, six months of which was suspended

He appealed to the Transvaal High Court, which declared that section 3(5) of the Prevention of Family Violence Act 133 of 1993 was unconstitutional and invalid to the extent that it placed an onus on him to prove that he did not violate the interdict. This was found to be in violation of section 35(3) of the Constitution, which provides that an accused person is presumed to be

innocent. In terms of section 167(5) of the Constitution, the Transvaal High Court had to refer its findings to the Constitutional Court for confirmation.

The Constitutional Court then had the complex task of trying to establish the appropriate balance between the state's constitutional duty to provide effective remedies against domestic violence and its simultaneous obligation to respect the constitutional rights to a fair trial of who might be affected by the measures taken. The Constitutional Court held that the Prevention of Family Violence Act did not violate the constitutional right to be presumed innocent. The Court held that the purpose of an interdict was to protect the victim of domestic violence, uphold respect for the law and indicate that society would not sit idly by in the face of spousal abuse. In the case of domestic violence, fairness to the complainant requires that the enquiry proceedings be speedy by dispensing with the normal process of charge and plea. The Court also noted that domestic violence had an immeasurable ripple effect in our society – the consequences of domestic violence affect not only the women being abused, but also her children, neighbours, friends, family and colleagues. It transgressed a constitutionally guaranteed right to be free from violence in both public and private sources. Judge Sachs acknowledged that these crimes are often committed against women within the family. This was a constitutional issue because the equality clause in section 9 of the Constitution prohibits unfair discrimination on the basis of gender (among other grounds). If the pattern of domestic violence against women continued without the perpetrators being punished, then the constitutional right to equality would be disregarded. It is therefore necessary for the state to protect women and the general public by punishing domestic violence offenders. South Africa was also obliged by international law, such as the United Nations Organisation's Declaration on the Elimination of Violence Against Women, to take steps to combat domestic violence.

In arriving at this decision, Judge Albie Sachs referred to writings by authors who are experts in the field of domestic violence and women's rights. One of the writers quoted was Joanne Fedler (para. 12). Judge Sachs referred to an article by Fedler wherein she asserts that domestic violence includes many crimes, including arson, assault, rape, murder, kidnapping, obstructing justice, cruelty to children, incest, malicious damage to property, stalking, unlawful possession of a firearm, involuntary sodomy, extortion, blackmail, sexual assualt and forced prostitution (Fedler, J. 'Lawyering Domestic Violence Through the Prevention of Family Violence Act 1993 – An Evaluation After a Year In Operation' (1995) 112 *SALJ* 231 at 243).

It is not uncommon for our courts to also refer to writers from other countries. Judge Sachs quoted the work of Donna Wills from the Unites States of America (para. 11). The judge agreed with Wills' views that domestic violence is a problem that is not just limited to the family. Instead, violence in the home affects the broader society for a number of reasons. Domestic violence:

- is the biggest cause of injury or harm to women
- can lead to many women committing suicide
- can lead to the murder of women (Wills, D. 'Mandatory Prosecution in Domestic Violence Cases: Domestic Violence: The Case for Aggressive Prosecution' (1997) 7 *UCLA Women's Law Journal* 173 at 174–175).

In this case, the judge used the writings of these authors on domestic violence to contextualise the harm that women face on a daily basis in their own homes. The reason that the judge trusted the authors above was that they had spent much time researching in the field, which made them experts on the subject.

In conclusion, the Constitutional Court unanimously ruled that the Transvaal High Court's decision was incorrect.

What do you think?

Having dealt with the Constitution as a primary source of law in Chapter 3 and secondary sources of law in this chapter, let us look at the constitutional right to freedom of expression in context. Section 16 of the Constitution states that:

> "… everyone has the right to freedom of expression, which includes:
> (a) freedom of the press and other media
> (b) freedom to receive or impart information and ideas
> (c) freedom of artistic creativity
> (d) academic freedom and freedom of scientific research.
>
> The right to the above does not extend to:
> (a) propaganda for war
> (b) incitement of imminent violence
> (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm".

Examine the human rights above, and consider the questions that follow.

1. When lawyers and researchers write and publish their critical analysis of the law, which parts of the provision above can they rely on to protect their right to freedom of expression?
2. In what instances will lawyers and researchers not be able to rely on their right to freedom of expression in the publication of their legal writings?
3. Is it a positive or negative thing in our young democracy for lawyers and researchers, or even ordinary citizens, to use their writings to criticise the government, or should we always show respect for the government in everything that we say and write about the government?

Chapter summary

In this chapter, we have learned the following about secondary sources:

- Primary and secondary sources of law are the origin of the authority on which legal decision-making rests.
- They are used to find the answer to a legal problem or question.
- Primary and secondary sources of law provide us with an in-depth knowledge of the law.
- Whereas primary sources of law are original law in that they provide us with the content of the law, secondary sources are sources that are subordinate to and support primary sources.
- Secondary sources of law do not create new law.
- Unlike primary sources of law, secondary sources are not legally binding in nature – they are merely of persuasive value.
- Secondary sources of law refer to writings on existing law by legal experts or legal principles of another country.
- There are various types of secondary sources – namely, books and textbooks, legal journals, online articles and foreign law.
- When relying on modern writings as a source of law, it is important to consider factors such as the date of the publication and the expertise of the author/s.
- Foreign law is a source of guidance for the interpretation of legislation or provisions of the Bill of Rights.
- The internet is an invaluable source of information, however, it is important to scrutinise the credibility of the source.

Review your understanding

1. Search for two of the most recent textbooks on the Law of Persons using the online databases in the law library. Once you find the details of the book (title, author/s, date of publication, edition and publisher), look for these books in the library. Use the research tools in the book (namely, the index of key words and phrases) to find and carefully read the chapter that explains the law regarding the termination of a pregnancy. What sources of law are used by the author/s to explain this section? Identify whether these are primary or secondary sources of law.
2. Write a short paragraph explaining the difference between a source of law that is binding in nature and one that is persuasive in nature. How does this impact the way in which a judge or magistrate deals with each source in his/her decision-making?
3. Write a short essay discussing the value of referring to various secondary sources of law when answering a legal question.
4. Briefly explain the difference between a textbook and legal journal as secondary sources of law.
5. Visit your law library. Find out where the legal journals are housed. Make a list of five South African legal journals, and make a list of five foreign or international legal journals (apart from the ones named in this chapter).
6. Using your research skills, find the case of *Islamic Unity Convention v Independent Broadcasting Authority and Others* (2002) 4 SA 294 (CC); (2002) 5 BCLR 433 (CC). Read the judgment, and identify the secondary sources of law that the Constitutional Court made reference to. To what extent was the Court influenced by these secondary sources of law?
7. Using your research skills on how to find a journal article, find the following modern writing: Pillay, K. 'From "Kill the Boer" to "Kiss the Boer" – has the last song been sung?' *Afri-Forum v Julius Sello Malema* (2011) 12 *BCLR* 1289 (EQC)' (2013) 28 *SAPL* 221–244. Read the case commentary, and identify what the decision was by the Equality Court. Consider whether the author agreed with the Equality Court's finding.
8. Using your electronic research skills, find at least three South African journal articles that deal with the issue of whether hate speech should be criminalised in South Africa. Evaluate whether these articles are credible sources. If they are, read the articles and determine whether or not the authors are in support of criminalising hate speech in the country. What are the reasons for their respective views?

Further reading

Barratt, A. et al. 2008. *Skills for Law Students – Fresh Perspectives.* Cape Town: Pearson Prentice Hall

Hoexter, C. (ed). 2005. 'History and Sources of South African Law'. In *Introduction to Law Course Pack*. Johannesburg: University of the Witwatersrand

Humby, H., Kotzé, L. and Du Plessis, W. (eds). 2012. *Law and Legal Skills in South Africa.* Cape Town: Oxford University Press Southern Africa

Kleyn, D. and Viljoen, F. 2010. *Beginner's Guide for Law Students,* 4th edn. Cape Town: Juta and Co. (Pty) Ltd

Sharrock, R. 2016. *Business Transactions Law,* 9th edn. Cape Town: Juta and Co. (Pty) Ltd

Chapter
10 The court structure

The main ideas

- An introduction to the court structure
- A closer look at courts in South Africa – the court hierarchy
- Resolving disputes outside of the courts – alternative dispute resolution

The main skills

- Discuss the provisions contained in the Constitution of the Republic of South Africa, 1996, dealing specifically with judicial authority.
- Explain the court hierarchy or court structure in South Africa.
- Distinguish between the various courts with reference to the origin, composition, jurisdiction and presiding officer in each court.
- Choose the appropriate forum for a particular matter, based on various factors.
- Evaluate and analyse formal litigation as a means of resolving disputes between parties with reference to the advantages and disadvantages.
- Identify and compare the most important forms of alternative dispute resolution.
- Evaluate and analyse alternative dispute resolution with reference to the advantages and disadvantages.

Apply your mind

Section 34 of the Constitution of the Republic of South Africa, 1996 provides that:

> "… everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing in a court, or, where appropriate, another independent and impartial forum".

All persons should therefore have equal access to an independent and impartial judiciary. The reality is that many members of society, for various reasons, including the costs associated with formal litigation or court proceedings, do not have access to courts. Various measures have been introduced to address this problem, for example, legal aid institutions and law clinics at universities offering legal assistance free of charge. Do you have any other suggestions to resolve this problem? What should be done to enhance access to justice?

This chapter gives you a basic introduction to the court structure or hierarchy in South Africa. We begin by looking at the court structure as outlined in the Constitution. Then we consider the various higher, lower and special courts that form part of the legal system. Finally, we see that formal litigation is not always the answer and we look at three forms of alternative dispute resolution and consider alternative dispute resolution (or ADR), such as arbitration, mediation and negotiation.

Before you start

We often see references to important court cases in the media. Think of the well-publicised murder trials of, for example. Donovan Moodley; Don Steenkamp; Oscar Pistorius and Henry van Breda; as well as the Nkandla matter; corruption trials relating to various high profile individuals and companies; the Speaker of Parliament's decision to allow a secret ballot in Parliament, following a Constitutional Court decision; decisions involving university applications to prevent damage to university property and urgent applications by politicians to prevent newspapers from publishing allegedly defamatory articles.

Court cases fill newspapers and news bulletins on television and radio almost on a daily basis. Headlines are dominated by what happens in our courts. Have you ever wondered where exactly all these cases take place? Where are the courts that are so often mentioned? Who are the presiding officers? Does it sometimes seem to you that a case can go on forever, moving from one court to the next? How far does the right to appeal from one court to the next extend if you're not satisfied with a particular court's decision? Can you simply take a matter from one court to the next until such time as you are satisfied with the court's decision? Many of these questions will be clarified in this chapter.

10.1 Introduction to the court structure

South Africa has a well-organised, well-established and sophisticated court structure to deal with the large number of civil and criminal cases in the country. The various courts serve and reflect the needs of the diverse South African community.

To understand how the machinery of our legal system operates, or works, we need to understand the hierarchy of courts in South Africa. We also need to consider what happens in the various courts (the civil and criminal court procedure) and we need to identify the role-players including legal practitioners who put the procedure in motion and make things happen in court.

We start by looking at a flowchart of the court hierarchy to get a general overview of the court structure. We also consider the constitutional framework within which the courts function and the importance of choosing the correct court or forum for a particular matter. In the next section, we will consider the features of each court in more detail.

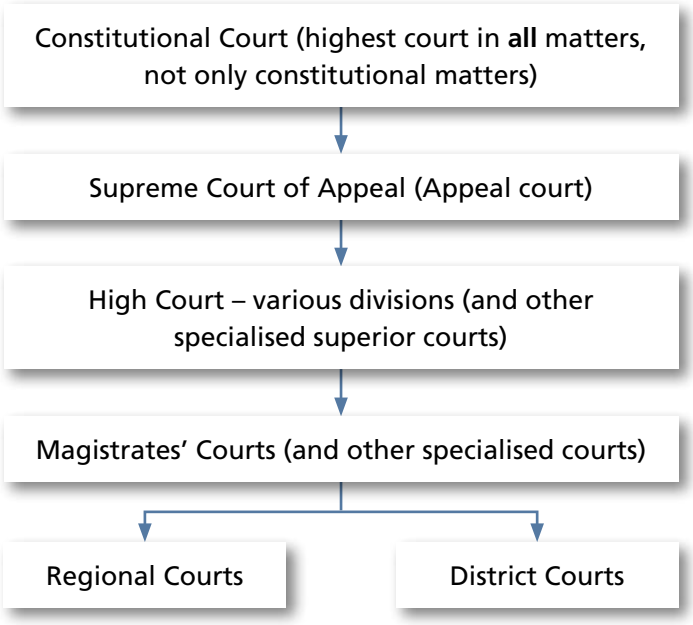

Figure 10.1 The court hierarchy or structure

10.1.1 Constitutional framework

The starting point for the court structure is the Constitution of the Republic of South Africa, 1996.

This is the correct way to refer to or cite the Constitution. We don't refer to the Constitution as Act 108 of 1996. Unlike other pieces of legislation or acts, the Constitution is identified with reference only to the year, not the Act number. In terms of the Citation of Constitutional Laws Act, 2005, neither the Constitution nor any of the acts amending the Constitution are allocated Act numbers. This took effect on 27 June 2005. To date, our Constitution has been amended by seventeen amendment acts.

Our Constitution is based on a separation of powers between the legislature, executive and judiciary. A separation of powers means that legislative (parliament), executive (cabinet) and judicial authorities

(courts) each has distinct powers that should not overlap. Their respective powers are defined in the Constitution. The power of the state is therefore divided between three different, but interdependent components. The Constitutional Court has indicated that:

- In democratic systems of government where checks and balances are restrained by one branch of government on another, there is no separation of powers that is absolute.
- The South African model of separation of powers should reflect the history of our country's constitutional development.
- An essential part of the separation of powers is an independent judiciary that functions independently of the legislature and the executive, and enforces the Constitution and the law impartially.

In his address at Stellenbosch University for the 2013 Annual Human Rights Lecture, Chief Justice Mogoeng Mogoeng emphasised the above principles of judicial independence as outlined by the Constitutional Court and stated that it was important that the courts were institutionally independent and governed themselves and that they were not controlled by other arms of government. (www.judiciary.org.za).

The courts must not be influenced by anyone. They must be respected and be accessible to everyone. It is important to note here that nobody is above the law or above the Constitution.

Section 165 of the Constitution deals with judicial authority in South Africa. It states that:

"(1) The judicial authority of the Republic is vested in the courts.
(2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.
(3) No **person or organ of state may interfere** with the functioning of the courts.
(4) Organs of state through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.
(5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies.
(6) The Chief Justice is the head of the judiciary and exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts."

In terms of section 165 (6) of the Constitution the Chief Justice now is "the head of the judiciary and exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts".

A number of Constitutional Court cases dealt with the independence of the judiciary, the separation of powers between the three branches of the state and the role of the judiciary in the administration of justice, for example:

- In re *Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) (First Certification judgment) at Paragraphs 112 and 113
- *De Lange v Smuts* 1998 (3) SA 785 (CC) at Paragraph 59
- *S v Dodo* 2001 (3) SA 382 (CC) at Paragraph 16
- *Van Rooyen and Others v The State and Others* 2002 (8) BCLR 810 (CC) at Paragraph 29.

To operate effectively, the courts should also be legitimate, which means that the public should have faith in the courts and the legal system. The courts will only be legitimate if they are representative of the population and if they serve the needs of our diverse community.

Presiding officers should not be biased – see *Bernert v Absa Bank Ltd* 2011 (3) SA 92 CC; *FS v JJ and Another* 2011 (3) SA 126 CC and *Ndimeni v Meeg Bank Ltd (Bank of Transkei)* [2011] 3 All SA 44 (SCA).

Section 166 of the Constitution outlines and explains the court structure or judicial system in South Africa, as follows:

1. Constitutional Court
2. Supreme Court of Appeal
3. High Court of South Africa and any **High Court of Appeal** that may be established by an Act of Parliament to hear appeals from any court of a status similar to the High Court of South Africa
4. Magistrates' Courts
5. Other courts – any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Court of South Africa or the Magistrates' Courts – recognised or established in terms of an Act of Parliament.

Other **High Courts of Appeal** include the Competition Appeal Court and the Labour Appeal Court.

You will find a summary of the courts in Figure 6.1.

10.1.2 The correct court

Many courts in South Africa only deal with cases of a specific or specialised nature, for example, appeal matters (the Supreme Court of Appeal) or labour disputes (the Labour Court and Labour Appeal Court). But there are certain other courts that can deal with a variety, or different types, of matters, such as the High Court of South Africa and the Magistrates' Courts. These courts are not limited to certain types of matters, but some courts are limited in their jurisdiction either with regard to the value of the claim and the nature of the claim (in civil matters) or the type of offence (in criminal matters).

Identifying the correct court is one of the most important decisions a legal practitioner has to take when dealing with a case. The legal practitioner must start proceedings in the correct court that has the necessary jurisdiction to deal with and grant relief in that matter. If the wrong court is chosen, the court will not have jurisdiction and, in a civil matter, the person being sued will have an absolute defence in that court. The opponent can raise the court's lack of jurisdiction as part of a special plea, without having to deal with the merits of the plaintiff's claim. In other words, even if it was in fact the defendant's negligent driving that caused a collision and the plaintiff's financial loss, it is irrelevant if the court does not have the necessary jurisdiction to deal with the case. If the presiding officer is convinced that the plaintiff has chosen the wrong court to decide a case, she will dismiss the matter and the party launching legal proceedings will have to institute new proceedings in the correct court, to the extent possible. In addition, the party may be penalised with a costs order. The consequences of proceeding in the incorrect court may be severe, both from a time and a legal costs point of view.

There are various preliminary considerations when accepting an instruction from a client:

- The appropriate forum – which court has jurisdiction to entertain the matter
- Legal standing – whether the client has the capacity to institute legal proceedings
- The cause of action – whether the client has a valid claim in law and if so, what the legal basis is, such as a contract or delict
- Which legal procedure to institute – civil or criminal and action or application
- When the matter prescribes or lapses and how quickly legal action should be instituted
- Whether notice in the form of a letter of demand or statutory notice should be given to the opponent before legal action is instituted, etc.

Professor says — Prescription

Certain types of obligations or debts may prescribe or become unenforceable if not exercised within a certain period of time. In terms of the Prescription Act 68 of 1969, there are different prescription time periods based on the type of debt. The general prescription period for a debt is three years. Longer periods apply in some other cases, i.e. six years in respect of a debt arising

Professor says (continued) Prescription

from an unpaid cheque; fifteen years in respect of a debt owing to the State arising from a loan of money or the sale or lease of land and thirty years in respect of a debt secured by a mortgage bond or a judgment debt.

10.2 A closer look at courts in South Africa

Now that you have an understanding of the court structure, let's take a closer look at each of the courts mentioned above. We will start with a general discussion of each court, followed by a table with a summary of the most important information in relation to:

- the origin of the court
- the jurisdiction of the court
- the presiding officer.

The origin of the court refers to where the court comes from, i.e. the legislation that establishes the particular court. The jurisdiction of the court refers to the power or capacity of the court or the range of matters that the court is authorised to deal with. It is important to understand that there are limits to each court's jurisdiction – certain matters may be beyond the court's jurisdiction, which means that the court will not be able to hear the matter. For example, certain serious criminal matters fall outside the jurisdiction of the lower courts. As a result, the Magistrates' Courts are not authorised to deal with certain matters and these matters have to be decided by the High Court. Similarly, in civil matters, there are certain matters which are excluded from the jurisdiction of the Magistrates' Courts. The presiding officer is the judicial officer who decides matters in the particular court. In the High court, this person is a judge whilst in the Magistrate's Court, it is a magistrate.

10.2.1 Constitutional Court

The Constitutional Court was established in 1994 by South Africa's first democratic constitution. The court is the first of its kind in South Africa and the key institution of our constitutional democracy. Its function is, in particular, to oversee the application and protection of the human rights provided for in the Constitution and more particularly in Chapter 3, which is known as the Bill of Rights.

President Nelson Mandela (as he then was) formally opened the court on 14 February 1995 with these words:

> "The last time I appeared in court was to hear whether or not I was going to be sentenced to death. Fortunately for myself and my colleagues, we were not. Today I rise not as an accused, but on behalf of the people of South Africa, to inaugurate a court South Africa has never had, a court on which hinges the future of our democracy."
>
> **Source:** Constitutional Court website, 'Speech by President Nelson Mandela at the Inauguration of the Constitutional Court', 14 February 1995, www.constitutionalcourt.org.za/site/thecourt/mandelaspeech.html

A plaque depicting the logo of the Constitutional Court, was unveiled by President Mandela.

> "It depicts people sheltering under a canopy of branches – a representation of the Constitution's protective role and a reference to a theme that runs through the Court, that of justice under a tree. The idea comes from traditional African societies: this was where people would meet to resolve disputes. As Justice Albie Sachs – who was deeply involved in the development of the logo and the design of the new building – told a group on a tour of Constitution Hill: 'The tree protects the people, and they look after the tree. Besides, in South Africa, justice has traditionally taken place under a tree.'"
>
> **Source:** http://www.constitutionalcourt.org.za/site/thecourt/thelogo.html

Figure 10.1 The logo of the Constitutional Court

The new court building in Braamfontein, Johannesburg, was officially opened in March 2004. The building at Constitution Hill has become a landmark of Johannesburg and South Africa.

> "It is fitting that the Court, a potent symbol of the democracy that replaced apartheid, has been erected on the site of the Old Fort, Johannesburg's notorious prison – symbolising the triumph of hope over a troubled past."
>
> **Source:** http://www.constitutionalcourt.org.za/site/concourt-tours/cd2/nonpopup2.html

Origin of the Constitutional Court

The Constitutional Court was originally established by the Interim Constitution of 1993, but now operates under the Final Constitution, known officially as the Constitution of the Republic of South Africa, 1996. Section 167 (read together with schedule 6 of the Constitution) refers to the operation of the court, its presiding officers and jurisdiction, among other matters. Related legislation is the Superior Courts Act 10 of 2013, which aims

> "… to rationalise, consolidate and amend the laws relating to the Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa and to make provision for the administration of the judicial functions of all courts".

We say that the Constitutional Court has its 'seat' in Johannesburg.

Jurisdiction of the Constitutional Court

The Constitutional Court is the highest court in *all* matters. Previously, the Constitutional Court was the highest court in constitutional matters only while the Supreme Court of Appeal was the highest court in all other matters. However, in terms of the Constitution Seventeenth Amendment Act 72 of 2013, this has changed. The Constitutional Court can now be considered as the apex court – it is the highest court in the Republic in all matters.

In terms of section 167(3) of the Constitution the Constitutional Court:

- may decide constitutional matters
- may decide any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by the Constitutional Court
- makes the final decision whether a matter is within its jurisdiction.

Constitutional matters are defined in s 167 (7) of the Constitution as 'any issue involving the interpretation, protection or enforcement of the Constitution'. The court may act as a court of appeal or as a **court of first instance** in all constitutional matters.

A **court of first instance** is the court in which the matter starts or is heard first.

The Constitutional Court's decisions bind all other courts. Since there is only one constitutional court in South Africa, the court has jurisdiction over the entire geographical area of the country. The jurisdiction is not limited to a particular province or area.

The function of the Constitutional Court is to interpret the Constitution and the Bill of Rights. In doing so, it has greatly influenced our legal system and case law since 1995.

The Constitutional Court is not the only court that deals with constitutional matters. You should note that other courts may also deal with certain constitutional matters, but their decisions must be formally confirmed by the Constitutional Court. In terms of s 172 (2) (a) of the Constitution, certain other courts (the Supreme Court of Appeal, the High Court of South Africa or a court of similar status) may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court. The Constitutional Court is therefore required to affirm the decision of other courts when it comes to a decision declaring a piece of legislation unconstitutional, in other words, in breach of the constitution and therefore invalid.

In terms of section 167 (4) of the Constitution the following six matters fall within the exclusive or original jurisdiction of the Constitutional Court. This means that no other court may deal with these matters. Only the Constitutional Court may:

1. decide disputes, or arguments, between organs of state in the national or provincial area concerning the constitutional status, powers or functions of any of those organs of state
2. decide the constitutionality of any parliamentary or provincial bill
3. decide on applications for a provincial Act or Act of Parliament to be declared unconstitutional (in terms of s 80 or s 122 of the Constitution)
4. decide the constitutionality of any amendment to the Constitution
5. decide that Parliament or the President has failed to fulfil a constitutional obligation
6. certify a provincial constitution in terms of section 144.

Although the court mainly functions as a court of appeal, it always acts as a court of first instance on these six matters and they will therefore commence in the Constitutional Court.

The court, in terms of s 173 of the Constitution also has inherent jurisdiction to regulate its own process and to develop the common law, taking into account the interests of justice. The same applies to the Supreme Court of Appeal and the High Court of South Africa.

Presiding officers of the Constitutional Court

The judges of the Constitutional Court are appointed by the President of South Africa, after he has consulted with the National Assembly and the Judicial Service Commission.

Section 167 (1) of the Constitution the Constitutional Court states that the presiding officers of the Constitutional Court are the **Chief Justice** of South Africa, the Deputy Chief Justice and nine other judges. Every matter in the court has to be decided by at least eight judges. A presiding officer in the Constitutional Court is addressed as 'Justice'.

During 2005, Justice Pius Langa was appointed as Chief Justice, after the retirement of Chief Justice Arthur Chaskalson. He was succeeded by Chief Justice Sandile Ngcobo. Since 2011 Mogoeng Mogoeng holds this position. Currently, the composition of the court is as follows:

- Chief Justice Mogoeng Mogoeng
- Deputy Chief Justice Ray Zondo
- Justice Chris Jafta
- Justice Edwin Cameron
- Justice Johan Froneman
- Justice Mbuyiseli Madlanga
- Justice Mhlantla Nonkosi Zoliswa
- Justice Sisi Khampepe.

The position of the **Chief Justice** combines two previous positions, that of the Chief Justice and President of the Constitutional Court. Not only is the Chief Justice now the most **senior judge** of the Constitutional Court, he is also the **head of the judiciary** of South Africa and exercises final authority over the functioning of all courts in the country.

Professor says — Judicial Service Commission

Section 178 of the Constitution provides that the Judicial Service Commission (referred to as the JSC) consists of the Chief Justice, the President of the Supreme Court of Appeal, one Judge President designated by the Judges President, the Minister of Justice, two practising advocates, two practising attorneys, one teacher of law, six persons of the National Assembly, four permanent delegates to the National Council of Provinces, four persons designated by the President as head of the national executive and, when considering matters relating to a specific Division of the High Court, the Judge President of that court and the Premier of the province concerned.

The JSC shortlists and interviews suitable candidates for appointment as judges. These interviews are open to anyone who wishes to attend. The JSC makes its decisions in private and then communicates its decision to the president. The president is responsible for making the

Professor says (continued) Judicial Service Commission

final appointment of judges. The JSC also advises national government on issues concerning the judiciary and on the administration of justice. It also deals with complaints against judges.

Note that the Judicial Service Commission Amendment Act 20 of 2008 took effect on 1 June 2010. This Act:

- amends the Judicial Service Commission Act 1994
- establishes the Judicial Conduct Committee to receive and deal with complaints about judges
- provides for a Code of Judicial Conduct which serves as the prevailing standard of judicial conduct which judges must adhere to
- provides for the establishment and maintenance of a register of judges' registrable interests
- provides for procedures for dealing with complaints about judges
- provides for the establishment of Judicial Conduct Tribunals to inquire into and report on allegations of incapacity, gross incompetence or gross misconduct against judges.

Table 10.1 summarises some of the important information you have learned about the Constitutional Court.

Table 10.1 The Constitutional Court

Constitutional Court (CC)			
Description	**Origin**	**Jurisdiction**	**Presiding Officer**
The highest court in ALL matters, not only constitutional matters – Apex court Oversees the protection of human rights provided for in the Bill of Rights Situated in Johannesburg (seat)	Constitution of the Republic of South Africa, 1996: (s 167 and schedule 6)	Constitutional and other matters Six defined matters within the exclusive jurisdiction of the CC Acts as a court of appeal or a court of first instance Whole of South Africa's geographical area Inherent jurisdiction to regulate own process and develop common law	Chief Justice, Deputy Chief Justice and nine other judges Every matter to be decided by at least eight judges (this is the prescribed quorum) Presiding officers addressed as 'Justice'

Activity 10.1

On this page and the next page is a list of some of the landmark Constitutional Court decisions together with a brief description of the issue decided by the court. Read any one two of these cases to see how the court applies and interprets our Constitution.

The accepted abbreviation for the Constitutional Court, especially in law reports, is **CC**. In Afrikaans, the abbreviation is KH (Konstitusionele Hof).

- *August and Another v Electoral Commission and Others* 1999 (3) SA 1 **CC**: right of prisoners to vote.
- *Azapo and Others v President of the RSA and Others* 1996 (4) SA 671 CC: challenge to the TRC's amnesty powers.
- *Biowatch Trust v Registrar, Genetic Resources and Others* 2009 (6) SA 232 CC: costs in constitutional litigation. Private litigants who bring constitutional claims are given some measure of protection.
- *Bhe and Others v The Magistrate, Khayelitsha and Others; Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa* 2005 (1) SA 580 CC:

gender equality and the right of African women to inherit under the African customary law of intestate succession.

- *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC); 2002 (1) SACR 79 (CC); [2001] 10 BCLR 995 (CC): duty of the police to prevent sexual violence against women.
- *Case and Another v Minister of Safety and Security and Others; Curtis v Minister of Safety and Security and Others* 1996 (3) SA 617 (CC); 1996 (1) SACR 587 (CC); [1996] 5 BCLR 609 (CC): the possession of pornography.
- *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 (6) SA 632 CC: striking down a statute making minimum sentencing provisions applicable to 16- and 17-year-old children.
- *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC); [2006] 12 BCLR 1399 (CC): the role of the public in the law-making process, which, as the court put it 'lies at the heart of our constitutional democracy'.
- *Du Toit and Another v Minister of Welfare and Population Development and Others (Lesbian and Gay Equality project as Amicus Curiae)* 2003 (2) SA 198 (CC): the adoption of children by same-sex couples.
- *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC); [2000] 11 BCLR 1169 (CC): the right to housing.
- *Harksen v President of the RSA and Others* [2000] 5 BCLR 478 (CC): extradition.
- *Hoffmann v South African Airways* 2001 (1) SA 1 (CC): discrimination against a person who is HIV-positive in the workplace.
- *KZN MEC of Education v Pillay* 2008 (1) SA 474 CC – prohibition against wearing a nose stud to a public school amounted to unfair discrimination on grounds of religion and culture.
- *Lindiwe Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 CC: found the use of prepayment water meters lawful and that the City's free basic water policy was reasonable.
- *Leon Joseph and Others v City of Johannesburg and Others* 2010 (4) SA 55 CC: when depriving residents of electricity, a service that is provided in fulfilment of constitutional and statutory duties, the City is obliged to provide them with procedural fairness, including fair notice of the disconnection.
- *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) 2002 (5) SA 721 (CC): the right to health care and access to HIV/Aids treatment.
- *Minister of Home Affairs v Fourie and Others; Lesbian and Gay Equality Project and Others v Minister of Home Affairs* 2006 (1) SA 524 (CC), [2006] 3 BCLR 355 CC: same-sex marriages.
- *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) and Others; August v Electoral Commission* 2005 (3) SA 280 (CC): the right of prisoners to vote.
- *Mohamed and Another v President of the Republic of South Africa and Others (Society for the Abolition of the Death Penalty in South Africa and Another Intervening*) 2001 (3) SA 893 (CC); 2001 (1) SACR 66 (CC); [2001] 7 BCLR 685 (CC): the constitutionality of extraditing an accused to a country where the death penalty can be imposed.
- *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC); 1998 (2) SACR 556; [1998] 12 BCLR 1517 (CC): the crime of sodomy, which the court abolished.
- *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC): unfair discrimination against same-sex life partners.
- *Prince v President, Cape Law Society and Others* 2002 (2) SA 794 (CC); [2002] 3 BCLR 231 (CC): freedom of religion in the context of a Rastafarian wanting to be admitted as an attorney.
- *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 CC: the obligation of rail service providers to protect the safety of commuters on trains.

- *S v Baloyi and Others* 2000 (2) SA 425 (CC), 2001 (1) SACR 81, [2000] 1 BCLR 86 (CC): family violence.
- *S v Jordan and Others* (*Sex workers education and advocacy task force and Others as amici curiae*) 2002 (6) SA 642 (CC): the law criminalising prostitution.
- *S v Makwanyane and Another* 1995 (3) SA 391 (CC): the death penalty, which the court unanimously declared to be unconstitutional. This was the very first case decided by the Constitutional Court on 6 June 1995.
- *S v Williams and Others* 1995 (3) SA 632 CC: corporal punishment as a sentence for juveniles declared unconstitutional.
- *Satchwell v President of the RSA and Another* 2002 (6) SA 1 (CC), [2002] 9 BCLR 986 (CC): entitlement of same-sex couples in life partnerships to pension benefits.
- *Shilubana and Others v Nwamitwa (National Movement of Rural Women and Commission for Gender Equality as amici curiae)* 2007 (5) SA 620 CC – development of customary law to bring it in line with the constitutional commitment to gender equality. Appointment by customary institutions of a female chief, contrary to tradition, was permissible.
- *Volks NO v Robinson and Others* [2005] 5 BCLR 446 (CC): a claim for maintenance against an estate in the event of parties not being married to each other.

The decisions of the Constitutional Court can be accessed on the court's website, **http://www.constitutionalcourt.org.za/site/judgments/judgments.html**, and are also available on the following website: **http://www.saflii.org/za/cases/ZACC/**

10.2.2 Supreme Court of Appeal

The Supreme Court of Appeal (**SCA**) is a court of appeal. A court of appeal acts as a court of second instance, not first instance. In other words, it deals with a matter only after it has already been decided by another court. The SCA's decisions bind, or have to be followed, by all lower courts. It is located in Bloemfontein and was previously known as the Appellate Division of the High Court.

The name of the court is abbreviated as **SCA**. In Afrikaans, the abbreviation is HHA – Hoogste Hof van Appèl.

Even though the seat is in Bloemfontein, legislation provides that a session of the Court may be held at another place when it is expedient or in the interests of justice.

Origin of the Supreme Court of Appeal

The Supreme Court Act 59 of 1959 established what is now known as the Supreme Court of Appeal. At the time, the 'Supreme Court' consisted of the Appellate Division (now the Supreme Court of Appeal) and several other divisions of the Supreme Court (now the High Court).

Jurisdiction of the Supreme Court of Appeal

The Supreme Court of Appeal (SCA) functions only as a court of appeal, not a court of first instance. In other words, a matter cannot be heard for the first time in the SCA. There is no automatic right to appeal to the SCA and a party would generally need to apply for leave to appeal to this court.

In terms of s 168 of the Constitution, the SCA decides:

- appeals (in any matter arising from the High Court of South Africa or a court of a similar status to the High Court of South Africa, except in respect of labour or competition matters so such extent as may be determined by an Act or Parliament),
- issues connected with appeals
- any other matter that may be referred to it in circumstances defined by an Act of Parliament.

The SCA is the second highest court in South Africa, except in certain competition and labour matters. The court has jurisdiction to hear an appeal against any decision of the High Court. Appeals from the

High Court end up before three judges in the High Court (known as a full bench) or in the SCA. A final appeal may lie to the Constitutional Court.

The SCA deals with appeal matters. It may also deal with constitutional matters on appeal, although it cannot deal with matters that fall within the so-called exclusive jurisdiction of the Constitutional Court. If the SCA makes an order of constitutional invalidity, such order has to be confirmed by the Constitutional Court.

As there is only one SCA in South Africa, the court has jurisdiction over the entire geographical area of South Africa. The court's process runs throughout the Republic and its judgments and orders must be executed in any area as if they were judgments or orders of the Division of the High Court or Magistrate's Court.

Section 20 of the Superior Courts Act 10 of 2013 provides for settling conflicting decisions in civil cases: whenever a decision on a question of law is given in any Division of the High Court that is in conflict with a decision given by another Division of the High Court, the Minister may submit these decisions to the Chief Justice, who must cause the matter to be argued before the Constitutional Court or the Supreme Court of Appeal to determine the said question of law for guidance.

This is the procedure in the SCA – the Court decides cases upon the record of the proceedings before the court *a quo*. Witnesses are not called to testify and generally parties don't have to be present during the appeal proceedings. The parties' legal representatives will present written and oral arguments in court and this will be followed by the judgment.

Presiding officers in the Supreme Court of Appeal

Section 168 of the Constitution provides that the SCA consists of a President of the Court, a Deputy President and a number of judges of appeal. The President and Deputy president of the SCA are appointed by the President of South Africa in consultation, or discussion, with the National Assembly and the Judicial Services Commission.

The other judges of appeal are appointed by the President of the country on the advice of the Judicial Service Commission (JSC).

Traditionally, SCA judges are appointed from the ranks of High Court judges. It is important that the judiciary reflect the racial and gender composition of our population.

The Court generally sits in panels of three or five judges, depending on the nature of the appeal. The decision of the majority is the decision of the Court.

Since 2 May 2002, the judges of appeal are addressed as 'Justice' followed by the person's surname. They used to be addressed as 'My Lord', 'My Lady', 'Your Lordship(s)' or 'Your Ladyship(s)'.

Table 10.2 provides a summary of the important features of the Supreme Court of Appeal (SCA).

Table 10.2 The Supreme Court of Appeal

Supreme Court of Appeal (SCA)			
Description	**Origin**	**Jurisdiction**	**Presiding officers**
A court of appeal – the second highest court in South Africa Situated in Bloemfontein (seat)	Constitution of 1996 (s 168 and schedule 6)	Only deals with appeals from High Court decisions Deals with appeals in the context of civil, criminal and constitutional matters Entire geographical area of South Africa	President and deputy president of the courts with a number of judges of appeal Where all the judges on the bench (never fewer than three) are addressed, they are referred to as 'the Court' – individual judges are addressed as 'Justice' followed by the person's surname

For more information on the Supreme Court of Appeal, visit **www.justice.gov.za/sca**

10.2.3 High Court

There are various divisions of the High Court of South Africa. These are listed in Table 6.7 in Chapter 6 of this book.

You will recall that previously their names corresponded with the old provincial and homeland structure of South Africa before 1994. The names have now changed (as you know, from the discussion in Chapter 6, first in terms of The Renaming of the High Courts' Act 30 of 2008 and then in terms of the Superior Courts Act 10 of 2013).

It was necessary to change the names of certain high courts as they reflected their apartheid origins. Also, Schedule 6 to the Constitution provided that, as soon as practical after the new Constitution took effect, all courts had to establishing a judicial system suited to the requirements of the new Constitution.

The Superior Courts Act 10 of 2013 states that:

> "… with the advent of the democratic constitutional dispensation in 1994, the Republic inherited a fragmented court structure and infrastructure that were largely derived from our colonial history and were subsequently further structured to serve the segregation objectives of the apartheid dispensation and that, before the advent of the democratic dispensation in 1994, the Magistrates' Courts were not constitutionally recognised as part of the judicial authority and were largely dealt with as an extension of the public service".

The Act consolidated the various High Courts into a new single High Court of South Africa and aims to 'rationalise, consolidate and amend' the laws relating to the Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa.

There are now various divisions of the (one) High Court of South Africa spread across the nine provinces. As discussed in Chapter 6, sections 6 and 50 of the Superior Courts Act determine that the High Court of South Africa consists of various divisions.

Table 10.3 Divisions of the High Court of South Africa

	Name of court	Seat of court
1	Eastern Cape Division of the High Court	Main seat in Grahamstown Local seat in Bisho Local seat in Mthatha Local seat in Port Elizabeth
2	Free State Division of the High Court	Main seat in Bloemfontein
3	Gauteng Division of the High Court	Main seat in Pretoria Local seat in Johannesburg
4	KwaZulu-Natal Division of the High Court	Main seat in Pietermaritzburg Local seat in Durban
5	Limpopo Division of the High Court	Main seat in Polokwane Local seat in Thohoyandou
6	Mpumalanga Division of the High Court	Main seat in Nelspruit
7	Northern Cape Division of the High Court	Main seat in Kimberley
8	North West Division of the High Court	Main seat in Mahikeng
9	Western Cape Division of the High Court	Main seat in Cape Town

The names are important as you will use them when drafting court documents in a matter. For example, when drafting the summons in a civil matter you will start, in the very first line of the document, with:
'In the High Court of South Africa,
Gauteng Local Division, Johannesburg.'

The High Court deals with matters of a general nature. As discussed in the context of the doctrine of judicial precedent in Chapter 6, the divisions are bound by decisions made by the SCA and their decisions create a binding precedent for lower courts.

Circuit courts are travelling high courts. They travel around the country to deal with criminal matters in rural areas. To find a circuit court, you need to contact the nearest division of the High Court. Circuit courts are presided over by a judge of the provincial division of the High Court in the province in which the circuit court operates. Note the name of the court – it is not a circus court!

Origin of the High Court

Before the Constitution, the High Court used to be known as the Supreme Court. The Supreme Court Act 59 of 1959 introduced the Supreme Court, which is now referred to as the High Court in terms of s 166 of the Constitution.

Jurisdiction of the High Court

The High Court has jurisdiction to deal with matters of all kinds. They deal with all civil and criminal matters, as well as constitutional matters – as long as the constitutional matter does not fall within the exclusive jurisdiction of the Constitutional Court.

In terms of section 169 of the Constitution, the High Court of South Africa may decide:

- any constitutional matter except a matter that the Constitutional Court has agreed to hear directly in terms of section 167(6)(a); or is assigned by an Act of Parliament to another court of a status similar to the High Court of South Africa
- any matter not assigned to another court by an Act of Parliament.

In civil matters, the High Court usually deals with civil claims exceeding R400 000 (four hundred thousand rand). It therefore deals with matters that are beyond the jurisdiction of the Magistrates' Courts. For example, matters concerning a person's status (with regard to marital status or mental health) cannot be decided by a Magistrate's Court – these matters have to be decided by the High Court.

Note the following with regard to the jurisdiction of the High Court:

- There is no lower limit and no upper limit on the value of the claim
- The court may hear any type of matter unless its capacity to do so has been limited by legislation
- The jurisdiction of each Division is limited to the geographical boundaries of a particular province
- In terms of section 21 of the Superior Courts Act 10 of 2013, there are two alternative grounds of jurisdiction: the Division will have jurisdiction in respect of a person residing or being in its area of jurisdiction or if the cause of action arose within its jurisdiction.

The High Court also deals with serious criminal matters, such as murder, treason, rape, etc. Its **penal jurisdiction** is unlimited except where minimum or maximum sentences are prescribed by law, and can even include life imprisonment.

Penal jurisdiction refers to the penalty that the court is entitled to impose in a criminal matter, for example, a jail sentence or fine.

The High Court also acts as an appeal court. When dealing with an appeal from a lower court, such as a Magistrate's Court, one High Court judge will decide the matter in the High Court. It is also possible to lodge an appeal against a decision of a single judge in the High Court to a **full bench** of judges in the same High Court. Such an appeal, against the decision of a single judge of the High Court, is decided by a full bench in the High Court.

A **full bench** in this context refers to a bench consisting of three judges in the High Court.

Each high court has jurisdiction over the defined, or outlined, geographical area in which the court is situated.

The High Court also has inherent power to regulate its own process and to develop the common law.

Presiding officers of the High Court

In terms of section 169(3) of the Constitution each division of the High Court consists of a judge president, one or more deputy judge presidents and a number of other judges determined in terms of national legislation. High Court judges are appointed by the president of South Africa on the advice of the Judicial Services Commission (JSC).

A matter is usually decided by a single judge in the High Court.

You should note that different legislation applies to judicial officers in the High Court and Magistrates' Courts respectively.

Table 10.4 summarises some of the important things about the High Court of South Africa.

Table 10.4 The High Court

High Court			
Description	**Origin**	**Jurisdiction**	**Presiding officer**
High Courts serve different geographical areas – each province has its own division Circuit courts are high courts that travel to rural areas for short periods Bound by decisions of the CC and SCA and create binding precedent for lower courts	Constitution of 1996 (s 166(c) and Schedule 6)	General civil, criminal and constitutional jurisdiction, as well as appeal jurisdiction Civil matters: Matters beyond jurisdiction of Magistrates' Courts (claims exceeding R400 000) but no lower or upper limit Criminal matters: Serious criminal offences, including treason Appeals: Appeals from lower courts heard by one judge; appeals from single judge of same high court heard by full bench Inherent power to regulate their own process and develop the common law Jurisdiction limited to defined geographical area in South Africa	Judge president, deputy judge president and a number of other judges Matters are usually heard and decided by a single judge Appeal matters are usually heard and decided by a full bench (3 judges) Presiding officers are addressed as: 'Your Lordship/Your Ladyship/My Lord/My Lady'

In the next case study, we will look at the so-called *Montecasino* case as an example of an appeal from the High Court to the SCA. The appeal case has been reported as *Tsogo Sun Holdings (Pty) Ltd v Qing-He Shan and Another* 2006 (6) SA 537 (SCA).

Case study An appeal from the High Court to the Supreme Court of Appeal – the 'Montecasino case'

The facts were as follows: On 20 June 2001, Shan and his wife visited the Montecasino complex in Johannesburg, a multi-billion gambling, retail and leisure centre.

Shan and his wife became involved in an argument with a person called Shoa, in the gaming area. Security personnel working for the casino came in and defused a volatile situation. Later, Shan and Shoa left the casino together. Near the boom gate at the exit of the parking area, Shoa produced a firearm and shot Shan three times in full view of a security member from an independent security company. Shan sustained serious bodily injuries. He sued Tsogo Sun

Case study (continued) An appeal from the High Court to the Supreme Court of Appeal – the 'Montecasino case'

Holdings, the major shareholder and owner/operator of the casino for damages – in other words, for the financial loss he suffered.

Tsogo defended itself. It argued that it had security controls at all the entrances to the casino. It also pointed out that the company responsible for security at the casino was an independent contractor and its employees were therefore not employed by Tsogo. It also relied on the numerous disclaimers displayed at the casino, which claimed to exclude responsibility for damage to both property or persons. For example, the following text was displayed on a notice at the casino:

> RIGHT OF ADMISSION RESERVED. The company does not accept any responsibility for loss or damage to property, nor any injury to any person on the premises.
>
> Firearms are not permitted on the gaming area. Persons entering these premises do so entirely at their own risk. Neither the landowner or the management, contractors or their employees shall be responsible or liable in any way for any injury or for death of any person or any harm caused to them or for the loss or destruction of or damage to any property of whatsoever nature by cause arising from any access to the premises.

The above is an example of a disclaimer, which is a notice in terms of which liability is excluded. It usually indicates that the owner of the property where the notice is displayed will not take responsibility for any harm caused. Disclaimers like these, in public places, are controversial. What if a person visiting a public place does not see these notices or, as was the case in the present matter, does not understand English? Should they be allowed to exclude liability?

The Transvaal Provincial Division of the High Court (now The High Court of South Africa, Gauteng Division, Pretoria) ruled in Shan's favour and decided that Tsogo owed all the casino's patrons and casual visitors a duty of care and that it had failed to observe this duty of care.

The **court *a quo*** indicated that Tsogo was unable to say that the plaintiff had knowingly and freely entered the premises at his own risk; he could not understand English and the notices had not effectively been brought to his attention. The casino had thought it necessary to have the gaming rules at the gaming tables translated into Chinese and there was therefore no reason why it could not have been expected to have the disclaimers translated into Chinese as well.

Tsogo then appealed against the High Court's decision. On 31 May 2006, the Supreme Court of Appeal held that Tsogo was not liable for the damages suffered by Shan and that it had not been negligent. The appeal court found that it was 'not reasonably foreseeable' that a regular patron at the casino could be a danger to another patron. There was 'no good reason' to suspect that Shoa would pose a risk to patrons of Montecasino. When asked about weapons Shoa lifted his jacket and indicated that he had none. Also, the 'steps taken by Tsogo were reasonable' and the alleged breach of contract by the security guards (the failure to body search Shoa) does not equate, or equal, negligence on the side of Tsogo towards Shan.

The court indicated that, if every facility in South Africa that had in the past been the subject of an armed robbery must search every single person who enters for firearms "life in this country would become unbearable and the duty cast on owners and occupiers limitless … Passengers have been shot on trains, buses and taxis … is it to be expected that every client has to be body searched before being allowed to enter a premises or use public transport? I think not."

A **court *a quo*** refers to the court of first instance – that is, the court that first heard the matter.

The court of appeal only reviews the record of the proceedings of the court *a quo*, as well as the legal argument presented to it on appeal by the legal representatives acting for the appellant and the respondent. The case is therefore not presented all over again when it comes to the appeal stage. No new or oral evidence is presented and no witnesses are called. The court of appeal will decide whether to uphold or to dismiss the appeal by considering only:

- the written record of the proceedings of the court *a quo*
- the oral argument and written heads of argument presented to the court on appeal by the legal representatives.

Finally, there are some important officers in each High Court Division that you should be aware of:

- Registrar of the High Court – the head of administration
- Family advocate – makes a recommendation to the Court with regard to custody or care and access in relation to minors (http://www.justice.gov.za/FMAdv/f_main.htm)
- Master of the High Court – looks after interests in matters involving deceased estates, insolvent estates, particularly with regard to minors and mentally ill persons
- Sheriff of the court – serves or executes court documents
- Directors of Public Prosecutions – responsible for all the criminal cases in the respective provinces (https://www.npa.gov.za/)
- State attorney – acts for and provides legal services the State (National and provincial governments) (http://www.justice.gov.za/branches/stateattorney.html)

10.2.4 Magistrates' Courts

Magistrates' Courts are established in terms of the Magistrates' Courts Act 32 of 1944 and are recognised by section 166 of the Constitution. They are called creatures of statute because these courts can only do what legislation specifically allows or authorises them to do. As a result, their jurisdiction is limited. In terms of s 170 of the Constitution, a court of a status lower than the High Court may not enquire into or rule on the constitutionality of any legislation or any conduct of the president. Matters of this nature are therefore excluded from the jurisdiction of Magistrates' Courts.

The presiding officer of a Magistrate's Court is a magistrate and is addressed as 'Your Worship'. Magistrates are appointed by the Minister of Justice following consultation with the Magistrates' Commission (MC).

Professor says — The Magistrates' Commission

The Magistrates' Commission was established by the Magistrates' Act 90 of 1993. This body consists of a number of persons, including:

- a judge of a Superior Court, as chairperson
- the minister or his nominee
- two regional magistrates
- two magistrates with the rank of chief magistrate
- two magistrates who do not hold the rank of regional magistrate or chief magistrate
- two practising advocates
- two practising attorneys
- one teacher of law
- any person designated by the Council of the South African Judicial Education Institute
- four persons designated by the National Assembly from among its members, at least two of whom must be members of opposition parties represented in the Assembly
- four permanent delegates to the National Council of Provinces
- five fit and proper persons appointed by the President in consultation with the Cabinet.

Professor says (continued) The Magistrates' Commission

The Magistrates' Commission is responsible for the appointment, promotion, transfer of, discharge of, or disciplinary steps against, judicial officers in the lower courts. It also investigates complaints against magistrates and misconduct by magistrates.

There are literally hundreds of Magistrates' Courts in South Africa. Most towns will have their own Magistrate's Court. Some of these are regional courts and others are district courts. Each region consists of a number of districts. New magisterial districts have been defined to correspond with the new municipal boundaries.

As there are some important differences between the two types of Magistrates' Courts, namely, regional and district courts, we discuss these under separate headings.

Regional courts

Up to now, criminal matters rather than civil matters were dealt with by a regional Magistrates' Court. A regional court has jurisdiction in all criminal matters except **treason**. The regional court's jurisdiction is limited to a defined geographical area or region.

Treason is a criminal offence that entails an intentional and unlawful overt act to overthrow the government or that endangers the existence, independence or security of the state.

A regional court's penal jurisdiction is limited by statute. Section 92 of the Magistrates' Courts Act 32 of 1944 provides that when a regional court imposes a sentence in a criminal matter, it may not order the imprisonment of someone for more than fifteen years (in terms of section 61 of the Magistrates' Courts Amendment Act 120 of 1993 this may change in future to a period of ten years) and it may not impose a fine of more than the prescribed amount of R600 000. This amount may change from time to time by notice in the Government Gazette.

Table 10.5 summarises some of the important things about regional courts.

Table 10.5 Magistrates' Courts: regional court

Magistrates' Courts: Regional court			
Description	**Origin**	**Jurisdiction**	**Presiding officer**
A Magistrate's Court that deals with both criminal matters and civil matters	Constitution of 1996 (s 166 and 170) and Magistrates' Courts Act 32 of 1944	Civil matters: Certain categories Criminal matters: The court has jurisdiction in all matters except treason. Penal jurisdiction: Limited to fifteen years' imprisonment and/or a fine of R600 000. Section 92 of the Magistrates' Courts Act also provides for correctional supervision. Jurisdiction is limited to a defined geographical region	Regional Magistrate Addressed as 'Your Worship' Appointed by the Minister of Justice after consultation with the Magistrates' Commission The head of administration – Registrar

There have been important developments with regard to regional courts. The Magistrates' Courts Act 32 of 1944 was amended to give powers to regional courts to deal with certain civil cases. Previously these courts only dealt with criminal matters, as shown in Table 10.5.

The Department of Justice and Constitutional Development has indicated that the amendments increase access to justice for members of the public, in particular those who go to courts on a regular basis for the resolution of family-related disputes relating to divorce, maintenance, adoption, and matters relating to custody of minor children.

The regional courts have therefore been authorised to deal with the following civil matters:

- Family disputes, including divorce, maintenance, adoption, and matters relating to custody of minor children
- Disputes over movable and immovable property of between R200 000 to R400 000 which were previously dealt with by the High Court
- Credit agreements of between R200 000 to R400 000
- Road Accident Fund claims of between R200 000 to R400 000.

This is an important and noteworthy development since the regional courts did not previously have jurisdiction to deal with any of these matters.

The benefits of the new legislation include the following:

- Reduced time of finalisation of cases:
  - There are now many more regional courts to deal with the workload of the former divorce courts and to lessen the burden on the High Court.
  - This will help to reduce case backlogs both at the high courts and Magistrates' Courts.
- Reduced costs:
  - Proceedings in the high courts are complex to the extent that attorneys and advocates are usually instructed, resulting in high litigation costs.
  - Regional courts have a reduced scale of costs in relation to the High Court, and simplified proceedings, which include the use of mediation in resolving civil disputes.

The effect of the Jurisdiction of Regional Courts Amendment Act 31 of 2008 is that regional divisions of the Magistrates' Courts now have jurisdiction in respect of certain civil disputes (the four categories of disputes are listed above) and have the same jurisdiction as any high court to:

- hear and determine suits relating to nullity of a marriage or civil union,
- hear and determine suits relating to divorce between persons, and
- hear any matter and grant any order provided for in terms of the Recognition of Customary Marriages Act 120 of 1998.

The Jurisdiction of Regional Courts Amendment Act 31 of 2008 also converted the (old) so-called divorce courts, which were established under s 10 of the Administration Amendment Act 9 of 1929, into regional Magistrates' Courts.

You should take note that:

- The Jurisdiction of Regional Courts Amendment Act repeals the Administration Amendment Act of 1929 in its entirety.
- The previous court rules in respect of the divorce courts and the Magistrates' Courts have been repealed.
- A comprehensive set of new rules that apply to all Magistrates' Courts took effect on 15 October 2010. The rules were published in Government Gazette No 33487 of 23 August 2010 are referred to as 'The Rules Regulating the Conduct of Proceedings of the Magistrates' Courts of South Africa'.

The rules set out the procedure to be followed when litigating in the Magistrates' Courts. For the High Court of South Africa, a separate set of rules exists, which is known as the Uniform Rules of the High Court of South Africa. The rules of court also contain certain forms, or templates, to be used for specific court notices. The rules read together with the relevant Act (the Magistrates' Courts Act or the Superior

Courts Act) are very important sources for litigation as these documents dictate the course of the process – step by step.

When drafting court documents in a civil matter in the regional court, the documents will start with, for example: In the Regional Court for the Regional division of …, held at … .

The head of the administration in this court is referred to as the *registrar*. In addition to the opponent, all court documents will also be addressed to the registrar of the court, who should receive a copy for filing.

The Chief Justice has issued Norms and Standards for the performance of judicial functions in terms of section 8(3) read with 8(5) of the Superior Courts Act, 10 of 2013 and updated Practice Directives for the Regional Courts were published in 2017. These directives deal with:

1. substituted service and edictal citation
2. judicial case management: pre-trial conferences and trial-readiness certification
3. registered post
4. motion court
5. civil trials
6. finalisation of civil cases
7. reserved judgments
8. security of court files
9. general provisions
10. commencement.

The directives are available on the Law Society's website as follows:
http://www.lssa.org.za/upload/Civil%20Court%20Practice%20Directives%202017%204th%20Revision%20(2).pdf

District courts

A district court deals with both civil and criminal matters. A district division of the Magistrates' Courts exists in most towns in South Africa.

The area of civil jurisdiction of a Magistrate's Court is the district for which the court has been established. District courts deal with all civil claims of not more than R200 000 (unless the parties have agreed to the jurisdiction of the court in matters where the claimed amount exceeds R200 000). Note that amounts may change from time to time, by notice in the Government Gazette.

It is possible for the parties to a dispute to extend the monetary jurisdiction of a district court by agreement. For example, the parties may agree in a written agreement that any dispute arising out the agreement will fall within the jurisdiction of the district Magistrate's Court, even if the claim amount exceeds R200 000.

The jurisdiction of the Magistrates' Courts may be limited to:

- the claim amount or value of the claim
- the cause of action or nature of the claim
- the geographical area.

The claim amount is limited to R400 000 in the case of the regional court and R200 000 in the district court.

With regard to the cause of action, there are certain matters listed in section 46 of the Magistrates' Courts Act 32 of 1944 over which the court has no jurisdiction. These are matters in which:

1. the validity or interpretation of a will or other testamentary document is in question
2. someone wishes to affect the status of a person with regard to mental capacity
3. **specific performance** without an alternative of payment of damages is asked for, except in certain circumstances

If a court orders **specific performance**, it is ordering a party to do something or to comply with this undertaking in terms of a contract or agreement.

4. a **decree of perpetual silence** is asked for.

If a prospective plaintiff has publicly threatened the defendant with a lawsuit, the defendant can ask the court to order the plaintiff to bring the action within a stipulated time, or lose her right to sue. In other words, to stop threatening and to take action within a set period of time failing which she must remain quiet on the matter. This is referred to as a **decree of perpetual silence**.

All of the aforesaid matters have to be dealt with by the High Court as they are specifically excluded from the jurisdiction of the Magistrates' Courts.

The matters which may be decided by the Magistrates' Courts are listed in s 29 of the Magistrates' Courts Act 32 of 1944 as:

- "Actions in which is claimed the delivery or transfer of any property, movable or immovable, not exceeding in value the amount determined by the Minister
- Actions of ejectment against the occupier of any premises or land within the district: Provided that, where the right of occupation of any such premises or land is in dispute between the parties, such right does not exceed the amount determined by the Minister
- Actions for the determination of a right of way, notwithstanding the provisions of section 46,
- Actions arising on or arising out of a liquid document or mortgage bond
- Actions on or arising out of any credit agreement as defined in section 1 of the National Credit Act
- Actions in terms of section 16(1) of the Matrimonial Property Act … where the claim or the value of the property in dispute does not exceed the amount determined by the Minister
- Actions, including an application for liquidation, in terms of the Close Corporations Act
- Actions other than those already mentioned in this section, where the claim or the value of the matter in dispute does not exceed the amount determined by the Minister".

With regard to territorial jurisdiction, the Magistrates' Courts in terms of section 28 of the Magistrates' Courts Act 32 of 1944 have jurisdiction in respect of:

- "Any person who resides, carries on business or is employed within the district or regional division
- Any partnership which has business premises situated or any member whereof resides within the district or regional division
- Any person whatever, in respect of any proceedings incidental to any action or proceeding instituted in the court by such person himself or herself
- Any person, whether or not he or she resides, carries on business or is employed within the district or regional division, if the cause of action arose wholly within the district or regional division
- Any party to interpleader proceedings in certain circumstances
- Any defendant (whether in convention or reconvention) who appears and takes no objection to the jurisdiction of the court
- Any person who owns immovable property within the district or regional division in actions in respect of such property or in respect of mortgage bonds thereon".

When it comes to criminal matters:

- District courts have jurisdiction in all criminal matters except the crimes of treason, murder and rape.
- When imposing a sentence in a criminal matter the court may not impose imprisonment for a period exceeding three years (see s 61 of the Magistrates' Courts Amendment Act 120 of 1993. This may be change in future to a period of one year) or a fine of more than a certain prescribed amount, which is R120 000 (s 92 of the Magistrates' Courts Act 32 of 1944).

As a general rule, district courts do not deal with appeals. The exception to this rule previously was that district courts could deal with appeals from courts of chiefs and headmen (section 12(4) of the Black Administration Act 38 of 1927). This is no longer the case.

When drafting court documents in a civil matter in the district court, the documents will start with, for example: In the Magistrate's Court for the district of Johannesburg, held at Johannesburg.

The head of the administration in this court is referred to as the *clerk*. In addition to the opponent, all court documents will also be addressed to the clerk of the court, who should receive a copy for filing.

Each district division of the Magistrates' Courts also functions, within its particular district, as a:

- children's court
- maintenance court.

Children's courts

Children's courts deal with various issues in relation to children. For example, adoption, neglect, ill-treatment and exploitation of children, children in need of care and children whose parents or guardians are unfit to care for them, are all issues dealt with by children's courts.

Maintenance courts

Complaints and investigations concerning the **maintenance** of children and older persons who are not able to support themselves are decided by maintenance courts. These courts are established and operate in terms of the Maintenance Act 99 of 1998.

Some persons are legally obliged to **maintain**, or support others. For example, parents are required to support their children.

Table 10.6 will help you remember the features of district courts.

Table 10.6 Magistrates' Courts: district court

Magistrates' Court: District court			
Description	**Origin**	**Jurisdiction**	**Presiding officer**
A Magistrates' Court that deals with both civil and criminal matters Established in most towns in South Africa Also functions as a children's court, maintenance court, etc.	Constitution of 1996 (ss 166 and 170) and Magistrates' Courts Act 32 of 1944	Jurisdiction limited to court's district (geographical area) Civil matters: All civil claims not exceeding R200 000 (unless parties have agreed to jurisdiction for a greater amount) Certain defined civil matters are excluded from jurisdiction (s 46 of the Magistrates' Courts Act) Criminal matters: All matters except treason, murder and rape Penal jurisdiction: limited to three years' imprisonment and/or a fine of R120 000 (s 92 of the Magistrates' Courts Act). This section also provides for correctional supervision. Appeal matters: The court does not deal with appeals.	Magistrate addressed as 'Your Worship' Appointed by the Minister of Justice after consultation with the Magistrates' Commission The head of administration – clerk

10.2.5 Other superior courts

Apart from the ordinary high courts, there are a number of other courts that deal with matters of a specialised nature. These courts operate at the same level as the High Court and are discussed under the individual headings that follow.

Labour Court

The Labour Court is established in terms of the Labour Relations Act 66 of 1995 (LRA). As its name suggests, this court deals with labour, or employment matters. These include disputes involving individual employees (such as the dismissal of an employee) and collective labour matters (such as a strike by a group of employees).

In terms of section 151 of the LRA the Labour Court is:

- a court of law and equity
- a superior court that has authority, inherent powers and standing, in relation to matters under its jurisdiction, equal to that which a court of a Division of the High Court of South Africa has in relation to matters under its jurisdiction
- a court of record.

The Labour Court has concurrent jurisdiction with the High Court on matters concerning the violation of fundamental rights relating to labour matters. As is the case with the High Court of South Africa, the Labour Court has inherent power to regulate its own process and to develop the common law.

It consists of a judge president, deputy judge president and as many other judges as the president may consider necessary (s 152 of the LRA) and has jurisdiction in all provinces in the Republic (s 156 of the LRA).

Labour Appeal Court

The Labour Appeal Court is established in terms of s 167 of the LRA as:

- a court of law and equity
- the final court of appeal in respect of all judgments and orders made by the Labour Court in respect of the matters within its **exclusive jurisdiction**
- a superior court that has authority, inherent powers and standing, in relation to matters under its jurisdiction, equal to that which the SCA has in relation to matters under its jurisdiction
- a **court of record**.

Exclusive jurisdiction means that no other court has jurisdiction.

A **court of record** is a court whose proceedings are recorded/taken down and this is available for use after the matter.

The Labour Appeal Court consists of the judge president of the Labour Court, who is also the judge president of the Labour Appeal Court; the deputy judge president of the Labour Court, who is also the deputy judge president of the Labour Appeal Court and a number of other judges as the Labour Court or High Court, as may be required for the effective functioning of the Labour Appeal Court (s 168 of the LRA).

The Labour Appeal Court, like the Labour Court, has inherent power to regulate its own process and to develop the common law.

Land Claims Court

The Land Claims Court has operated since 1996 in terms of s 22 of the Restitution of Land Rights Act 22 of 1994. Its function is to decide land claims in cases where land was taken away from people. It operates at the same level as the High Court and has its own rules. This court may conduct its proceedings informally and **inquisitorially**.

The Land Claims Court also has inherent power to regulate its process and to develop the common law.

An **inquisitorial** approach means that the presiding officer is actively involved in the procedure and asks a lot of questions as opposed to the usual accusatorial approach adopted in court proceedings in South Africa.

Tax Courts

In terms of s 116 of the Tax Administration Act 28 of 2011, the president may by proclamation in the Gazette establish a tax court or additional tax courts for areas that the president thinks fit and may abolish an existing tax court as circumstances may require. A tax court is also a court of record.

Competition Appeal Court

The Competition Appeal Court operates in terms of s 36 of the Competition Act 89 of 1998. It has a status similar to that of the High Court, has jurisdiction throughout the Republic and is a court of record. It deals with appeals and reviews from the **Competition Tribunal** concerning competition issues.

This court also has inherent power to regulate its process and to develop the common law.

The Competition Appeal Court is made up of three judges of the High Court, one of whom must be designated as judge president. The judges are appointed by the president on advice of the JSC.

The **Competition Tribunal** has jurisdiction throughout South Africa and adjudicates competition matters, such as restrictive practices, abuse of dominant position, and mergers, in terms of the Competition Act 89 of 1998.

Electoral Court

The Electoral Court operates in terms of s 18 of the Electoral Commission Act 51 of 1996. It deals with matters relating to the **Electoral Commission**.

The Electoral Court deals with:

- reviews of decisions of the Electoral Commission
- appeals against decisions of the Commission
- any matter relating to the interpretation of any law referred to it by the Commission
- allegations of misconduct, incapacity or incompetence of a member of the Commission.

The **Electoral Commission's** function, in terms of the Constitution, is generally to manage and control elections of national, provincial and municipal legislative bodies.

The presiding officers of this court are the chairperson (who must be a judge of the Supreme Court of Appeal), two High Court judges and two other South African citizens.

Table 10.7 will help you remember the key features of the specialised superior courts.

Table 10.7 Other superior courts

Certain other superior courts				
Name of court	**Description**	**Origin**	**Jurisdiction**	**Presiding officer**
Labour Court	Deals with individual and collective labour law matters	Labour Relations Act 66 of 1995 (s 151)	Labour matters only Concurrent jurisdiction with the High Court on violations of fundamental rights relating to labour matters Inherent power to regulate own process and to develop common law	Judge president, deputy judge president and a number of other judges
Labour Appeal Court (LAC)	Deals with appeals in labour matters only	Labour Relations Act 66 of 1995 (s 167)	Exclusive jurisdiction in appeals from the Labour Court Inherent power to regulate own process and to develop common law	Judge president and deputy judge president of Labour Court play same role for LAC; number of other appeal judges

Certain other superior courts				
Name of court	**Description**	**Origin**	**Jurisdiction**	**Presiding officer**
Land Claims Court	Has dealt with land claims since 1996 May conduct proceedings informally and inquisitorially Appeals from this court go to the SCA or the CC Located in Gauteng	Restitution of Land Rights Act 22 of 1994 (s 22)	Land claim matters in terms of the Restitution of Land Rights Act Has inherent power to regulate its process and to develop the common law	President of the court, as well as a number of additional judges
Competition Appeal Court	Deals with appeal matters in competition disputes	Competition Act 89 of 1998 (s 36)	Appeals and reviews from the Competition Tribunal Jurisdiction throughout the country Has inherent power to regulate own process and develop the common law	Three judges of the High Court, one of whom must be designated as Judge President
Electoral Court	Deals with matters relating to the Electoral Commission	Electoral Commission Act 51 of 1996 (s 18)	Review decisions of the Electoral Commission Appeals against decisions of the Electoral Commission Interpretation of any law referred to it by the Commission Allegations of misconduct, incapacity or incompetence of a member of the Commission	Chairperson (who must be a judge of the SCA), two High Court judges and two South African citizens

10.2.6 Other inferior courts

Apart from ordinary Magistrates' Courts, there are also a number of other inferior or lower courts that deal with matters of a specialised nature.

Small claims courts

There are more than 150 small claims courts in South Africa. These are set up in terms of the Small Claims Court Act 61 of 1984. They assist in resolving civil claims of up to R15 000 quickly, informally and inexpensively. This amount may change from time to time, by notice in the Government Gazette. The monetary jurisdiction was previously limited to R12 000.

Only natural persons (not juristic persons, like companies) can refer matters to this court. Neither party is allowed to have legal representation so each party has to present their own case. Decisions of a small claims court are final and there is no possibility of appeal.

The presiding officer is called the commissioner for small claims. He is usually a practising advocate or attorney, a legal academic or other competent person who provides his services free of charge.

Action again the State cannot be instituted in a Small Claims Court.

There are also certain matters, or causes of action, which are excluded from its jurisdiction (s 16 of the Small Claims Court Act 61 of 1984):

- divorce matters
- matter concerning the validity or interpretation of a will
- matters in which specific performance without an alternative claim for payment of damages save in certain exceptional circumstances are sought
- matters where an interdict is sought
- matters in which a decree of perpetual silence is sought
- damages in respect of defamation, malicious prosecution, wrongful imprisonment, wrongful arrest, seduction or breach of promise to marry.

Short process courts

A short process court provides speedy and inexpensive resolution of civil claims that could not be resolved through mediation. It operates in terms of the Short Process Courts and Mediation in Certain Civil Cases Act 103 of 1991.

The parties are allowed to make use of legal representation, but the presiding officer, the adjudicator for short process, may order that the normal rules of evidence will not apply.

Courts of chiefs and headmen

The courts of chiefs and headmen are community courts where an authorised African headman decides matters in accordance with local customary law. Proceedings are informal. These courts operated in terms of the Black Administration Act 38 of 1927, which has been repealed.

An important new development is the Traditional Courts Bill, 2008. The Bill aims to provide for the structure and functioning of so-called traditional courts, in line with constitutional imperatives and values. It will enhance customary law and the customs of communities by observing a system of customary law.

In terms of the Bill, senior traditional leaders will act as presiding officers of traditional courts, these courts will not have jurisdiction in respect of the following matters: constitutional matters and questions of divorce, custody of minor children, and property disputes within a value range decided by the Minister, and these courts will have jurisdiction in respect of both civil and criminal disputes within local communities.

An summary explaining the Bill was published in Government Gazette No. 40487 of 9 December 2016. At a high level, the Bill covers the following:

1. definitions
2. objects of Act
3. guiding principles
4. institution of proceedings in traditional courts
5. composition of and participation in traditional courts
6. nature of traditional courts
7. procedure in traditional courts
8. orders that may be made by traditional courts
9. enforcement of orders of traditional courts
10. provincial traditional court registrars
11. review by High Court

12. escalation of matters from traditional courts
13. record of proceedings
14. transfer of disputes
15. limitation of liability of members of traditional courts
16. code of conduct and enforcement thereof
17. regulations
18. transitional provisions and repeal of laws
19. short title and commencement.

Equality courts

The equality courts deal with complaints about unfair discrimination, harassment or hate speech regarding incidents that took place after 16 June 2003. These courts deal with matters covered by the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. The court also has jurisdiction to deal with unfair discrimination against consumers in terms of the Consumer Protection Act 68 of 2008.

Every high court is an equality court for the area of its jurisdiction. The minister must also designate one or more Magistrates' Courts as equality courts for the administrative region concerned.

Water tribunal

In terms of s 146 of the National Water Act 36 of 1998, the water tribunal has taken the place of the water court. The tribunal is an independent body that has jurisdiction in all the provinces of South Africa and may conduct hearings concerning water disputes anywhere in the country.

The presiding officers of the water tribunal are the chairperson, deputy chairperson and additional members appointed by the Judicial Service Commission. Members of the tribunal must have knowledge in law, engineering, water resource management or related fields.

Table 10.8 summarises key features of the specialised lower courts that we have been discussing.

Table 10.8 Other inferior courts

Other inferior courts				
Name of court	**Description**	**Origin**	**Jurisdiction**	**Presiding officer**
Small claims courts	Help individuals deal with civil claims quickly, informally and inexpensively No legal representation allowed No appeal possible	Small Claims Court Act 61 of 1984	Civil claims up to R15 000	Commissioner for small claims Usually a practising advocate or attorney or a legal academic providing services free of charge
Short process courts	Provide seedy and inexpensive resolution of civil claims Normal rules of evidence need not apply Legal representation allowed	Short Process Courts and Mediation in Certain Civil Cases Act 103 of 1991	Deal with disputes that could not be resolved through mediation in terms of the Short Process Courts and Mediation in Certain Civil Cases Act	Adjudicator for short process

Other inferior courts				
Name of court	**Description**	**Origin**	**Jurisdiction**	**Presiding officer**
Courts of chiefs and headmen	Community courts where authorised African headman decides matters in accordance with local customary law Litigants choose to use this court or a Magistrates' Court Informal proceedings	Black Administration Act 38 of 1927 (ss 12 and 20) and Traditional Courts Bill	Disputes in terms of customary law Indigenous law and custom used to decide disputes	Chiefs, headmen and chiefs' deputies
Equality courts	Deal with complaints about unfair discrimination, harassment or hate speech that took place after 16 June 2003 Every high court is an equality court for its area Minister of Justice also designates certain Magistrates' Courts as equality courts	Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (s 16)	Matters covered by the Promotion of Equality and Prevention of Unfair Discrimination Act	Judge, magistrate or additional magistrate
Water tribunal	Independent body replacing the water court in 1998 May conduct hearings throughout South Africa	National Water Act 36 of 1998 (s 146)	Water disputes throughout South Africa	Chairperson, deputy chairperson ad additional members Appointed by the Judicial Service Commission Members must have specialist knowledge

There are also other specialised lower courts, for example:

- special commercial crimes courts
- sexual offences courts
- environmental courts.

The sexual offences courts deal only with criminal matters where the accused is charged with having committed a sexual offence. They provide special facilities (for example, child witness rooms and closed-circuit television links) where child witnesses can testify in a safe and friendly environment.

Also, take note of the so-called military courts. Members of the South African National Defence Force are subject to the Military Discipline Code and the jurisdiction of the military courts. In *Minister of Defence v Potsane and Another*; *Legal Soldier (Pty) Ltd and Others v Minister of Defence and Others*, 2002 (1) SA 1 CC, the court discussed the relevant legislation. The Military Discipline Supplementary Measures Act 16 of 1999, which contains a whole new system of military justice, was enacted in order to harmonise the country's military justice system with the new culture of constitutionalism.

Professor says Visit the internet to learn more about our courts

The extensive network of courts that we have discussed attempts to ensure that justice is administered in a procedurally fair and substantively sound manner. There are a number of interesting websites where you can obtain more information about the courts mentioned above, in addition to the website of each individual court:

- www.justice.gov.za
- www.gov.za/about-government/judicial-system
- http://www.southafrica.info/ess_info/sa_glance/constitution/judiciary.htm

On 29 September 2017, Chief Justice Mogoeng Mogoeng said that English will be the only language of record in South African courts. This is what he said with regard to this new development in South African courts:

> "Nobody is saying South Africans are not permitted to speak in their mother tongue in a court of law, we are just saying, to facilitate efficiency and a smooth running of the court system, we would do well according to our experience … We [should] have everything that is said in a particular case captured in one language that is understood by all the judges – and that language is English".

Mogoeng said that poor people who had little resources and wanted to take their matters to the appeal court would have to exhaust their resources paying for their records to be translated. Not all appeal judges understood all 11 official languages, he added.

> "We are alive to the reality that language is a very emotive issue. When you don't allow people to communicate in their mother tongue, they feel disempowered."

He said they had not arrived at the decision lightly, but had felt that what went into the records should be in English.

Source: http://www.news24.com/SouthAfrica/News/english-will-be-only-language-of-record-in-courts-mogoeng-20170929

We end this chapter with a summary in Table 10.9 of the different courts in South Africa.

Table 10.9 Summary of the different courts in South Africa

Constitutional Court	Supreme Court of Appeal	High Court	Magistrates' Courts	Other courts
Jurisdiction				
Highest court in ALL matters, not only constitutional matters Apex court	Deals with appeals only	Court *a quo* and court of appeal Circuit courts are also part of the High Court	District courts deal with both civil and criminal matters Regional courts deal with both civil and more serious criminal matters Previously regional courts only dealt with criminal matters. In 2010 the jurisdiction was extended to	Labour Court and Labour Appeal Court Competition Appeal Court Land Claims Court Small claims courts Short process courts Equality courts Water tribunal Maintenance courts

Constitutional Court	Supreme Court of Appeal	High Court	Magistrates' Courts	Other courts
Jurisdiction				
			include civil matters, including divorce matters	Sexual offences courts Children's courts
Address and contact details				
1 Hospital Street Braamfontein Johannesburg, 2017 Tel. 011 359 7400	Cnr Elizabeth and President Brand Streets, Bloemfontein, 9301 Tel. 051 412 7400	Situated in various provinces Contact the Registrar of the relevant division of the High Court	Situated in various towns and cities Contact the registrar/clerk of the court.	
Website				
www.constitutionalcourt.org.za	www.supremecourtofappeal.gov.za/index.htm or www.justice.gov.za/sca	For more information: www.justice.gov.za/about/sa-courts	For more information: www.justice.gov.za	

10.3 Resolving disputes outside the courts

Litigation refers to formal court proceedings (in each of the courts we have referred to above). This form of conflict resolution poses various disadvantages and is not always appropriate for all types of disputes. These are some of the disadvantages:

- A court case takes a long time to conclude as prescribed steps have to be followed, in accordance with a prescribed time line. From the time that a party issues a summons until the matter is finally argued in court may be several months or even years.
- Litigation is expensive. The majority of the population are simply not in a position to afford legal fees.
- Courts and legal aid are not available in all communities (for example in rural areas).
- Court procedures and documents are technical and complex in nature and require assistance from a legal practitioner. People who don't have access to legal aid or legal assistance may find it impossible to handle court cases themselves.
- Court proceedings are very formal.
- The litigation is presented and argued by legal practitioners. The people involved in the dispute may feel that they play no part in the process of dispute resolution.
- The nature of litigation may be contrary to the traditional or customary way of resolving disputes within a particular community and this may keep parties from using litigation.
- A court order (the end result of litigation) in terms of which one party wins and the other loses, may not be satisfactory to the parties. It may not even address the full extent of the dispute between the parties.
- Also, the court's decision may take so long that it has no practical effect. Appeals against a court order may delay resolution of the dispute even further.

For these kinds of reasons, formal litigation may not be the best way to resolve certain disputes. People therefore sometimes choose other, less formal means of resolving their differences, one of which is known as alternative dispute resolution or ADR.

Activity 10.2

Can you think of any other reasons that a party to a dispute may have elected *not* to approach a court to resolve the matter? Have a look at the following useful websites with information about alternative dispute resolution:

- www.arbitration.co.za
- www.ccma.org.za

Alternative dispute resolution can take the form of negotiation, mediation or arbitration. Each of these forms of dispute resolution has its own advantages and disadvantages.
All of them have the following advantages over formal litigation or court proceedings:

- They are voluntary, rather than forced processes.
- They are informal and speedy.
- Alternative dispute resolution can save time and legal fees, so it makes commercial sense to use it.
- The parties can control the date, time and pace of alternative dispute resolution, which they cannot do in court proceedings. There is no lengthy waiting for court dates for parties using alternative dispute resolution.
- Negotiation, mediation and arbitration are confidential and private, unlike court proceedings, which take place in public.
- The documents relating to the dispute don't form part of a court file and are therefore private.
- The parties have control over who the decision-maker or facilitator will be.
- The parties can agree to the terms of a dispute resolution in a written agreement.

10.3.1 Negotiation

Negotiation has been defined by Dawie Bosch, Edwin Molahlehi and Winnie Everett as:

> "a process of verbal interaction between parties with the objective of arriving at a mutually acceptable agreement over a problem or conflict of interest between them. The parties engage in the process, while trying in as far as possible to preserve their interests, of adjusting their views and positions in the joint effort to achieve an agreement".
>
> **Source:** *The conciliation and arbitration handbook: a comprehensive guide to labour dispute resolution procedure*, 2004, Durban: LexisNexis Butterworths, South Africa p. 9

Negotiating parties and their legal representatives attempt to settle a dispute by finding a mutually acceptable solution. The process therefore entails more than informal discussions between the parties; it is planned and structured. Settlement discussions between parties are conducted on a without prejudice of rights basis. This means that any settlement proposals that a party makes during the course of negotiations cannot be used against that party at a later stage in court.

Negotiation as a means of alternative dispute resolution is suitable for all civil matters.

Advantages of negotiation

The advantages of negotiating a solution to a dispute are numerous.

- The parties can resolve the matter themselves without using legal representatives. They may however agree to use legal representatives.
- Parties have control over the procedure and the content of the settlement agreement.
- Parties have control over the outcome of negotiations. They design their own solution to the problem and so are not subject to a binding court order that they may feel they weren't party to. A 'win-win' situation can be reached.
- Negotiations can take place before and even during the course of formal litigation.

- Settlement discussions are conducted without prejudice to any party's rights.
- If negotiations fail, the parties may still proceed with formal litigation. In other words, the parties have nothing to lose in attempting to resolve their dispute through negotiation.
- A settlement agreement can be made an order of court and is therefore fully enforceable.

Disadvantages of negotiation

There are no obvious disadvantages to negotiation, other than that it may delay formal litigation. Also, any of the parties can withdraw from the process at any time.

10.3.2 Mediation

Mediation is a consensus-based approach where the parties to a dispute involve a neutral or acceptable third party, the mediator, to assist them in resolving the dispute. In doing so, the parties hope to arrive at a mutually acceptable and binding solution. Mediation is also sometimes referred to as conciliation. It is really an extension of the negotiation process, as the parties actively engage a third party in an attempt to reach an agreement in their dispute.

The mediator should be an independent, mutually accepted third party who will listen to both sides of the case and then make proposals or recommendations on how the dispute could be resolved. In separating issues and explaining to the parties how the law may deal with the issues in dispute, she guides the parties to a settlement. The mediator makes suggestions, but takes no final decisions in the matter. Her recommendations are not binding on any of the parties to the dispute.

The types of dispute for which mediation is most suitable include:

- matters where the parties do not want to or are unable to talk to each other directly, but wish to control the outcome of the dispute
- matters where speed is important and where the parties prefer not to litigate.

Typical examples of matters that may be mediated successfully include family law matters such as divorces, custody, access and maintenance disputes, labour matters and international disputes between organisations or countries.

Note that court annexed mediation was launched in the Magistrates' Courts as part of a pilot project in 2015. This provides an alternative dispute resolution mechanism in civil matters that allows for a voluntary and negotiated settlement between parties and reduces litigation costs. In the case of a dispute between parties, a mediator will be appointed to facilitate discussions between them, help to identify the issues and explore areas of compromise at a cheaper rate or tariff.

Advantages of mediation

The advantages of mediation include the following:

- The parties can present their own cases. They are not excluded from the process as is often the case with litigation. But they may choose or agree to make use of legal representatives.
- The parties have control over discussions and any settlement agreement. The mediator only controls the procedure.
- The parties have control over the outcome of mediation.
- Parties can agree on the mediator. In litigation, the parties have no influence on who the judge or presiding officer in their particular matter is going to be.
- A mediator can be chosen for her expertise in the field or area that the dispute concerns. A judge will not necessarily be an expert in this field.
- If mediation does not succeed, the parties may still resort to formal litigation. The parties have nothing to lose in attempting to resolve their dispute through mediation.
- An agreement reached through mediation can be made an order of court.

Disadvantages of mediation

There are a few disadvantages to mediation.

- The mediator cannot take a final decision.
- The parties are not bound by the mediator's proposals.
- If one party is not committed to resolving the dispute through mediation, it will simply delay the resolution of the dispute.
- Any of the parties may at any point withdraw from the process.

10.3.3 Arbitration

In *The conciliation and arbitration handbook: a comprehensive guide to labour dispute resolution procedure*, Dawie Bosch, Edwin Molahlehi and Winnie Everett define arbitration, as:

> "… a process whereby a dispute is referred by one or all of the disputing parties to a neutral or acceptable third party who fairly hears their respective cases by receiving and considering evidence and submissions from the parties and then makes a final and binding decision…which is called an award …
>
> The parties do not have control over the outcome, although they will obviously influence it through their evidence and argument".

Although the reason for choosing **arbitration** is to keep the matter out of court, parties agree that if necessary either one can still approach the court.

A third party, known as the arbitrator, resolves the dispute by taking a final decision that is binding on both parties. The arbitration process is subject to review, but not usually to appeal, unless the parties have specifically agreed to the possibility of appeal.

In South Africa, only civil matters are arbitrated. In particular, matters of a technical nature such as construction disputes, commercial disputes and labour matters are suitable for arbitration.

The following is an example of an arbitration clause. Clauses like this are often included in commercial agreements or contracts and state that the parties have to use **arbitration** (and not court proceedings) to resolve any disputes that may come up between them.

The **Arbitration Foundation of Southern Africa (AFSA)** is a non-profit company established by the legal and accounting profession and organised business. It provides mediation and arbitration services, as well as relevant training.

Arbitration

1. Any disputes arising from or in connection with this agreement shall be finally resolved in accordance with the rules of the **Arbitration Foundation of Southern Africa (AFSA)** by a single arbitrator appointed by the Foundation.
2. The arbitration shall take place in Johannesburg.
3. The parties shall each be responsible for 50% of the costs of the arbitrator.
4. The provisions of paragraph 1 shall not preclude any party from obtaining interim relief on an urgent basis from a court of competent jurisdiction pending the decision of the arbitrator.

Advantages of arbitration

Arbitration has many advantages:

- It is confidential and private, although it should be noted that **statutory arbitration** may not be.
- Parties can present their own cases or make use of legal representatives to present their cases during arbitration.
- Parties have control over the procedure, but agree to be bound by the final ruling. The parties do not have control over the outcome, although they will obviously influence it.
- Parties can agree on who the arbitrator will be. In litigation, the parties have no influence on who the judge or presiding officer will be.

Private arbitration is a voluntary process whereas **statutory arbitration** is a compulsory process prescribed by legislation such as the Labour Relations Act.

- An arbitrator can be chosen for his expertise in the field or area that the dispute concerns. A judge will not necessarily be an expert in this field.
- The arbitrator takes a final decision and so brings an end to the dispute.
- Arbitrations result in a win-lose situation, usually without the possibility of appeal. It therefore concludes the matter.
- The arbitrator's decision can be made an order of court. It is then possible to enforce the arbitration award against other parties.

Disadvantages of arbitration

There are some disadvantages to arbitration.

- Parties have to pay the arbitrator. They do not have to pay a judge in court.
- If one of the parties is obstructive or does not cooperate, this may delay the resolution of the dispute.
- Any of the parties may withdraw from the process at any time.
- An inexperienced or unskilled arbitrator may result in the process being costly and time-consuming.
- There is usually no appeal from an arbitration. This can be frustrating if one or more parties are dissatisfied with the outcome of the arbitration.

10.3.4 Specialist areas of alternative dispute resolution

Some areas of law have developed a particular **affinity** for and specialisation in alternative dispute resolution.

Affinity between two things means a natural liking or understanding between them.

Labour disputes

In labour law disputes, the Commission for Conciliation, Mediation and Arbitration (CCMA) helps with alternative dispute resolution, which is compulsory before a matter can proceed to the Labour Court. The CCMA has its head office in Johannesburg and regional offices in each province. The CCMA's major activities are:

- promoting sound worker-employer relations
- preventing labour disputes from happening
- settling disputes that do happen by conciliation
- arbitration (if necessary).

Commercial disputes

The use of arbitration is on the increase in commercial matters. Consider the following extract from an article by François du Plessis:

> "With the globalisation of international trade … there is a gradual and steady increase in cross-border commercial disputes. The generally preferred method to resolve such disputes is arbitration. … [I]n an international context it is often said that arbitration is the only realistic alternative to court litigation. This is so, particularly if one bears in mind that the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 … renders foreign arbitral awards generally easier to enforce than a foreign court judgment."
>
> **Source:** F. du Plessis. 2005. 'International commercial arbitration practices', *De Rebus*, p. 20.

Professor says Attorneys' and advocates' journals

De Rebus is a specialist journal for attorneys published by the Law Society. It appears on a regular basis and contains different articles written by and for attorneys. A journal called *Advocate* is published for advocates. Each journal has articles specifically of interest and relevance to attorneys or advocates respectively.

Criminal matters

Arbitration and mediation is used in the USA to reduce caseloads in criminal courts. These forms of dispute resolution recognise the interests of the victim in the criminal justice process, which formal litigation fails to do.

What do you think?

Why do you think the courts are still the main role-players in the administration of justice in South Africa? Some useful websites taken from www.conflictdynamics.co.za can be found in the Further reading section of this topic.

Chapter summary

In this chapter, we have learned the following about the court structure:

- Formal litigation requires a network of courts for purposes of resolving disputes between parties.
- The Constitution vests judicial authority in the courts of South Africa, which consist of:
  - the Constitutional Court
  - the Supreme Court of Appeal
  - the High Court
  - Magistrates' Courts
  - other courts.
- South Africa has a well-organised and sophisticated court structure to deal with the complex needs of its population.
- A hierarchy of courts exists in South Africa. The hierarchy includes higher and lower courts.
- Courts, with the authority of the Constitution, are the main role-players in administering justice in South Africa.
- Judicial authority is exercised, or carried out, by the courts.
- Judicial authority should be free from interference by the other two levels of state authority, that is the legislature (Parliament) and the executive (government) and should also be free from interference by any other person or organ of state.
- Courts should be independent. Although there are different levels of courts within one court structure or system, there must be judicial independence on all these levels.
- Courts are subject only to the Constitution (the highest law in the land) and the law. This means that the rules and principles that the courts have to follow are the ones in the Constitution and the same laws everyone else follows. Courts are required to interpret and to uphold the Constitution.
- Legal practitioners have to choose the correct court when they institute legal proceedings on behalf of a client. A wrong choice will mean they have to start again, which can be very expensive.
- If parties prefer not to resort to litigation, they may use other forms of conflict resolution. Alternative dispute resolution makes use of negotiation, mediation and/or arbitration to resolve disputes.

- There are three main forms of alternative dispute resolution that can be used when disputing parties prefer not to engage in formal litigation in court. These are:
  - negotiation: settlement discussions are held where the parties (with or without their legal representatives) discuss the problem and attempt to find a solution both parties can agree on
  - mediation – a mediator facilitates talks between the parties and assists them in coming up with a mutually acceptable solution to the problem themselves. The mediator only makes suggestions and cannot take any final or binding decision.
  - arbitration – an arbitrator listens to both sides of a dispute and then makes a final decision that is binding on the parties.

Review your understanding

1. In each of the following cases, indicate which court or forum is best suited to hear the relevant matter. There may be more than one court that can hear a particular case, but you only need to identify the court that is most appropriate. Provide the court's full name.
   a) A sues B for an amount of R20 000 in damages as a result of a motor vehicle collision between A and B.
   b) A wants to recover an amount of R800 from his friend, B. B refuses to pay this amount to A after A had done paint and repair work at B's home.
   c) C takes part in a legal strike at his workplace. He is subsequently dismissed by his employer and wants to challenge the fairness of his dismissal.
   d) D wishes to challenge the constitutionality of the Anti-Terrorism Bill.
   e) Two organs of state are in dispute.
   f) An accused in a criminal case is charged with treason.
   g) Mr A is suing his wife, Mrs B, to obtain a decree of divorce.
   h) Mr A refuses to pay maintenance to his ex-wife in respect of their two minor children.
   i) B has lost his case in the Gauteng Division of the High Court, Pretoria and wishes to appeal against the judge's decision. The appeal case is complicated and involves various questions of law.
   j) With regard to question i) above, will it change your answer if the appeal involved only a question of fact?
   k) C claims specific performance from the defendant without claiming damages in the alternative.
   l) A minor applies for consent to get married.
   m) B applies for a family violence interdict (protection order).
   n) C is accused of murder.
   o) The president of the country is charged with rape.
2. Draw a flowchart of the court structure. You should include a reference to all of the superior courts and lower courts in South Africa. You may want to use this summary to study from in the future.
3. With regard to the Constitutional Court:
   a) Provide a brief explanation of the history of the court.
   b) Discuss the composition of the court.
   c) Indicate which matters fall within the exclusive jurisdiction of the court.
   d) Indicate whether this is the only court in South Africa that deals with constitutional matters. Give reasons for your answer.
   e) Indicate how many Constitutional Courts we have in South Africa.
4. With regard to the Supreme Court of Appeal:
   a) The Supreme Court of Appeal 'never acts as a court of first instance'. Explain this statement.
   b) Indicate where the seat of this court is.
   c) Indicate whether there are any geographical limitations on the jurisdiction of the court. Explain your answer.

5. Distinguish between the jurisdiction of the provincial division and the local division of the High Court in a particular province.
6. Identify the two types of Magistrates' Courts in South Africa.
7. Which civil matters fall outside of the jurisdiction of the district court?
8. Which criminal matters fall outside of the jurisdiction of the district court?
9. Which criminal matters fall outside the jurisdiction of the regional court?
10. How would you address the presiding officer in the Labour Court?
11. Briefly discuss the jurisdiction of the Labour Appeal Court.
12. Who is the presiding officer in the Small Claims Court?
13. Briefly discuss the jurisdiction of the Small Claims Court.
14. Provide your own definition of mediation.
15. Provide your own definition of arbitration.
16. Accept that you represent a large South African company, Ubuntu (Pty) Ltd.
    The company is based in Johannesburg, South Africa. It designs and constructs sport stadiums throughout the world. The company intends to enter into a number of contracts with provincial governments across South Africa to build sports stadiums in various provinces. This is part of the government's plan to host the Olympic Games in 2020. The company asks for your advice – it wants to know if it should include an arbitration clause in these contracts.
    Write a short memorandum setting out your advice and the reasons for your opinion.
17. What does it mean if settlement discussions are conducted 'without prejudice' to a party's rights?

Further reading

For further interesting information, you may wish to consult the following textbooks that deal with alternative dispute resolution in the South African context:

Bosch, D., Molahlehi, E. and Everett, W. 2004. *The conciliation and arbitration handbook: a comprehensive guide to labour dispute resolution procedure*. Durban: LexisNexis Butterworths. South Africa

Brand, J., Steadman, F and Todd, C. 2012. *Commercial Mediation: A User's Guide*. Cape Town: Juta and Co. (Pty) Ltd

Pretorius, P. 1993. Dispute Resolution. Cape Town: Juta and Co. (Pty) Ltd

Wiese, T. 2016. Alternative Dispute Resolution in South Africa: Negotiation, mediation, arbitration and ombudsmen. Cape Town: Juta and Co. (Pty) Ltd

It is important that you are able to distinguish between the forms of alternative dispute resolution on the one hand and formal litigation in courts on the other. Visit your library and read at least one of the following articles dealing with alternative dispute resolution in the context of our judicial system and the court structure:

Barker, H. 1998. 'Language in the courts.' *De Rebus,* Oct., 63

Boulle, L. 2012. 'Promoting rights through court-based ADR?' *South African Journal on Human Rights,* Vol. 28, 1:1–17

Du Plessis, F. 2005. 'International commercial arbitration practices.' *De Rebus,* Nov., 20

Faris, J.A. 1994. 'Exploring the alternatives in "Alternative Dispute Resolution"'. *De Jure,* 331

Hiemstra, V.G. 1992. 'The courts in the new South Africa.' *Consultus,* Oct., 119

Moerane, M. T. K. 1996. 'The Courts and the Administration of Justice.' *Human Rights and Constitutional Law Journal of Southern Africa,* Oct., Vol. 1, 3:14

Mohamed, I. 1998. 'The role of the Judiciary in a Constitutional State.' *SALJ,* 115, 1:111

Mowatt, J. G. 1992. 'Alternative dispute resolution: some points to ponder.' *CILSA,* Mar., 44

Rycroft, A. 2014. 'What should the consequences be of an unreasonable refusal to participate in ADR?: notes.' *SA Law Journal,* Vol., 131, 4:778–786

Sarkin, J. 1997. 'The political role of the South African constitutional court.' *SALJ,* 114, 1:134

Van Blerk, A. 1992. 'The South African courts: a legitimacy crisis – yes or no?' *Consultus,* Vol. 5, 2:135

Wiese, T. 2014. 'The use of alternative dispute resolution methods in corporate disputes: the provisions of the Companies Act of 2008: analyses.' *SAMLJ,* Vol. 26, 3:668–677

Here are some useful links to websites on dispute resolution and mediation taken from http://www.conflictdynamics.co.za:

The Centre for Effective Dispute Resolution, www.cedr.com

Mediate.com mediators, arbitrators, and everything ADR, www.mediate.com

Mediation World, www.mediationworld.net

Mediatori Mediation Panel, www.mediatori.co.za

The American Arbitration Association and the International Centre for Dispute Resolution, www.adr.org

International Chamber of Commerce (ICC), www.iccarbitration.org

International Centre for Settlement of Investment Disputes (ICSID), www.worldbank.org/icsid

International Institute for Conflict Prevention and Resolution (CPR), www.cpradr.org

International Mediation Institute (IMI), www.imimediation.org

Singapore International Arbitration Centre (SIAC), www.siac.org

United Nations Commission on International Trade Law, www.uncitral.org

Visit this website, where you can join a virtual tour of the court building and art collection at http://www.constitutionalcourt.org.za/site/takeatour/courtbuilding.html

The legal profession

Chapter 11

The main ideas

- The legal profession
- Legal professionals in the private sector
- Legal positions in the public sector
- Other positions in the legal sphere
- The Legal Practice Act

The main skills

- Explain the features or characteristics of the legal profession.
- Identify and distinguish between different career opportunities in the public and private sectors.
- Explain the divided bar and the referral rule.
- Indicate how new legislation will transform the legal profession in South Africa.

Apply your mind

Have you considered the career path you want to pursue after having completed your law degree? It is important that you gain some experience and exposure to practice during the course of your studies if possible. You can do this by attending a law student vacation programme with a law firm or by shadowing a prosecutor or advocate during court proceedings. There are many opportunities for law students to gain practical experience – you just have to do some research to find opportunities sooner rather than later. This will assist you to make an informed decision about your future career path.

This chapter is a basic introduction to the legal profession in South Africa. We look at the two main branches of the legal profession, namely attorneys and advocates, as well as other role-players in the legal sphere. We consider their duties and responsibilities. We look at ethical rules or rules relating to appropriate professional conduct that apply to legal professionals. We conclude with new legislation in the form of the Legal Practice Act 28 of 2014, which will fundamentally transform and regulate the legal profession in South Africa.

Before you start

What are the career options available to a law graduate? This chapter aims to provide an answer to this very important question. A law degree opens the door to many exciting and stimulating, but challenging career opportunities. Although you are only in the first year of your legal studies, you must have thought about the career path that you want to follow one day. Some television series or films may have inspired you to practise as an attorney or advocate. You may want to appear in court on a regular basis. Perhaps you're thinking of working as a prosecutor or a legal advisor for a company or a bank instead?

The law offers many attractions: the potential of prestige, power, and, most importantly, a chance to make a difference. The legal profession also offers intellectually challenging and fulfilling career opportunities. On the other hand, the profession has a poor public image – it is increasingly difficult for new graduates to enter the profession and to secure, for example, articles of clerkship or pupillage; there are limited jobs, not all of which pay well; legal work can be particularly demanding and many practitioners leave the profession.

In his 2010 bestseller, *The End of Lawyers,* author Richard Susskind challenges all lawyers and everyone in the professional services environment. It seems as if the time has come to consider which elements of the work of an attorney can be done faster and better through, for example, advanced systems, standard

processes, self-help tools or even robots. Going forward, technology will continue to have a profound impact on the legal profession and, in particular, the skills set required to succeed in law. This is an important consideration for any prospective legal practitioner, i.e. law students intending to enter the profession.

Since legal education is expensive, studying towards a law degree is not a decision that you should take lightly. Learn as much as you can about the profession before you invest your life in it!

11.1 The legal profession

Let's consider the characteristics or features of a so-called 'profession'. The *Longman Dictionary* defines a profession as 'a job that needs a high level of education and training'. It is a calling founded on specialised educational training. Professions generally enjoy high social status and esteem.

What does it mean if a soccer or tennis player turns professional (as opposed to being an amateur)? This means that the person possesses a high degree of knowledge or skill in his particular sport and takes part in it as his main paid occupation. However, being part of the legal, medical or architectural profession entails more than simply having specialised knowledge or skill. People in these professions offer a service to members of the public and their behaviour and conduct is controlled or regulated by a governing body.

Sir Henry Benson in his article '*Professional efficiency-1'* has the following to say about a profession:

> "The term "profession" is often misused. In my view a true profession has the following characteristics… The primary function … is to give advice and service to the community in a specialized field of training. A profession must have a governing body which represents it and has power of control and discipline over its members…The governing body must restrict the entry to those with a minimum standard of education. The subsequent system of education and training in both theory and practice must be constantly updated and adapted so that the members can speak with knowledge and authority on the subjects within their field of learning. In order to protect its clients and provide a service of the necessary quality, a profession must impose on its members a high standard of conduct and performance, above those required by the general law…".
>
> **Source:** *De Rebus*, October 1980:491

Legal practitioners may practise law either as *attorneys* or *advocates*. What are the distinguishing features or characteristics of the legal profession?

The conduct of a legal practitioner is regulated or controlled by a professional regulatory body (such as the Law Society of South Africa or the General Council of the Bar). This entails that the legal practitioner's accountability goes further than that of someone with any other kind of job or occupation.

A legal practitioner is considered to have specialised knowledge of the law. She has obtained the necessary academic qualifications and has undergone practical training.

A legal practitioner provides a professional service to members of the public. She has to follow a certain code of ethics, or rules, determining how she should behave in rendering this service.

The Attorneys Act 53 of 1979 states that a person should be a **fit and proper** person in order to be admitted as an attorney. For example, you should not have a criminal record.

Activity 11.1

Visit the website of the South African Law Society (www.lssa.org.za) and the General Council of the Bar of South Africa (www.sabar.co.za). Find out as much as you can about what these entities do and what they aim to regulate.

Now that you understand how the conduct of attorneys and advocates is regulated, let's consider your position as an aspiring legal professional.

Do you think you are **fit and proper** to practise law? How important do you regard values such as integrity and honesty?

In her article "The requirement of being a 'fit and proper' person for the legal profession, Magda Slabbert (See Slabbert, M. *PER/PELJ*. 2011 (14) 4: 209.) indicates that:

- "The requirement of being considered a 'fit and proper' person is neither defined nor described in legislation, despite the fact that it is a stringent requirement.
- Since the beginning of time, the law of considered a noble profession and only certain people were allowed to practise.
- The "fit and proper" person test does not succeed in keeping unwanted elements out of the legal profession. It is also no guarantee of moral goodness…it is a means of screening prospective lawyers…".

Apart from hard work and commitment, complete **integrity** and honesty are the most important characteristics of the ideal legal practitioner. This is not something that you can work on or develop later in your life – it should be part of who you are, your character, even at this early stage of your legal career.

Integrity is the quality of being honest and feeling strongly about what you believe is right.

An interesting decision where the court had to deal with the profession is found in *Prince v President, Cape Law Society and Others* 2002 (2) SA 794 CC. Mr Prince, a Rastafarian, had two previous convictions for possession of cannabis, or dagga, and would continue to break the law due to his religious beliefs. Do you think it would be 'fit and proper' to allow him to register his articles of clerkship and to qualify as an attorney? Should he be forced to choose between his conscience and his career? Consider the three judgments delivered in this case.

11.2 Legal professionals in the private sector

In William Shakespeare's play *Henry VI,* Part 2, Act 2, Scene 2, a character called Dick Butcher has this to say: "The first thing we do, let's kill all the lawyers …".

This negative attitude towards lawyers is quite common. Although society sometimes has bad things to say about attorneys, the law schools are attracting an increasing number of students each year. In a developed community, and more specifically a democratic dispensation, the law and legal practitioners perform a very important function in maintaining the values on which the democracy is based.

The **private sector** is made up of the industries and services in a country that are owned and run by private companies, and not by the government. Private companies usually aim to make a profit from their activities.

In this section, we present in some detail the characteristics of the legal professionals who work in the **private sector**. These include legal practitioners and legal advisors.

At the outset, you should note that the Legal Practice Act 28 of 2014 will fundamentally change the legal profession in South Africa. It aims to transform and restructure the fragmented legal professions in line with the constitutional imperatives in s 1 of the Constitution:

- human dignity; the achievement of equality; the advancement of human rights and freedoms;
- non-racialism and non-sexism
- supremacy of the Constitution and the Rule of Law
- universal adult suffrage, a national common voters' roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

In terms of the short title of the Act, it aims to 'provide a legislative framework to facilitate and enhance an independent legal profession that broadly reflects the diversity and demographics of the Republic'. In the preamble it states:

- The legal profession is regulated by different laws which apply in different parts of the Republic, and, as a result thereof, is fragmented and divided.
- Access to legal services is not a reality for most South Africans.
- The legal profession is not broadly representative of the demographics of South Africa;
- Opportunities for entry into the legal profession are restricted in terms of the current legislative framework.

The Act aims to ensure that legal services are accessible to the public and to regulate the legal profession by means of a single statute. The Act consists of ten chapters covering a range of issues:

1. Definitions, application and purpose of the act
2. South African Legal Practice Council
3. Regulation of legal practitioners and candidate legal practitioners
4. Professional conduct and establishment of disciplinary bodies
5. The Legal Services Ombud
6. Legal Practitioners' Fidelity Fund
7. Handling of trusts monies
8. General provisions
9. Regulations and rules
10. National forum and transitional provisions.

Chapter 3 of the Act is particularly important for attorneys and advocates. It deals with, for example:

- admission and enrolment (s 24)
- right of appearance of legal practitioners and candidate legal practitioners (s 25)
- minimum legal qualifications and practical vocational training (s 26)
- practical vocational training (s 27)
- assessment of vocational training (s 28)
- community service (s 29)
- enrolment with the Legal Practice Council (s 30)
- cancellation and suspension of enrolment (s 31)
- conversion of enrolment (s 32)
- authority to render legal services (s 33)
- forms of legal practice (s 34)
- fees in respect of legal services (s 35).

Although this legislation has not taken full effect yet, we will consider the most important implications of this new legislation in respect of each of the issues below. You should therefore keep in mind that some of what is discussed in this chapter will change once the legislation comes into force.

The Legal Practice Act 28 of 2014 will repeal the following Acts in their entirety, once it comes into force:

- the Admission of Advocates Act 74 of 1964
- the Attorneys Act 53 of 1979
- the Recognition of Foreign Legal Qualifications and Practice Act 114 of 1993
- the Right of Appearance in Courts Act 62 of 1995.

In South Africa we have a divided profession. This has its origin in both Roman Dutch and English law.

The profession is split into two main branches:

1. advocates, who are known as barristers in England and in some Commonwealth countries
2. attorneys, who are known as solicitors in England and in some Commonwealth countries.

For a summary of the profession, please consider the quote from Dijkhorst J in *Lawsa*, which we refer to in Chapter 5 of this textbook.

Although advocates and attorneys both practise law, attorneys deal with members of the general public or clients directly and have more general practices. Advocates on the other hand, do not deal with members of the public directly and are specialists in the skill of arguing the cases of their clients in courts of law.

See, for example, the decision in *Society of Advocates of Natal v De Freitas (Natal Law Society Intervening)* 1997 4 SA 1134 (N) at 1140–1157 for a discussion of the history of the divided bar in South Africa.

The annual *Hortors Legal Diary/Directory* lists the names of all law firms, advocates and attorneys in each town and city in South Africa with their contact details. *Hortors* should be available in your university library.

The Legal Practice Act 28 of 2014 will retain this distinction. Section 34 of the Act refers to three categories of practitioners:

- attorneys
- advocates, who may only act upon receipt of a brief from an attorney
- advocates, who may accept briefs directly from a member of the public provided that he/she is in possession of a Fidelity Fund certificate and has notified the Legal Practice Council thereof.

Section 4 of the Legal Practice Act 28 of 2014 defines the South African Legal Practice Council as a body corporate with full legal capacity and which will exercise jurisdiction over all legal practitioners and candidate legal practitioners. It will therefore replace the current regulatory structures of the legal profession.

Section 33 of the Legal Practice Act 28 of 2014 deals with work that is reserved for legal practitioners. The rendering of the following services, in expectation of any fee, commission, gain or reward, by persons other than legal practitioners are prohibited:

- to appear in any Court of Law or before any Board, Tribunal or similar institution in which only legal practitioners are entitled to appear
- to draw up or execute any instruments or documents relating to or required or intended for use in any action, suit or proceeding in a Court of civil or criminal jurisdiction within the Republic
- to directly or indirectly perform an act or render any service which in terms of any other law may only be done by an advocate, attorney or conveyancer or notary.

Articles of clerkship refers to a set training period that all candidate attorneys have to complete before they can be admitted as attorneys.

Case study Conversations with legal practitioners

Let's talk to two legal practitioners, William and Martha, about their work.

William is 26 years old and a qualified attorney. He served his **articles of clerkship** (referred to as articles) with a well-known law firm in Johannesburg immediately after obtaining his LLB degree. He was recently admitted as an attorney of the High Court. It seems as if he really enjoyed his articles and, at the same time, built up a successful family law and general litigation practice. He decided to stay with the firm after his articles and now works in the litigation department. He hopes to be promoted in due course and become a partner in the firm within the next few years. When asked to give a brief description of a typical week in an attorney's office, he responded as follows:

"There's nothing like a typical week! Every day is different. I have a stressful, but extremely rewarding job. My week starts with an early morning meeting with colleagues to discuss various matters relating to the practice. In so far as professional services go, I meet with clients on a daily basis. I work in the firm's litigation department where I deal with and consult on a variety of matters, ranging from divorces, maintenance matters, contractual claims, motor vehicle collisions to wills and labour law disputes. In certain matters, I instruct an advocate to appear in court on behalf of my client, as I need to deal with a large number of cases on a daily basis and I'm not an expert in oral advocacy. In some smaller matters that I may decide to appear in court myself.

Apart from consultations with clients or counsel and negotiations or settlement discussions, a large part of my work is administrative in nature. I draft various legal documents ranging from letters to agreements. I spend a lot of time on the telephone and dealing with correspondence. Over time, I've learned the importance of proper file management. I always ensure that my documents are filed correctly, whether in hard copy or online. I quite enjoy doing legal research, which is a big part of the work of an attorney. I also try to read the latest law reports on a monthly basis in order to stay informed of the latest legal developments. This helps me to give the correct advice to clients. In addition, I subscribe to some regular online alerts to keep me informed of legislative developments.

Case study (continued) Conversations with legal practitioners

I think that it is important for any attorney to develop a certain area of specialisation early in his career. As a candidate attorney, you normally get exposure to a number of areas of the law – this helps you see where your niche lies and to decide which area you may ultimately want to specialise in. I intend to specialise in family law, I feel very comfortable advising clients on family law related matters as I've studied the law in this regard quite extensively. Also, I'm now at a point where I've appeared in a number of undefended and defended divorce matters in the regional court, so I'm comfortable with the court process."

Martha is a practising advocate. She practised as an attorney for three years before joining the Bar (a society for advocates) in Cape Town. She is enjoying her new career thoroughly and explains it as follows:

"An advocate has to be persuasive on behalf of the person who pays for her voice or opinion. Being an advocate is often a lonely, but challenging career. I don't work as part of a law firm or partnership. My work requires late nights and stressful days in court. My daily tasks include studying briefs from attorneys, doing legal research, consulting with attorneys and their clients in my chambers, dictating and typing legal documents, giving legal advice, negotiating with colleagues, consulting with witnesses in preparation for trial; drafting written arguments ('heads of argument') and arguing cases in court where I have to persuade the presiding officer of the client's case.

I spend most of my time on preparation and court appearances. This requires a mastery, or full knowledge, of the law and the facts of a matter, good judgment and the ability to present a case coherently. In preparing for a court cases, I am required to do comprehensive legal research with reference to various sources of the law and to prepare heads of argument in which the main submissions I intend to make are set out clearly and logically with reference to case law and legislation.

It is very important for me to have good relationships with attorneys in the city where I am practising, since advocates receive their instructions from attorneys. Advocates practise only upon referral by another professional (the attorney) and control their own affairs. Compared to my previous position as an attorney, I like the fact that advocates practise independently, and not in firms or partnerships. I also like the fact that I can focus on court documents and court skills or oral advocacy, rather than administration and having to deal with members of the public directly."

The Case study should give you a better understanding of these two branches of the profession.

The next important question is whether it is possible for a person to be an admitted attorney and advocate at the same time. The answer is no. A person cannot practise as both an attorney and an advocate at the same time. This means that, if a practising attorney decides to become an advocate instead, she has to have her name removed from the **roll of attorneys** and make application to the High Court to be admitted as an advocate. A similar process in reverse would apply to an advocate who wanted to practise as an attorney.

The **roll of attorneys** is the list of all admitted attorneys in a particular area.

The Legal Practice Act 28 of 2014 in section 32 provides for conversion of enrolment and the procedure seems somewhat easier as a legal practitioner may at any time apply to the Legal Practice Council to convert his enrolment as an attorney to that of an advocate and *vice versa*.

It should be clear from the case study that the most important skills of the successful legal practitioner, whether an attorney or an advocate, include the following:

- strong analytical, logic and reasoning skills
- creative problem-solving skills
- excellent reading and writing abilities

- good oral communication skills
- research skills
- management skills
- time management skills
- attention to detail
- negotiation skills
- conflict management skills.

In his article, 'The ideal legal practitioner (from an academic angle)', Du Plessis lists the following qualities of a successful practitioner:

- "integrity
- objectivity
- dignity
- the possession of knowledge and technical skills
- a capacity for hard work,
- a respect for the legal order
- a sense of equity or fairness."

Source: *De Rebus*, 1981:424–427

The distinction between the two professions lies in the nature of the work. They involve different fields of legal expertise and different training. The difference does not lie in their qualifications or seniority.

We will now look at the attorneys' and advocates' professions separately in more detail before discussing the position of the legal advisor.

11.2.1 Attorneys

Attorneys can be understood broadly to be general legal practitioners. They can be compared to general medical practitioners who deal with various kinds of medical problems. Although some attorneys specialise in a particular area of law, most attorneys deal with a variety of legal problems covering a number of areas of law.

Attorneys are a lay client's first point of contact. Most people will need to contact an attorney to assist with, for example, a divorce matter, personal injuries or damage to vehicles following a motor vehicle collision or contractual disputes. When someone experiences a legal problem, he may decide to consult an attorney. The attorney, if he accepts the instruction, will then decide how to manage the case and whether or not to instruct an advocate. If it is appropriate to involve an advocate, the attorney will usually instruct an advocate by providing her with a formal brief – that is, written instructions from the attorney addressed to the advocate. Advocates in general take work only through the instructions of an attorney. Attorneys therefore refer their clients' cases to advocates rather than advocates dealing directly with lay clients.

Attorneys may practise on their own or with other attorneys in partnerships, professional companies or firms. In order to practise as an attorney, the individual, or the firm, has to have two bank accounts – a trust account and a business account. Clients' money is deposited in the trust account for the attorney to keep on the clients' behalf – for example, if a client has sold his house, the purchase price might be paid into his attorney's trust account by the purchaser before it is paid over to the client. The business account is used for keeping the firm's own money, in other words money received by the attorney/firm after it has rendered legal services to clients.

All attorneys are ***ex officio*** also **commissioners of oaths**.

In other words, all attorneys can commission documents by administering an oath or affirmation to or by taking a solemn or attested declaration from any person. The position of commissioners of oaths is regulated by the Justices of the Peace and Commissioners of Oaths Act 16 of 1963.

Ex officio means by virtue of the office or position. Other **commissioners of oaths** include postmasters and police officers above a certain rank. When a person reports an accident or a robbery to the police, her statement is signed and stamped by a commissioner of oaths.

Until more recently, attorneys could only appear, in other words, argue cases in Magistrates' Courts. In terms of the Right of Appearance in Court Act 62 of 1995, attorneys now also have the **right of appearance** in the High Court, as long as certain requirements have been met.

Advocates have a long-standing **right to appear** in any court.

Subject to certain requirements, attorneys may make application to the High Court to acquire the right of appearance in the High Court. Although attorneys now have the right of appearance in the High Court, many attorneys do not use this right much because they are generally not specialists in litigation and it may prove more efficient to brief advocates to argue the particular matter in court.

When appearing in court, attorneys wear an attorney's robe that is slightly different from the robe worn by advocates. Attorneys appearing in the High Court are required to wear the following attire at all times:

- a white shirt or blouse
- dark trousers or skirt
- a bib
- a black jacket (as worn by counsel)
- an attorney's gown or robe.

Section 25 of the Legal Practice Act 28 of 2014 deals with the right of appearance of legal practitioners and candidate legal practitioners. Attorneys wanting to appear in the High Court, the SCA or the Constitutional Court are required to apply to the registrar of the Division of the High Court in which he or she was admitted and enrolled as an attorney for a prescribed certificate which will give him or her the right of appearance in all these courts. There are specific requirements which apply in this context. The attorney must:

- have been practising for a continuous period of not less than three years
- be in possession of an LLB degree
- not have had his/her name struck off the role
- have gained the appropriate relevant experience as may be prescribed by the Minister of Justice and Constitutional Development.

Candidate attorneys may not appear in the High Court, the SCA or the Constitutional Court. They can only appear in district Magistrates' Courts. To the extent that a candidate attorney wants to appear in the regional Magistrates' Court, the requirement is that he or she must have previously practised as an advocate for at least one year or has undergone at least one year of practical vocational training.

Attorneys' admission requirements

Before a person can start or join a practice as an attorney, he must be admitted as an attorney by the High Court. The Attorneys Act 53 of 1979 sets out the admission requirements that apply in respect of attorneys. To be admitted as an attorney, a person must:

- be a fit and proper person to be admitted and enrolled as an attorney
- be at least 21 years old
- be a South African citizen, or be lawfully admitted to South Africa for permanent residence and be ordinarily resident in South Africa
- have an LLB degree
- have passed practical examinations
- have served articles of clerkship for a period of two years (or a shorter period if allowed by the Act) with an attorney who has been in practice for more than three years
- have attended a training course approved by the law society of the province in which he completed his service under articles or contract of service.

In terms of these requirements, a candidate attorney must serve articles of clerkship with a practising attorney or law firm and undergo practical training for a period of two years. During this period, the candidate attorney will work under the supervision of a senior attorney. The supervising senior attorney is known as the candidate attorney's principal. The candidate attorney receives a salary during the period of articles of clerkship.

After having satisfied all the requirements listed above, a candidate attorney has to make a formal *ex parte* **application** to the High Court to be admitted as an attorney.

This is an **application** where only one party has an interest in the matter. This party is referred to as the applicant and approaches the court on application without there being any other party (respondent) to the matter.

The Legal Practice Act 28 of 2014 aims to remove any unnecessary or artificial barriers for entry into the legal profession. Certain requirements must be satisfied in terms of s 24 in order for a legal practitioner, conveyancer or notary to practise and be enrolled in the High Court. The candidate must:

- be duly qualified (LLB degree) or law degree in a foreign country which is equivalent to the LLB degree and recognised by the SA Qualifications Authority established by the National Qualifications Framework Act 67 of 2008
- have undergone the practical vocational training requirements as a candidate legal practitioner including community service for candidate legal practitioners
- have undergone a legal practice management course for candidate legal practitioners
- be a South African citizen or permanent resident in the Republic
- be a fit and proper person to be admitted
- have served a copy of the application to be admitted on the Legal Practice Council in accordance with the rules.

Once admitted by the High Court, a candidate will need to apply for enrolment of his or her name on the roll with the Legal Practice Council. In terms of s 30 of the Legal Practice Act 28 of 2014 the application for enrolment must:

- be accompanied by the fee determined in the rules
- indicate whether the applicant intends to practise as an attorney or an advocate, and, in the case of an advocate, whether he or she intends practising with or without a Fidelity Fund certificate
- be submitted to the Legal Practice Council in the manner determined in the rules through the Provincial Council where the legal practitioner intends to practise.

The Legal Practice Council will be responsible for keeping a roll of all legal practitioners, practising as well as non-practising.

Positions available in a law firm

A typical, medium sized to large law firm has both professional and non-professional staff at various levels of seniority.

Professional staff

This includes the attorneys and candidate attorneys. The positions available to professional staff, in order of seniority, are as follows:

- Directors or partners are normally experienced attorneys, who either earn fixed salaries or share in the profit of the firm as a whole.
- Senior associates are attorneys who may have built up their own practices and who make a financial contribution to the profit of the firm.
- Associates are attorneys who have not yet been promoted to the level of senior associates.
- Candidate attorneys refer to individuals who are serving their articles of clerkship in terms of a written contract as part of their training to become attorneys. They have therefore not yet been admitted as attorneys.

Professional staff members usually work in larger law firms in a particular department or practice area, such as:

- commercial or corporate – also referred to as M&A (mergers and acquisitions)
- property and conveyancing
- dispute resolution or litigation and ADR
- employment law
- banking and financing
- tax law
- environmental law.

There may also be other specialised units, such as immigration law, international trade, aviation law, technology, media and telecommunications etc. within particular departments or practice areas.

Support staff

Law firms also require a number of support staff members (non-lawyers) to enable them to render services in an efficient manner.

- Paralegals are not qualified attorneys, but they have appropriate legal experience and training in subsidiary, or additional legal matters. Paralegals, or legal assistants, are employed by law firms, government agencies, banks and other organisations. They perform specific assigned legal work. In a law firm, the paralegal will assist with, for example, debt collection matters, conveyancing, legal research, general administration and legal office management. The need for qualified paralegals is growing rapidly in South Africa. Paralegals are required to have a diploma in this field from a tertiary education institution. They do not usually have a degree in law.
- Legal secretaries or personal assistants help with general administration in a law firm, such as typing documents, communicating with clients and preparing documents.
- Filing clerks, messengers and other administrative personnel ensure that legal documents are stored, copied and delivered efficiently. Some of these functions may be outsourced to external service providers.
- Other employees deal with support functions, such as financial aspects, human resources, marketing and business development, knowledge management and office management in a law firm.

Conveyancers

A conveyancer is a qualified attorney who has passed an additional examination that entitles her to attend to the registration of the transfer of immovable property (that is, land and everything attached to land). Whenever immovable property or land, i.e. houses, farms, plots and flats are sold or inherited, a conveyancer will be involved in registering the transfer of ownership from the name of one person (the seller) into the name of another (the purchaser or new owner). Ownership in the case of immovable property is transferred through registration at the deeds office. Any change in ownership has to be recorded at the deeds office by way of a transfer deed.

Notaries

A notary is a qualified attorney who has passed an additional examination entitling him to perform specialised legal work such as, for example, registering ante-nuptial agreements (**ANC**) and drafting long-term lease agreements. Certain contracts or documents must be certified or executed by a notary (versus any other attorney) in order for these documents to be valid.

Attorneys' regulatory bodies

All attorneys are required to be members of the provincial law societies of the province in which they practise. The different Law Societies are: the Law Society of the Northern Provinces, the Law Society of the Cape of Good Hope, the Law Society of KwaZulu-Natal, the Law Society of the Free State and the Law Society of South Africa.

An **ANC**, as it is commonly known, is a contract that parties may enter into before marriage. The contract regulates the matrimonial property regime – that is, whether the parties are married in or out of community of property – and must be signed before the parties get married, although the contract will only be registered after the marriage has taken place.

The provincial law society disciplines members who transgress the ethical or other rules of the attorneys' profession. It also investigates complaints received from the public and from within the profession.

The *Law Society of South Africa (LSSA)* is a voluntary association that represents the entire attorneys' profession in South Africa. It was initiated by the statutory provincial law societies, the Black Lawyers' Association and the National Association of Democratic Lawyers. The LSSA is the coordinating or umbrella body of the different independent law societies.

The stated mission of the LSSA is as follows:

- "To promote the substantive transformation of the legal profession through its leadership role,
- To represent and promote the common interests of the profession, having regard at all times to the broader interests of the public, whom the profession serves, and
- To empower the profession by providing training to candidate attorneys and continuing professional development to attorneys to ensure quality legal service to the community in an ethical, professional, competent and caring manner."

The LSSA publishes the attorneys' journal, *De Rebus*, on a monthly basis. Legal Education and Development (LEAD) is the LSSA's legal education and development division. It offers, for example, vocational training for candidate attorneys, continuing education for attorneys, as well as skills development, skills transfer and mentorship programmes. You can find out more about the LSSA by visiting its website: **www.lssa.org.za**

Another important entity is the Attorneys Fidelity Fund (hereinafter the Fund), which is a statutory body established in terms of section 25 of the Attorneys Act 53 of 1979. Its objective is to protect the public against loss through theft of trust funds by practitioners. This protection is intended to encourage the public to make use of the services provided by legal practitioners and to have confidence in doing so.

The Fund will continue to exist as a juristic person under the new name of the Legal Practitioner's Fidelity Fund.

The Fund derives its main income from interest earned on practitioners' trust accounts. It also provides money for various projects, including the distribution of the *De Rebus* journal to all legal practitioners. You can find out more about the Fund by visiting its website: **www.fidfund. co.za**

In terms of the Legal Practice Act 28 of 2014 the Legal Practice Council will replace the statutory provincial law societies and exercise jurisdiction over all legal practitioners (attorneys as well as advocates). The objects of the Legal Practice Council are set out in s 5 of the Act and are as follows:

- to facilitate the realisation of the goal of a transformed and restructured legal profession that is accountable, efficient and independent
- to ensure that fees charged by legal practitioners for legal services rendered are reasonable and promote access to legal services, thereby enhancing access to justice
- to promote and protect the public interest
- to enhance and maintain the integrity and status of the legal profession
- to determine, enhance and maintain appropriate standards of professional practice and ethical conduct of all legal practitioners and all candidate legal practitioners
- to promote high standards of legal education and training, and compulsory post-qualification professional development.

Going forward, there will therefore be a single unified governing structure or body in the form of the Legal Practice Council, rather than separate structures for attorneys and for advocates.

The Act will introduce Continuing Professional Development (CPD), similar to what is in place in some other jurisdictions and for some other professionals, such as doctors, engineers, auditors, etc. This is basically a process of tracking and recording the skills, knowledge and experience each individual gains in the workplace. Even though CPD is relatively new in the South African context, it has been in existence in various other jurisdictions across the world for a number of years.

Here are some examples:

- All solicitors and registered European lawyers in legal practice or employment in England and Wales must comply with the requirements of the Solicitors Regulation Authority's continuing professional development scheme. The scheme makes it compulsory for solicitors to attend accredited training courses and/or to undertake certain other CPD activities. Non-compliance may result in disciplinary proceedings and or a delay in the issuing of a practising certificate.
- The same applies in various African jurisdictions, such as Uganda, Zambia, etc.

CPD seems to be motivated by the following factors:

- existing legal qualifications/law school are inherently incomplete
- the law changes on a regular basis
- the focus of an individual's practice may change
- the need for public confidence.

The benefits of CPD are numerous. Some of these benefits are as follows:

- CPD enables the individual attorney to assess his/her own training needs and requirements on a regular basis, based on the individual's personal experience and circumstances. An individual attorney can therefor develop his own training and skills development plan.
- Training and skills development that is appropriate to the individual's level of experience and expertise can be identified and implemented.
- It becomes a tool for attorneys to manage their own professional development and growth.
- A scheme of this nature contributes to the general skills level of the profession as a whole and ultimately this should also benefit clients.
- It facilitates the transfer of knowledge and skills from senior attorneys to junior professionals.
- It will broaden attorneys' knowledge and perspectives.

In so far as a CPD scheme is introduced, it is important that the scheme complements other, existing training programmes and initiatives. It should not detract from the attorney's first and foremost duty, i.e. to render professional services of the highest quality to his client. Any proposed scheme should be flexible enough to accommodate the diverse needs of attorneys and the needs of attorneys in different types of practice. The content and scope of courses and topics which will be accredited should receive special attention. They should provide for knowledge of the substantive law. as well as legal skills, such as personal management, client management and information management. Careful consideration should also be given to the number of hours that is required and the requirements in respect of formal, accredited training as well as other CPD activities. The scope of the requirements should be wide enough to allow attorneys to engage in a range of CPD activities for purposes of gaining CPD credits, in addition to formal, accredited training sessions and courses, especially having regard to the costs and limitations of external training courses. When considering the CPD, try not to lose sight of the local context and to ensure that the requirements are appropriate for South African attorneys and the reality of the legal profession in the country.

Professional conduct

New ***Rules for the Attorneys' Profession*** took effect on 1 March 2016. These rules replaced the rules of the various provincial law societies and have been approved by the Chief Justice of South Africa. The rules consist of eight parts as follows:

1. Definitions
2. Members
3. The council
4. General practice
5. Accounting rules
6. Conduct

The ***Rules for the Attorneys' Profession*** was published in Government Gazette 39740 on 26 February 2016.

7. Disciplinary proceedings
8. Miscellaneous.

Part 6 is of particular importance to attorneys as it deals with professional conduct.

In terms of s 39:

"Members shall comply with the rules of professional conduct set out below. A member who fails to so comply shall be guilty of unprofessional and/or dishonourable and/or unworthy conduct".

In terms of s 40,

"Members shall at all times:

40.1 maintain the highest standards of honesty and integrity

40.2 treat the interests of their clients as paramount, provided that their conduct shall be subject always to:

40.2.1 their duty to the court

40.2.2 the interests of justice

40.2.3 the observation of the law

40.2.4 the maintenance of the ethical standards prescribed by these rules and generally recognised by the profession

40.3 honour any undertaking given in the course of their practice, unless prohibited by law

40.4 refrain from doing anything in a manner prohibited by law or by the code of conduct of the profession which places or could place them in a position in which a client's interests conflict with their own or those of other clients

40.5 maintain confidentiality regarding the affairs of present or former clients, unless otherwise required by law

40.6 respect the freedom of clients to be represented by the lawyer of their choice;

40.7 account faithfully, accurately and timeously for any of their clients' money which comes into their possession, keep such money separate from their own money, and retain such money for so long only as is strictly necessary

40.8 retain the independence necessary to enable them to give their clients unbiased advice

40.9 advise their clients at the earliest possible opportunity on the likely success of such clients' cases and not generate unnecessary work, nor involve their clients in unnecessary expense

40.10 use their best efforts to carry out work in a competent and timely manner and not take on work which they do not reasonably believe they will be able to carry out in that manner

40.11 be entitled to a reasonable fee for their work, provided that no member shall fail or refuse to carry out, or continue, a mandate on the ground of non-payment of fees and disbursements (or the provision of advance cover therefore) if demand for such payment or provision is made at an unreasonable time or in an unreasonable manner

40.12 remain reasonably abreast of developments in the law and legal practice in the fields in which they practise

40.13 behave towards their colleagues, including any legal practitioner from a foreign jurisdiction, with integrity, fairness and respect

40.14 refrain from doing anything which could or might bring the attorneys' profession into disrepute".

The rules also deal with conduct in relation to:

- approaches and publicity
- specialisation and expertise
- **touting**
- sharing of fees

Touting refers to a situation where an attorney personally or through the agency of another, procures or seeks to procure, or solicits for, professional work in an improper or unprofessional manner by unfair means.

- sharing of offices
- payment of commission
- naming of partners and practice
- replying to communications
- naming in deed of alienation.

11.2.2 Advocates

Advocates can be understood broadly to be court specialists, in other words specialists in litigation and court appearances. Advocates are experts in trial, motion court, appellate and opinion advocacy. They can be compared to medical specialists, as opposed to general practitioners.

Advocates are also referred to as counsel. They are individual practitioners – in other words, they do not practise in partnership with others or as part of a firm or company. Instead, advocates practise for their own account in offices called chambers. Chambers are shared by a number of advocates who form part of the same group.

Advocates don't accept instructions directly from members of the public. All their work is referred to them by practising attorneys. The advocates' profession is therefore a so-called referral profession – a client approaches an attorney, who, in turn, instructs an advocate to, prepare documents or appear in court on behalf of the attorneys' client. Attorneys' written instructions to counsel are called **briefs**.

'**Brief**' may also be used as a verb. For example, one might say that the attorney has briefed counsel in a matter.

An attorney refers a matter to an advocate because of the advocate's expertise in a specific area of the law and more specifically because the advocate has extensive experience and skill in presenting a case in court. Advocates may also be briefed to draft legal documents or to provide written opinions about, for example:

- a particular legal aspect
- the nature of evidence required to be presented
- a client's prospects of success in a particular matter.

Advocates have a right of appearance in all courts in South Africa. When appearing in the High Court, advocates wear a black jacket, a white neckband and a robe. Advocates don't normally wear robes when appearing in Magistrates' Courts.

A distinction is made between junior and senior advocates. Senior counsel usually appears with junior counsel in complex cases. A senior counsel is an advocate of proven skill, experience and expertise and is appointed by the president of South Africa. He bears the title 'SC', which stands for 'Senior Counsel' or 'Senior Consultus'. He usually wears a silk robe, different from that worn by junior advocates. For this reason, when an advocate is appointed as senior counsel, she is said to 'take silk' and is also referred to as a 'silk'. Up to approximately 1995, many judges were appointed from the ranks of senior advocates.

Advocates' admission requirements

In terms of the Admission of Advocates Act 74 of 1964, a person cannot be admitted as an advocate unless:

- she is over the age of 21 years and is a fit and proper person
- she is duly qualified with an LLB degree or equivalent
- she is a South African citizen or a lawful permanent resident of South Africa who is ordinarily resident in South Africa
- in the case of an attorney, her name has been removed from the roll of attorneys on her own application.

After having satisfied all of the above-mentioned requirements, a person may make application to the High Court to be admitted as an advocate. It is important to note that additional requirements apply if a person wants to become a member of the Bar. Although most advocates belong to a Bar, there are some independent advocates, who do not keep chambers in groups and are not subject to the Bar rules.

Again, the admission requirements will change in terms of s 24 of the Legal Practice Act 28 of 2014 as set out above.

Advocates' regulatory body

The General Council of the Bar represents the advocates' profession and has various provincial societies of practising advocates (called Bars) that are affiliated to it. The General Council functions as the coordinating body of the various Bar associations. The Bar is the name traditionally used for a society of advocates. A Bar is a group of persons who practise as advocates in the place where the Bar is situated. The Johannesburg Bar is the largest in South Africa.

The general purpose of the Bar is to maintain professional standards and to enforce discipline among its members. The Bar enforces a strict code of ethical conduct with which advocates have to comply.

To become a member of a Bar, a person is required to complete a training period referred to as **pupillage**.

From the earliest times, an apprenticeship was the way into the profession. A practical training period is required in the case of both attorneys (articles of clerkship) and advocates (**pupillage**).

During this time, the aspirant advocate is referred to as a pupil. Pupillage consists of practical training followed by the Bar examinations. The practical training is conducted under the supervision of a more senior advocate, who is referred to as the pupil's master. Pupillage is regarded as a practical learning experience and a pupil does not receive any salary during the period of pupillage.

As indicated above, members of a Bar are bound by the ethical rules of the Bar. These rules cover, for example, the advocates' duties when handling a case, his duties to the court as well as to clients and colleagues, restrictions on receiving gifts from clients and the fees that advocates may charge. The Bar also requires its members to occupy offices, or chambers, in premises controlled by the Bar. Advocates keep chambers together in sets of chambers. Since they practise from chambers, clients and attorneys are called to their chambers to consult.

For more information about the Bar, consult its website at www.sabar.co.za. The website contains interesting information about, for example:

- What is the Bar?
- What is the Bar committed to?
- Where do advocates get their work from?
- What exactly is the work that an advocate does?
- What are the working conditions of an advocate?
- Where do advocates appear to represent their clients?
- Where do I get training in preparation for practising as an advocate?
- Is there any financial assistance during the period of pupillage?
- What is the career path of an advocate?
- What key competencies and qualifications do I need to be a successful advocate?

Professional conduct

The General Council of the Bar's *Uniform Rules of Professional Conduct* are intended to serve as a guideline for members of the advocates' profession. The rules consist of nine parts as follows:

1. Introduction
2. Duties of counsel in connection with briefs
3. Duties of counsel in connection with litigation
4. General professional conduct
5. Briefs
6. Legal assistance
7. Fees
8. Pupils and pupillage
9. Military service.

You can see that the rules deal with the duties of advocates in relation to a range of issues as well as general professional conduct. When it comes to advocates' fees, the rules determine that fees must be reasonable (rule 7.1):

> "Counsel is entitled to a reasonable fee for all services. In fixing fees, counsel should avoid charges which over-estimate the value of their advice and serves, as well as those which under-value them. A client's ability to pay cannot justify a charge in excess of the value of the service, though is lack of means may require a lower charge, or even none at all.
>
> In determining the amount of the fee, it is proper to consider:
>
> (a) the time and labour required, thee novelty and difficulty of the questions involved and the skill requisite properly to conduct the cause.
> (b) the customary charges by counsel of comparable standing for similar services; and
> (c) the amount involved in the controversy and its importance to the client.
>
> No one of the above considerations in itself is controlling. They are mere guides in ascertaining the real value of the service.
>
> In fixing fees it should never be forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade."

Professor says — Are legal costs too high?

The Constitution (s 34 of the Bill of Rights) provides that every person has the right to use the court system. The major barrier to access to justice, or getting legal assistance in South Africa, remains the high cost of legal assistance. The average South African household reportedly would need to save a week's income to afford a consultation with a legal practitioner. In reality, not all citizens are able to afford the services of an attorney or an advocate – legal fees are in many instances simply too high for the average South African.

Some examples of alternatives are:

1. **Legal Aid South Africa**: This is a statutory body established as a national public entity as provided for in the Public Finance Management Act 1 of 1999 and established in terms of the (new) Legal Aid South Africa Act 39 of 2014, which came into operation on 1 March 2015. For more information, visit www.legal-aid.co.za
2. The **Legal Resources Centre**: The centre is a private, independent, non-profit organisation that provides legal services to poor and homeless individuals and communities. For more information, visit http://www.lrc.org.za/
3. **Law clinics**: In terms of the Legal Practice Act 28 of 2014, a clinic can be established by a non-profit juristic entity registered in terms of the Non-profit Organisations Act 71 of 1997 or any university in the Republic.
4. **Legal insurance**: Some private insurance companies offer clients legal insurance cover in return for a monthly premium, or payment. If the client becomes involved in litigation, the insurance company will pay the legal fees and expenses. Insurance cover is available for both criminal and civil matters.
5. Legal services by attorneys in the form of:
   - *pro amico* legal aid, which is free legal assistance to friends and family members
   - *judicare* legal aid (state-compensated private counsel), where the state appoints and pays for an advocate to appear on behalf of a person who cannot afford an attorney in very serious criminal cases
   - *pro bono* legal aid, which is free legal assistance offered as a service to the community.

Activity 11.2

Consider sections 2–3 of the Contingency Fees Act 66 of 1997 and answer these questions:

1. What do contingency fees refer to?
2. Is it acceptable for a legal practitioner to agree with her client that the practitioner will only get paid if the client succeeds with, in others words wins her case? Provide reasons for your answer.

Note that the Legal Practice Act 28 of 2014 does not preclude the use of contingency fee arrangements as provided for in the Contingency Fees Act 66 of 1997.

11.2.3 Other relevant provisions of the Legal Practice Act 28 of 2014

Let's look at some of the provisions taken from sections 34, 35 and 36 of the Legal Practice Act 28 of 2014.

Section 34 – forms of legal practice

In terms of section 34 (5) attorneys may only practise: for their own account; as part of a commercial juristic entity; as part of a law clinic; as part of Legal Aid South Africa or as an attorney in the full-time employment of the State as state attorney or the South African Human Rights Commission. The commercial juristic entity referred to here is one where terms of its founding documents: its shareholding, partnership or membership is comprised exclusively of attorneys; provision is made for legal services to be rendered only by or under the supervision of admitted and enrolled attorneys and all present and past shareholders, partners or members are liable jointly and severally together with the commercial entity for: the debts and liabilities of the commercial juristic entity as are or were contracted during their period of office and in respect of any theft committed during their period of office.

It is interesting to note limit liability legal practices are not allowed. However, the Legal Practice Council is authorised to, in due course, make recommendations to the Minister of Justice and Constitutional Development on the creation of other forms of legal practice, including limited liability legal practices.

In terms of s 34 (6) advocates may only practise: for their own account and as such may not make over to, share or divide any portion of their professional fee whether by way of partnership, commission, allowance or otherwise; as part of a law clinic; as part of Legal Aid South Africa or as an advocate in the full-time employment of the State as a state advocate or the South African Human Rights Commission.

Subject to approval by the Legal Practice Council, a law clinic may be established by a university in the Republic if it is constituted and governed as part of the faculty of law at that university.

Section 35 – Fees in respect legal services

With regard to fees in respect of legal services section 35(7) determines that when an attorney or advocate receives instructions from a client for the rendering of litigious or non-litigious legal services, or as soon as practically possible thereafter, provide the client with a cost estimate notice, in writing, specifying all particulars relating to the envisaged costs of the legal services, including the following:

- the likely financial implications including fees, charges, disbursements and other costs
- the attorneys or advocate's hourly fee and an explanation to the client or his or her right to negotiate the fees payable to the attorney or advocate
- an outline of the work to be done in respect of each state of the litigation process, where applicable
- the likelihood of engaging an advocate, as well as an explanation of the different fees that can be charged by different advocates, depending on aspects such as seniority or expertise
- if the matter involves litigation, the legal and financial consequences of the client's withdrawal from the litigation as well the cots recovery regime.

There is now a statutory obligation to provide a client with a written quotation for legal services. This is an interesting new legal development. In addition, the legal practitioner must also "verbally explain to the client every aspect contained in that notice, as well as any other relevant aspect relating to the costs of the legal services to be rendered" (section 35 (8)).

Section 36 – Code of Conduct

In terms of section 36 the Legal Practice Council "must develop a code of conduct that will apply to all legal practitioners and all candidate legal practitioners …".

11.2.4 Legal advisors

Although **legal advisors** are not practising attorneys or advocates, they hold legal qualifications and provide legal services and advice to their employers in finance, commerce or industry. Typically, employers of legal advisors are banks, mines, insurance companies and other large concerns. Many legal advisors are in fact duly admitted attorneys or advocates who don't practise as such.

Legal advisors are not in private practice, because they don't take private instructions from individual clients.

No formal requirements apply, other than the appropriate academic qualification such as an LL.B or B.Com. Law degree. However, companies and banks are increasingly looking to appoint legal advisors who are also qualified attorneys. This means that, in order to be appointed as a legal advisor, a person may first have to complete her articles of clerkship, pass the admission examination.

11.3 Legal positions in the public sector

A wide range of career opportunities exist within the **public sector**. Some positions require formal legal qualifications, while others are more administrative in nature.

The **public sector** consists of the industries and services that are owned and run by the government.

11.3.1 Positions within the judicial structure

The courts, as the main organs of the administration of justice, employ many people in a variety of positions in order to carry out their work.

Presiding officers

In accordance with the adversarial nature of South African court proceedings, a presiding officer is responsible for overseeing matters brought before court. A presiding officer is required to read the relevant documents, to listen to both sides of a case, to consider the evidence and finally, to reach a conclusion and to make his decision known by delivering a judgment.

In addition to judges and magistrates, there are also other presiding officers, such as commissioners in the CCMA (Commission for Conciliation, Mediation and Arbitration) or the Small Claims Court. Presiding officers are required to have legal qualifications. Chapter 10 discusses the different presiding officers in the various courts, commissions and forums.

Registrars and clerks of the court

The registrar is the head of administration in the High Court, while the clerk is the head of administration in the district Magistrates' Courts. The head of the administrative staff in the regional court is also referred to as the registrar. There are usually a number of registrars or clerks appointed for each court.

As head of administration, the registrar or clerk deals with matters such as the filing of documents at court, the opening and safe-keeping of court files, allocation of case numbers, the receipt of fines, the **set down** of matters for hearing in court and the finalisation of the court roll for each day.

Set down refers to the allocation of court dates for applications and trials.

Sheriff of the court

The sheriff is an impartial and independent official of the court appointed by the Minister of Justice and Constitutional Development. This official is responsible for delivering court documents, for example, a

summons, to parties in civil cases. He also attaches property when a warrant is issued. To summarise, he must **serve** or execute all documents issued by our courts.

For more information on sheriffs, you may want to look at the Sheriffs Act 90 of 1986.

The website of the South African Board for Sheriffs, who is responsible for monitoring conduct, also provides useful information: www.sheriffs.org.za

We say that the sheriff '**served**' the documents. Most documents relating to a court case have to be served (by the sheriff) and filed at court (stamped at court and placed in the court file). Each matter has its own court file and is awarded a case number at court. You are not allowed to remove court files from the court building.

11.3.2 Legal representatives of the state

Apart from providing an infrastructure for the administration of justice, the state is often itself a party to litigation. The state may initiate litigation against other parties or defend itself against claims brought against the state. The state employs different kinds of legal professionals to represent it in these matters.

Director of public prosecutions

The office of the **director of public prosecutions** is responsible for criminal prosecutions by the state in each province. More particularly, it is responsible for decisions as to whether the state will or will not prosecute in a specific matter (in other words, whether there is sufficient information and evidence to prove in court that the person is guilty), and for carrying out any functions connected to instituting and conducting criminal prosecutions.

The **director of public prosecutions** was previously known as the attorney-general.

Section 179 of the Constitution establishes a single National Prosecuting Authority (the NPA). The NPA consists of the National Director of Public Prosecutions (NDPP) (who is also the head of the NPA), as well as Directors of Public Prosecutions, Investigating Directors and Special Directors and other members of the prosecuting authority.

The structure of the NPA includes:

- the National Prosecuting Service (NPS)
- the Directorate: Special Operations, which is responsible for investigating and prosecuting particularly serious crimes that threaten South Africa's democracy and economy
- the Witness Protection Unit (WPU) that is responsible for the protection of witnesses in terms of the Witness Protection Act 112 of 1998
- the Asset Forfeiture Unit, which is established in terms of the Prevention of Organised Crime Act 121 of 1998 to seize and forfeit property that was bought from the proceeds of crime, or property that has been used to commit a crime
- specialised units such as the Sexual Offences and Community Affairs Unit (SOCA) and the Specialised Commercial Crimes Unit (SCCU).

Important legislation that impacts on the NPA's activities include:

- the National Prosecuting Authority Act 32 of 1998
- the Witness Protection Act 112 of 1998
- the Domestic Violence Act 116 of 1998
- the Prevention of Organised Crime Act (POCA) 121 of 1998
- the Prevention and Combatting of Corrupt Activities Act 12 of 2004

For more information, you can refer to the website of the NPA: www.npa.gov.za

State advocates and prosecutors

The NPA delegates its authority to state advocates in the High Court and to prosecutors in the Magistrates' Courts. State advocates prosecute accused persons in criminal matters on behalf of the state in the High Court. Prosecutors perform the same function in the Magistrates' Courts. A law degree is required to become a prosecutor or a state advocate.

State attorney

A state attorney is a qualified attorney who is not in private practice but acts instead on behalf of the state in civil matters (when the state sues someone, is being sued, brings an application against someone or has to respond to an application brought against the state). State attorneys work for the state on a full-time basis and are not allowed to accept private instructions from individuals. A state attorney may act as an attorney, notary and conveyancer for the government and she derives her powers from the State Attorney Act 56 of 1957 in terms of which a state attorney protects the interests of the state in legal matters covering a wide spectrum of the law.

According to the website of the Department of Justice and Constitutional Development (**www.justice.gov.za/branches/stateattorney.html**) the Office of the State attorney provides legal series to national and provincial departments and functions include:

- the drafting and managing of contracts on behalf of the state
- the handling of criminal and civil litigation cases instituted against state officials and committed by means of acts or omissions while executing their official duties
- the handling of applications from qualifying personnel for admission as advocates
- the handling of applications for admission as practising attorney
- the regulation and overseeing of the conduct of private attorneys operating under the State Attorney Act 56 of 1957.

State legal advisor

A state legal advisor is employed by the state on a full-time basis and gives legal advice to the various state departments. State law advisors provide cost-effective legal opinions, scrutinise and amend international agreements, draft legislation and attend parliamentary portfolio committees as legal advisors for state departments.

11.3.3 Other positions

Apart from needing officials to represent it in litigation, the public sector also provides various offices and officials to support the public and the courts in civil matters.

Master of the High Court

A Master of the High Court is appointed for every division of the High Court. This office is created by statute and various statutes determine and regulate the powers and duties of the Master. The Master's office provides services in relation to:

- administering deceased estates
- liquidations (insolvent estates where liabilities exceed assets)
- the registration of trusts
- tutors and curators
- the administration of the Guardian's Fund for minors and mentally challenged persons.

Staff members at the Master's office are specialists in the field of administration of these matters.

Family advocate

The High Court is the upper guardian of all children. As you may know, the Constitution defines a child as a person under the age of 18. The age of majority has also been changed from 21 to 18 years of age. To assist the court in making decisions in relation to minor children, the Office of the Family Advocate has been established in the various divisions of the High Court. The Mediation in Certain Divorce Matters Act 24 of 1987 sets out the family advocate's duties. In general, the office of the family advocate must investigate and report to the court on certain matters concerning the welfare of children. The best interests of children are of the utmost importance in every matter concerning a child and, in the context of divorce matters, this is the court's most important duty.

The office of the family advocate will investigate a case if requested to do so by the court, or by one or both parties to litigation, or on its own initiative (in which case the court's authorisation must be obtained). As part of the investigation, the family advocate will work in conjunction with a social worker and meet with the children and the parents on more than one occasion.

For more information, please refer to www.justice.gov.za/fmadv/f_main.htm

Public protector

The public protector is appointed by the President of the country, on the recommendation of the National Assembly. This is done in terms of Chapter 9 of the Constitution. The Office of the Public Protector functions independently from government and all political parties. In terms of section 181 of the Constitution the Public Protector is subject only to the Constitution and the law.

In the preamble to the legislation, the Public Protector Act 23 of 1994 indicates that:

> "Whereas sections 181 and 183 of the Constitution of the Republic of South Africa, 1996, provide for the establishment of the office of the Public Protector and that the Public Protector has the power, as regulation by national legislation, to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to have resulted in any impropriety or prejudice, to report on that conduct and to take appropriate remedial action, in order to strengthen and support constitutional democracy in the Republic".

The public protector is required to be a South African citizen who is suitably qualified and experienced and has displayed a reputation for honesty and integrity. Adv. Busisiwe Mkhwebane succeeded Adv. Thulisile Madonsela as the new Public Protector in 2016.

Some of Advocate Madonsela's most controversial and well publicised reports include the Secure in Comfort report, dealing with President Zuma's homsestead in Nkandla and the State of Capture report dealing with state capture and corruption.

The Office of the Public Protector receives and investigates complaints from the public against government agencies or officials. It is competent to investigate matters, issue reports and make recommendations.

As the public protector does not act as the legal representative of any of the parties, it will refer a party to the relevant court if litigation is required. The National Office of the Public Protector is situated in Pretoria. There are also regional offices in the various provinces. In general, a law degree is required to work as an investigator at any of the offices of the public protector. There are however also other positions available in respect of which no legal background is required.

The public protector has jurisdiction over all organs of state, any entity in which the state is the majority or controlling shareholder and any public entity as defined in section 1 of the Public Finance Management Act 1 of 1999.

The public protector will not investigate:

- judgments by judges and magistrates, including sentences imposed by them
- private acts by individuals
- private companies
- doctors or lawyers who are not working for the state.

However, the staff of the public protector can help by telling you where to complain or what to do in the types of matters listed above. For more information, visit the website of the Office of the Public Protector: http://www.pprotect.org/. The website contains useful information in relation to the complaint process and the steps to be taken in this regard.

Public defenders

A state-employed attorney or advocate who defends people who cannot afford legal representation in criminal matters is called a public defender.

11.4 Other positions in the legal sphere

Legal professionals have many options apart from the more usual career paths in the private and public sectors.

They may choose to become academics or researchers at universities or research institutes. Here their work may include teaching, research, writing and critical analysis of developing law.

Legally trained people could also choose to serve on **statutory bodies** like the South African Law Reform Commission (SALRC) (previously known as the SA Law Commission), the South African Human Rights Commission (SAHRC) or the Commission for Gender Equality (CGE).

Statutory bodies are established through legislation.

Those working as part of the SALRC aim to improve existing law through research, investigation and by providing advice to ministers and state departments on proposed legislation. For more information, visit **www.justice.gov.za/salrc/**

Those working as part of the SAHRC are empowered by s 184 of the Constitution and the Human Rights Commission Act 54 of 1994 to promote and monitor the observance of human rights in South Africa. For more information, visit **www.sahrc.org.za/home/**

People employed by the CGE are empowered by s 9 of the Constitution to promote a respect for and protection of gender equality, and to work towards its achievement and maintenance. For more information, visit **www.cge.org.za/**

11.5 Ethics and professional conduct

Now that we have discussed the various positions that are available to legal professionals, we conclude with one of the key characteristics of the profession, namely its code of conduct or ethical rules. The rules of ethical or proper behaviour are found in various sources such as legislation, case law, the rules issued by the various law societies and Bar councils as well as the common law. A legal practitioner has to comply with prescribed ethical rules in his relationship with clients, colleagues, the court and the public in general.

It has been said that:

> "a practitioner must avoid all conduct which, if known, could damage his reputation as an honourable lawyer and honourable citizen".
>
> **Source:** Lewis, E.A.L. 1982. *Legal Ethics: A guide to professional conduct for South African attorneys*. Cape Town: Juta

A practitioner's conduct must, at all times, be ethical and professional. As such, legal practitioners are required to maintain the highest standard of honesty and integrity at all times. Legal practitioners are bound to comply with a strict code of ethics. If a practitioner does not follow these rules, he may be suspended or **struck off the roll**.

When being admitted as an attorney of the High Court, the person's name is officially placed on the roll of attorneys. This refers to a list of all admitted attorneys in a particular area. Being **struck off the roll** entails that the attorney's name is removed from the list and she can no longer practise law as an attorney. The same applies to advocates.

Here are some important documents to take note of:

- *New Rules for the Attorneys' Profession* took effect on 1 March 2016. The advocates' profession also has its own set of rules.
- A new Code of Conduct under the Legal Practice Act 28 of 2014 was gazetted on 10 February 2017.

What do you think?

Have you thought about your future career path? What do you intend to do with a degree in law? What is the motivation or reason behind your decision? Make a list of the main reasons for your decision. It is important to review these reasons as you progress with your legal studies. You may change your mind as you come to know more about certain areas of the law.

Chapter summary

In this chapter, we learned the following about the legal profession:

- The various career opportunities for people with a law degree are summarised in this table.

Table 10.1 Careers for legal professionals

Private sector	Public sector	Other positions
Attorney	Presiding officer	Academic position
Notary	State advocate or prosecutor	Research position
Conveyancer	State attorney	Statutory bodies
Advocate	State legal advisor	
Legal advisor	Court officials, i.e. registrar/clerk	

- Once a person with a law degree has chosen a particular career, she will usually have to meet certain additional requirements that are specific to her position. These requirements are explained in various statutes and rules of professional bodies.
- Being part of the legal profession means:
  - falling under the control of a governing body
  - having appropriate knowledge and training in a particular area
  - offering a service to the community within a specific field
  - acting ethically, correctly and honestly at all times. Integrity is the quality of being honest and strong about what you believe is right.
- The legal practitioner forms part of a profession and has to comply with a code of conduct.
- South Africa has a divided profession. It is divided into two main branches: attorneys and advocates. No dual practice is permitted.
- A position as a legal advisor is a further career opportunity in the private sector.
- The difference between attorneys and advocates lies not in their academic qualifications or income – it is the nature of their work that differs.
- An attorney is a general practitioner – clients go to attorneys with their legal problems. An advocate is a specialist litigator who is briefed by attorneys. A member of the public may not instruct, or deal directly, with an advocate – she has to work through an attorney.
- Both attorneys and advocates have the right of appearance in the High Court, although attorneys' right of appearance is subject to additional requirements.
- Conveyancers and notaries are attorneys with additional qualifications that allow them to perform specialist functions. Conveyancers deal with the registration of the transfer of immovable property. Notaries prepare special documents.
- All attorneys are commissioners of oaths. As a result, all attorneys are qualified to commission documents. Commissioners of oaths are not necessarily attorneys.
- Attorneys may practise as individual practitioners, but more usually, they organise themselves into firms. Firms have professional and support staff at various levels of seniority.
- A candidate attorney needs to complete her articles of clerkship and pass the admission examination for attorneys before she can make application to the High Court to be admitted as an attorney.
- A pupil needs to complete his pupillage and pass the admission examination for advocates before he can practise as a member of the Bar.
- A legal advisor may or may not be a qualified attorney. He is not in private practice, but instead, provides his employer with legal advice regarding a variety of matters.

- Legal fees seem to be out of reach of the majority of South Africans. There are a number of alternatives or solutions to make legal services more freely available.
- There are a variety of legal career opportunities in the public sector. The most important ones are listed below.
  - Presiding officers adjudicate disputes in courts and other forums.
  - The registrar or clerk of a court is the head of administration in the court.
  - The sheriff of the court is an official responsible for serving documents and executing court orders.
  - The director of public prosecutions decides on whether or not the state will prosecute.
  - State advocates and state prosecutors prosecute on behalf of the state.
  - A state attorney is an attorney working for the state.
  - A state legal advisor is a legal advisor advising the state.
  - The Master of the High Court is an officer at each division of the High Court who renders a variety of services relating to the administration of justice.
  - A family advocate makes recommendations to the High Court on the best interests and welfare of children when their parents get divorced.
  - The public protector investigates complaints against government.
  - Public defenders are legal practitioners who represent indigent (very poor) accused at the expense of the state.
  - Persons with a degree in law may decide to work as academics or researchers, rather than to practise law as attorneys or advocates. A post-graduate qualification in law (LL.M. or LL.D. degree) is usually required for these positions. Legally-trained people are also needed to serve on certain statutory bodies that protect our constitutional democracy and foster respect for human rights, such as the SALRC, SAHRC or CGE.

Review your understanding

1. Complete the following table. Try to keep your answers as brief as possible. You may want to use this table to study from later.

Position	Role or function – What does this person do? What is the person's role and responsibility?
Attorney	
Advocate	
Conveyancer	
Notary	
Legal advisor in the private sector	
Director of Public Prosecutions	
Presiding officer: judge or magistrate	
Public Prosecutor	
State advocate	
State attorney	
State legal advisor	

Position	Role or function – What does this person do? What is the person's role and responsibility?
Master	
Registrar of High Court	
Registrar of Regional Magistrates' Courts	
Clerk of District Magistrates' Courts	
Sheriff	
Family advocate	
Public Defender	
Public Protector	

2. South Africa has a divided profession. In other words, we make a distinction between two kinds of legal practitioners. What are they?
3. In your own words, explain what it means if a person forms part of a 'profession'.
4. What are the requirements for admission as an attorney of the High Court?
5. What are the requirements for admission as an advocate of the High Court?
6. What is required of an advocate who wishes to practise as a member of the Bar?
7. What is the difference between articles of clerkship and pupillage?
8. What does it mean if an advocate has taken 'silk'?
9. Discuss the relevance of the Right of Appearance in Court Act 62 of 1995.
10. What is the difference between a notary and a conveyancer? Compare these roles.
11. What is the difference between a commissioner of oaths and a legal advisor? Compare these roles.
12. Explain what *pro amico* means.
13. What is the difference between the following concepts? Explain the main differences between the various positions:
    a) a state advocate and a prosecutor
    b) an attorney in private practice and a state attorney
    c) a legal advisor to a company and a state legal advisor
    d) the public protector and the public defender.

Further reading

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Susskind, R. 1996. *The Future of Law.* Oxford: Clarendon Press

Susskind, R. 2008. *The End of Lawyers? Rethinking the Nature of Legal Services.* Oxford: Oxford University Press

Susskind, R. 2013. *Tomorrow's Lawyers: An Introduction to Your Future.* Oxford: Oxford University Press

The following articles contain interesting information about the legal profession:

Godfrey, S. 2009. 'The legal profession: transformation and skills'. *SALJ*, 91

Groot B 'New trends facing lawyers', *De Rebus*, 2014 (542) June 2014:20

Lohr, S. 'A.I. is Doing Legal Work. But It Won't Replace Lawyers, Yet.' *The New York Times,* 19 March 2017, https://www.nytimes.com/2017/03/19/technology/lawyers-artificial-intelligence.html

Sobowale, J. 'How artificial intelligence is transforming the legal profession.' *ABA Journal*, April 2016, https://books.google.co.uk/books/about/The_End_of_Lawyers.html?id=LPedSQAACAAJ&source=kp_cover&redir_esc=y

Whittle, B. 'Law Societies' Presidents commit to a clean, ethical and responsive legal profession: LLSA news.' *De Rebus*, 2016 (563) May 2016:19

Wildenboer, L. 2010. 'The origins of the division of the legal profession in South Africa: A brief overview.' *Fundamina*, 16 (2) 199–225

The following websites contain useful information about legal practitioners and other legal careers:

Attorneys' Fidelity Fund website, **www.fidfund.co.za**
(Here you will find more information on this body's important role in protecting the public from dishonest attorneys.)

Department of Justice and Constitutional Development website, **www.doj.gov.za**
(You will find more information on many aspects of the legal profession here – including the role of the family advocate.)

International Bar Association website, **www.ibanet.org/images/downloads/international ethics.pdf**
(This website will give you more information on the international code of ethics of advocates.)

Master's office website, **www.justice.gov.za/master/index.html**
(The role of the Master of the High Court is explained more fully on this website.)

General Council of the Bar of South Africa website, **www.sabar.co.za**
(This site will give more information generally about a career at the Bar in South Africa as well as about the specific ethical duties of an advocate contained in the Uniform Rules of Professional Conduct issued by the General Council of the Bar of South Africa.)

South Africa info website, **www.pprotect.org**
(This website has more information on the public protector.)

South African Law Society website, **www.lssa.org.za**
(This is the official website of the attorneys' regulatory body. The website makes reference to a career guide to the legal profession, which is available at: **http://www.issa.org.za/upload/Career_Guide_to_the_Legal_ profession.pdf**)

The branches of our law

Section 3

Chapters in this section

- **Chapter 12** Constitutional law and human rights
- **Chapter 13** Administrative law
- **Chapter 14** Criminal law
- **Chapter 15** Law of persons, family law and law of succession
- **Chapter 16** Law of property and law of intellectual property
- **Chapter 17** Law of obligations
- **Chapter 18** Commercial law
- **Chapter 19** Law of evidence
- **Chapter 20** Criminal procedure
- **Chapter 21** Civil procedure

You will learn about

- Public law
- Private law
- Procedural law

Substantive and procedural law

In Section 2, we learned about the trunk that supports the branches of our tree of law. So we are now ready to look at these branches more closely. It is these branches that give us legal protection in the various aspects of our lives.

All legal systems can be divided into two main branches of law: international law and national law. International law lays down the rules generally accepted as binding on states and nations. We will explore international law in Section 4.

National law is the law that is applicable to a specific country. In this section, we look at the branches of our national law.

Go back to page 2 and take another look at our tree of law. You will see that it has two main branches. These are called substantive law and procedural law.

Substantive law

Substantive law is the written and unwritten law of a country that defines the legal relationships between people, as well as between people and the state.

Substantive law in turn can be divided into two main branches. These branches are:

- public law, which deals with the state or government and the relationships between individuals and the state or government
- private law, which defines and regulates relationships among individuals, associations and corporations.

Public law

If you look at the tree of law more closely, you will see that public law can be divided into three sub-branches, being constitutional law and human rights, administrative law and criminal law.

In Chapter 12, we show how constitutional law draws on the Constitution to establish and protect a system of government, the legislature and the judiciary. Constitutional law must be distinguished from substantive law found in the common law and other legislation, as all other law is subordinate to it.

Because South Africa has an entrenched Bill of Rights, we'll also spend some time on human rights law in Chapter 12.

In Chapter 13, you will learn that administrative law regulates the powers, procedures and acts of public administration (but not the acts of the legislature and judiciary). As distinct from the legislature and the judiciary, administrative law in general looks at the way administrative powers are exercised by any administrative authority. So, for example, it governs a municipality's power to make by-laws and a governmental organ's power to issue permits, licences and passports.

In Chapter 14, we explore criminal law, which deals with crime and punishment.

Private law

If you look at your tree again, you will see that the main branches of private law are customary law (already discussed in Chapter 8), the law of persons, family law, the law of succession, the law of property, the law of intellectual property, the law of obligations and commercial law.

In Chapter 15, we look more closely at the law of persons (which deals with relationships between legally defined persons), family law (regulating family relationships) and the law of succession (which regulates what happens to your property when you die).

Chapter 16 introduces the law of property (which gives legal rules on the relationships among members of a society with respect to 'things') and intellectual property law (which deals with property that comes from the work of the mind or intellect). In Chapter 17 we look at the law of obligations (which covers the law of delict and the law of contract).

The law of contract is explored more fully in Chapter 18, when we deal with commercial law, where we cover topics such as insolvency law, the law of negotiable instruments, labour law and the law of sale and lease.

Procedural law

Procedural law, which is sometimes also referred to as adjectival law, deals broadly with the rules according to which a court hears legal proceedings and what happens in these proceedings. We will look at the following sub-branches of procedural law: the law of evidence (in Chapter 19), the law of criminal procedure (in Chapter 20) and the law of civil procedure (in Chapter 21).

The law relating to the interpretation of statutes is also a sub-division of procedural law; but we have already discussed that in Chapter 4 dealing with legislation.

Briefly, the law of evidence, covered in Chapter 18, provides us with rules on what evidence is and whether it can be used in court. It also provides the rules on how officers of the court should work with evidence.

Chapters 20 and 21 place the procedural rules of criminal and civil proceedings in their practical context. You will be introduced to the basic concepts of criminal procedure, which regulates matters concerning aspects of a criminal trial, and of civil procedure, which applies to civil matters.

Constitutional law and human rights

Chapter 12

The main ideas

- The meaning of constitutional law
- Categories of human rights
- The beneficiaries of the Bill of Rights
- The importance of the rights to equality, human dignity, life, religion and social assistance
- Reasonable and justifiable limitation of rights
- Suitable relief

The main skills

- Understand what is meant by constitutional law.
- Explain what constitutional principles and values are.
- Understand what is meant by the rule of law and democracy.
- Know the categories of human rights.
- Know who may use the Bill of Rights.
- Know and understand the right to equality.
- Debate whether the death penalty for murder is in line with the Constitution.
- Explain whether a person has a right to believe what he or she wants to.
- Explain human dignity as an encompassing value or right.
- Explain the criteria applied in determining whether a limitation of a right is reasonable and justifiable.
- Know the different types of suitable relief for infringements of human rights.

Apply your mind

This chapter is about human rights as an important part of constitutional law. Consider the role of the Constitution in action namely: What happens when an employer has an affirmative action plan and follows it to such an extent that equity targets are actually reached? Can the employer still argue that the appointment of an inferior designated candidate is justified? Read the case of *University of SA v Reynhardt* (Labour Appeal Court case no. JA36/08 dated 25/05/10, (unreported, available at www.saflii.co.za) for the court's answer to this interesting question.

The legal system has been adapted to aid the transformation of South Africa through the achievement of human rights protection and the practice of constitutional principles and values. Besides the principles already dealt with in Chapter 3, we see additional principles such as the rule of law and democracy included in the Constitution. Important human rights explained in this chapter are **equality**, **human dignity**, freedom of religion, life and access to social assistance.

Constitutional values and principles, as well as fundamental human rights, have been entrenched in the Constitution. These are the foundation of the legal system. Constitutional law is that part of the law that focuses on the functions and obligations of the different branches of government and of governmental organs, as well as their relationship with one another. We will look at the values and principles of the Constitution as they permeate, or run through, the way government functions. The main focus of this

Equality means that all people, no matter what their race, gender, sexual preference, religion or culture, should be treated in the same way by the law.

Human dignity is an inherent right that represents the unconditional importance of everyone simply because of being human which in turn calls for our well-being, whether mental or physical.

chapter is to introduce to you to some of the key rights in the Bill of Rights in more detail and to deal with other topics that are relevant to the enforcement of rights.

Before you start

Every year, on 27 April, we celebrate Freedom Day to commemorate the first democratic elections held in South Africa on that day in 1994. Democracy has brought us many freedoms and rights that are set out and enshrined in the Constitution. Constitutional law deals with the way in which the government should use the powers given to it by the people, so that the people may enjoy the rights and freedoms that they celebrate on Freedom Day.

12.1 South African constitutional law

If you look at the South African nation, you will find there is a **government**, which is the ruling authority, as well as subjects, being the people over which the government rules. A nation comes into existence when a group of people takes control over a specific geographical territory and becomes responsible for running the nation internally (in the relationship between government and subject), as well as externally (in the relationship between government and other states). Constitutional law is that branch of public law that regulates how the government functions.

In this chapter, we use the terms 'state' and '**government**' as synonyms, that is, as words with the same meaning.

A government needs a fair degree of power in order to be able to govern effectively. However, power in the hands of the government needs to conform to certain guidelines. Otherwise chaos and the abuse of power is possible. The values, principles and human rights in the Constitution, as the supreme law, act as the foundations of our law and ensure that there is a proper relationship between a government and its subjects, as well as between the subjects themselves.

12.1.1 The way government functions

As explained, the Constitution regulates the protection of human rights as well as the way in which the government functions. On the subject of how government functions, it is enough, for the purposes of this chapter, for you to refer back to previous chapters where we looked in some detail at the different ways and areas in which government functions. In Chapter 3, we dealt with the most important areas of government regulated by the Constitution. We learned about the legislative functions in Chapter 4. In Chapter 6 dealing with case law, and Chapter 10, covering the court structures, we looked at judicial authority. In the next chapter on administrative law (Chapter 13), we will show you how the state organs, such as the ministers and state departments, should function in terms of public law.

Before we focus on human rights the question needs to be asked as to what the values and principles of the Constitution are? Because the values and principles entrenched in the Constitution are the guidelines according to which our Constitution, and therefore government, should function, we are going to take a closer look at them, bearing in mind that some of these have been focused on in Chapter 3.

12.1.2 Values of the Constitution

Values are the moral norms or accepted foundational normative standards that serve as the basis for the management of society which includes all the interests present in society. Section 1 of the Constitution states that South Africa is a **sovereign**, or independent, democratic state established on the following values:

- human **dignity**, the achievement of equality and the advancement of human rights and freedoms
- non-racialism and non-sexism
- supremacy of the Constitution and the rule of law
- universal adult suffrage, a national common voters' roll, regular elections and a multi-party system of democratic government, to ensure **accountability**, responsiveness and openness.

In this sense, **sovereign** means to possess supreme or ultimate power.

Dignity is an inbuilt right or privilege in all humans. It refers to a person's sense of his value or importance.

Accountability means that the government must be responsible to the people of South Africa for its actions.

12.1.3 Principles of the Constitution

As explained in Chapter 3, a constitutional principle is a norm or standard that helps the government to effectively maintain and protect the interests of all within society. Some examples of constitutional principles include:

- cooperative government
- **separation of powers**
- checks and balances
- rule of law
- democracy.

Although there are no specific references in the Constitution to the principles of **separation of powers** or to checks and balances, the Constitution indirectly implies the importance of these principles.

The principles listed above influence all branches of law. Let us look at the rule of law principle, as well as democracy in more detail.

Professor says — Values, principles and human rights

It may be confusing at times when reading certain clauses in the Constitution regarding the distinction between principles, values and human rights. For example, s 1 of the Constitution includes constitutional principles, such as the rule of law, as well as that of democracy, as a value. We also see that equality and human dignity, which are referred to in the said section and which are generally understood as specific human rights, are labelled as values. This goes to show that there may be some overlap with regard to what we understand principles, values and human rights to be.

Let us look at some of these important principles in more detail.

Rule of law

The term '**rule of law**' is often used by politicians and jurists around the world. When we talk about the rule of law we mean that the law is supreme and that the government must comply with, or obey, the law, just as its subjects ought to do. In addition, the rule of law implies that the law must be clear and that everyone must be treated equally, or in the same way, by the law – regardless of race, gender, sexual preference, religion and culture.

The **rule of law** is both a principle and a value.

The rule of law also implies the need for the state to be guided by fundamental rights, and therefore for the government to respect the individual's basic rights, especially the basic rights of human dignity, equality and life. The concept of the rule of law has both substantive and procedural aspects. The substantive aspect of the rule of law refers to its content, for example, the right to freedom of expression and what this right precisely entails. The procedural aspect refers to the way in which the protection of substantive rights is achieved. For example, the rule of law requires a fair procedure to be followed when a human rights issue is decided in court. The rule of law requires that the law must be impartially enforced, by independent courts, in accordance with fair procedures that exclude arbitrary action by the courts.

The Constitution has much in common with the rule of law doctrine. The values found in s 1 of the Constitution, as well as the various human rights included in the Bill of Rights (such as the right to equality and human dignity, as well as access to the courts and a fair trial), all form part of the rule of law doctrine. Also, the Constitution emphasises the importance of the judiciary (the courts) and its independence from other organs of government, which is fundamental to the rule of law. Here it needs to be emphasised that before 1994, the courts in South Africa, were not autonomous and independent from other branches of government. We can now see that the Constitution gives form to the rule of law doctrine in several ways.

Democracy

The word 'democracy' comes from the Greek words *demos* and *kratos*, meaning 'the people rule'. The principle of democracy is referred to in several places in the Constitution. Although there is no definition of democracy in the Constitution, it would seem that the Constitution recognises three kinds of democracy:

1. Representative democracy. Citizens vote for individuals or political parties to speak and act for them in government decisions.
2. Participatory democracy. Citizens help government to make decisions, not only by voting for their representatives, but also in other ways such as participation in the legislative process.
3. Direct democracy. Citizens take part directly in making public decisions without elected or appointed officials acting as their representatives.

Let's look at these different kinds of democratic systems of government more closely.

Representative democracy

In societies organised as representative democracies, citizens elect officials to make political decisions and laws as well as to run programmes for the public good. Different political parties in South Africa represent the various views of the country's population. We vote for the political party that best represents our view and rely on that party to represent our interests at local, provincial or national level. The government is accordingly run by professional politicians in a representative democracy.

Participatory democracy

Participatory democracies aim at establishing as many opportunities as possible for their citizens to help make the decisions that affect them. This means, for example, that when Parliament is **drafting laws** on a certain issue all those people who have an interest in the issue may comment on or criticise the proposed legislation.

Draft legislation is called a 'bill'. To draft something is to prepare a first version of something before making it final.

Since the advent of the new Constitution, there have been a number of legal and contentious matters that have resulted in public debate, and that therefore require the participation of interested parties or civil society regarding the drafting of the relevant legislation such as for example, the matter related to the legalisation of abortion. Also, in the spirit of participatory democracy, the rules of the Constitutional Court allow for a person who is not directly involved in a particular case to assist the court. This person is known as an *amicus curiae* or friend of the court. The *amicus curiae* is allowed to provide the court with his expert opinion on a certain issue. For example, in a case concerning the constitutionality of abortion, a representative from the various churches in South Africa could provide the court with potentially information or advice.

Direct democracy

In a direct democracy, all citizens can take part directly in making public decisions, without elected or appointed officials acting as their representatives. For example, in a referendum, the public votes for or against a particular issue, such as whether homosexual citizens should have the same legal rights to marry as heterosexual citizens. In any society, there are individuals or groups who do not or cannot make use of existing opportunities to participate in decision-making. Direct democracy is important for such people. All adult citizens can therefore be given the opportunity to vote on certain issues of major importance to the country.

Professor says — What may a referendum be held on?

There may not always be agreement on what types of matters a referendum may be held. In other words, some may be of the view that matters relating to the legalisation of marriages between persons of the same sex is a matter only for the legislature to decide upon whilst others may be of the view that it is for a given society by means of a referendum to decide on. The same challenges pertain to matters such as the legalisation of abortion or of prostitution, for example. What is your view on this?

Human rights in the Constitution

As you may know, the human rights provisions of the Constitution are in Chapter 2 of the Constitution, which is the Bill of Rights. As we explained in Chapter 3 of this textbook, all humans have basic universal human rights. These rights do not depend on your sex, nationanality, race, religion or culture. No government, institution or person may interfere with these rights, unless the rights can be limited in terms of the Constitution.

Professor says Does everyone understand human rights to mean the same thing?

When you are approached with a question such as "What is freedom?" or "When does human life begin?" you may come to the realisation that these are not always easy questions to answer or that the answers you may give may differ from those of your friend's. In other words, we are not always in agreement with one another regarding the meaning of freedom or of human life, for example. Our religious or cultural backgrounds, or even that which our parents, friends or school teachers may have taught us, may have influenced our perspectives on what freedom or life should actually mean. These differences of interpretation should be taken into acount when learning about human rights. We should accept the fact that we differ in many instances from those around us regarding our understanding of many of the human rights and that these differences should be accommodated within a country that prides itself on the accommodation of diversity, as long as such accommodation does not substantively violate the public order.

1. Discuss those human rights that may lend themselves to differences in meaning and give examples.
2. Discuss those human rights that do not lend themselves to major differences in meaning and contentiousness.

Human rights have been traditionally classified into the following three categories:

1. first generation rights
2. second generation rights
3. third generation rights.

Although this classification has been criticised for prioritising so-called 'civil and political' rights over social, economic and environmental rights, the classification does explain *when* certain rights started receiving prominent recognition. The categorisation used should certainly not imply that second and third generation rights are less important than first generation rights. As will be illustrated later in the chapter, modern South African society faces numerous challenges relating to poverty, with the result that the recognition and enforcement of socio-economic rights have assumed greater importance.

Civil and political rights

These were the so-called 'first generation rights', also known as individual rights. These are the oldest types of rights and were first recognised in about the 18th century. These rights include:

- the right to life
- the right to human dignity
- the right to freedom of speech, which is the freedom to say what you want about anything, as long it is not **hate speech**
- the right to freedom of religion
- political rights, which include the right to belong to any political party
- the right to freedom of association, which is the freedom to meet with and form groups with whoever you choose
- the right to freedom of assembly, which is the freedom to come together as a group
- the right to freedom of movement, or the freedom to go where you please.

Hate speech encourages hatred and harm towards a person or a group based on the person or group's race, ethnicity, gender or religion.

These rights apply to the individual. The government has to accept people making use of their civil rights and may not interfere with this. If these rights have been **harmed**, threatened or violated, it is expected that the government will become involved in order to protect them.

Civil rights are relatively easy to enforce. A court order can prevent the government from interfering with civil rights. The rights are absolute, meaning that they always need to be protected. The rights are also immediate. This means that if these rights are violated, protection must be provided as soon as possible.

Economic, social and cultural rights

These so-called 'second generation rights' became especially important after World War II, when the world's economy and **infrastructure** needed to be rebuilt after the destruction of the war.

Infrastructure refers to a country's man-made systems and structures such as schools, hospitals, factories and roads.

These rights include:

- the right to have access to housing
- the right to have access to health care
- the right to education
- labour rights.

There is now greater appreciation of the fact that civil and political rights are insufficient on their own. People in need, particularly in developing countries, require state assistance in respect of securing access to food, water, social security and the like. States often try to avoid linking legal entitlements to such matters because of the massive cost and resource implications. In South Africa, for example, over 17 million people are recipients of social assistance (state welfare) grants, particularly directed towards vulnerable children, persons with disability and older persons (people over the age of 60 years who are unable to support themselves). This places a tremendous burden on the economy and the national treasury has questioned whether such practices are sustainable. In countries such as India, which faces similar issues of poverty, unemployment and inequality to South Africa, socio-economic rights were deliberately not included as fundamental rights and were instead included in a chapter of the constitution entitled 'directive principles of state policy'. As a result, while the state in India is required to consider these directive principles when making policy and passing law, individuals are generally unable to approach a court in order to demand a particular entitlement. By contrast, socio-economic rights in South Africa are 'justiciable' meaning that they may form the subject matter of court action. It is arguable that this approach has made a meaningful difference to the lives of many people in the country, given that the state is legally required to take reasonable measures, within its available resources, to achieve the progressive realisation of these rights. A number of landmark judgments giving direct effect to socio-economic rights are now considered globally to be a positive reflection of South Africa's human rights culture.

Environmental rights

These so-called third generation rights came into existence in the 1980s, as pollution and wars highlighted the need to protect:

- the right to a clean environment
- the right to peace (not to make war).

These rights require positive action from a government. But a government may also need help and cooperation from the governments of other countries to put these rights into practice. For example, governments need to work together to limit the harmful effects of pollution on the ozone layer. These rights are difficult to enforce, but are increasingly important given the crucial need for sustainable development, which incorporates the idea of balancing economic development with socio-economic upliftment and environmental considerations. While it may be impossible to imagine that a local court

order could successfully prevent another country from polluting the environment or a country from going to war with another country for no reason whatsoever. However, this does not imply that we should ignore these rights.

Activity 12.1

1. Consider each of the rights in the Bill of Rights and see if you can clearly ascertain which rights are civil, political, economic, social, cultural and environmental. Do you think that any of the rights (or category of rights) are more important than the rest?
2. Perform an internet search for the most recent South African budget speech by the Minister of Finance. Consider the allocation of funding in the country and observe whether there is a correlation between this and the rights contained in the Bill of Rights.

Now that we have looked at the different categories of rights, we are going to see how these rights are given life and put into practice. Remember, the symbol or logo of the Constitutional Court is a tree with overarching branches to protect the people. In the following section, we will look at how the Constitution protects the fundamental rights of the people of South Africa.

Who can use the Bill of Rights?

In developing countries, such as South Africa and India, many people do not have easy access to justice to enforce their rights because of their poor circumstances. Before South Africa's interim and final constitutions came into operation, a person was only able to take a matter to court if she had been personally affected by the matter. In India, this sort of principle meant that the Indian courts were used only by those people wealthy enough to afford legal fees. The Supreme Court in India now allows any member of the public to approach the court to enforce the rights of another person (or class of person) – if that other person or class is not able to approach the court personally because of the poor situation he or they are in. South Africa has followed this approach. The right of a person to have his case heard by a court is referred to as the person's standing.

Anyone listed in s 38 of the Constitution has the right to approach a **competent** court to allege that a right in the Bill of Rights has been infringed or threatened. The persons who may approach the court are

A **competent** court is one that has the legal power to deal with the matter before it.

- anyone acting in her own interest
- anyone acting on behalf of another person who cannot act in his own name
- anyone acting as a member of, or in the interest of, a group or class of persons
- anyone acting in the public interest
- an association acting in the interest of its members.

We will now deal with each of these categories.

12.3.1 Anyone acting in her own interest

This first-named category of person who may approach a court here is similar to the category of person who could approach a court before 1994. However, the 'interest' mentioned in this category does not need to link with the constitutional right of the person who wishes to approach the court for **relief** but may relate to the constitutional right of some other person or persons. For example, a municipality may take steps to benefit previously disadvantaged communities by asserting these people's rights to real equality. The municipality acts in its own interest, but on the basis of the constitutional rights of the community it serves. The following case study illustrates this point.

When you ask a court for **relief**, you are asking for assistance or help.

Case study Legal standing to approach court on the Bill of Rights

The case of *Port Elizabeth Municipality v Prut NO and Another* (1996) 4) SA 318 (E) illustrates the situation of a party whose standing to approach the court is recognised on the basis of the party's own interest in the matter and because it is acting in the public interest.

For several reasons, the Port Elizabeth Municipality (the appellant) had decided to write off R63 million in outstanding service charges owed by residents of those areas formerly administered by black local authorities. The respondents were administrators of a trust that was the owner of certain property in the area run by the municipality. The trust owed the municipality R9 158 in respect of arrear rates. The municipality launched an application for an order declaring that its action in initiating proceedings against the respondents (who were white ratepayers) did not constitute unfair discrimination, even though it had written off the debts of certain black ratepayers.

The court held that it was clear that the appellant was concerned not only with the pending action against the respondents, but was anxious to obtain a declaration of rights that would have wider effect. The court also held that it would exercise its power to hear a case where a decision would be in the public interest and where it might put an end to similar disputes. In other words, the municipality had an interest in obtaining an order as to whether its conduct infringed the rights of the ratepayers.

12.3.2 Anyone acting for someone who cannot act in his own name

Another category of person who has standing to bring a matter to court is anyone acting on behalf of another person who cannot act in his own name. Why would people not be able to act in their own name? Often, applicants are too scared to challenge a wrong that has been Id for fear of what will happen to them. People also often live hundreds of kilometres away from the relevant court and are unable to afford the cost of the trips to court. These scenarios fall within this part of s 38 – another person is then allowed to bring such challenges to court on the fearful or poor person's behalf.

12.3.3 Anyone acting as a member of, or in the interest of, a group or class of persons

Anyone seeking to claim or assert a right in the Bill of Rights may go to court as a member of, or in the interest of, a group or class of persons. This type of court case is known as a class action. The most important feature of a class action is that other members of the class, although not specifically mentioned in the case, benefit from the result of the case. They also have to follow the court's decision, unless they have followed specific procedures to exclude themselves from the case's application. You will have a better understanding of what a class action is when you have looked at the following case study.

Case study Class action

In *Permanent Secretary, Department of Welfare, Eastern Cape and Another v Ngxuza and Others* 2001 (4) SA 1184 (SCA), tens of thousands of people who used to receive a disability grant lost their grant without any notice from the Eastern Cape provincial authorities. Some of these people approached the court on behalf of the entire class of persons concerned. There were questions of law and fact common to the entire class and the claims of the people before the court were found to be typical of the rest of the people in the class. The court held that this case was tailor-made, or very suitable, for a class action because the class that was represented by the few people before court:

- was from the poorest in society
- had the least chance of accessing its legal rights

Case study (continued) Class action

- only had small individual claims, common in nature, but which may not be worth fighting in court by themselves
- were scattered throughout the province, many in small towns and remote rural areas
- were victims of official excess and unlawful administrative methods.

In the more recent decision of *Children's Resource Centre Trust and Others v Pioneer Food and Others* (2012) ZASCA 182, a number of NGOs (non-governmental organisations) and individual consumers attempted to certify a class action against three of the major bread producers in the country. The Supreme Court of Appeal held that class actions should be recognised, laying down the following requirements for such an action:

- The court must certify the class action before summons is issued.
- There must be an objectively identifiable class.
- There should be a claim raising an issue that could be tried by a court.
- There should be appropriate procedures for distributing the damages that a court may award to the members of the class.
- Representatives must be suitable to conduct litigation on behalf of the class.

12.3.4 Anyone acting in the public interest

Imagine that Shan has evidence that Dante Corporation is manufacturing a chemical that is going to damage the ozone layer very badly. One of the rights contained in the Bill of Rights is the right to a healthy environment. Shan wants to bring a case to court to stop the manufacturing of the chemical on behalf of everyone. When can he do so?

The provision that allows Shan to act in the public interest (s 38*(d)*) is the broadest of the categories mentioned in s 38. The following factors will be considered when deciding if Shan enjoys standing on behalf of the general public:

- whether there is another reasonable and effective way in which the challenge can be brought
- the nature of the relief being requested – in this case, a court order preventing Dante Corporation from manufacturing the harmful chemicals
- the extent to which the relief being requested is of general application
- the range of people or groups who may be directly or indirectly affected by any order that the court may make – in this case, it is everyone
- the opportunity that these people or groups have had to present evidence and argument to the court.

The public need to have a sufficient interest in the remedy that is being requested for Shan to claim he has standing in the public interest. This means that Shan may need to produce evidence to explain the seriousness of the effect of the chemicals on the ozone layer, and the likely consequences of damage to the ozone layer, to explain why he wants the manufacture of the chemical to stop. If the chemical really is life-threatening, the public would clearly have a sufficient interest in getting its manufacture stopped.

Professor says When will the public have sufficient interest?

Showing 'sufficient interest' only gets Shan into court on behalf of the public in general – whether or not the court will force Dante Corporation to stop manufacturing the chemical will depend on a number of other things, including what the right to a healthy environment actually means and whether the court finds that there is a duty on Dante Corporation not to pollute the environment in this way. Meeting one of the s 38 categories means only that the court will hear and consider a matter concerning a violation of a right contained in the Bill of Rights – it is no guarantee of success.

12.3.5 Associations acting in the interest of their members

Just as Shan would have needed to show a court that the public had a sufficient interest in the remedy that he was requesting, any association trying to act on behalf of its members would also need to show a close link between what they are asking for (the requested remedy) and the circumstances faced by the members of the association (the requirement of sufficient interest). Associations do not have to be formalised companies or juristic persons to have standing – even a voluntary group of vulnerable people who have formed a group to tackle some injustice will meet the requirements of this sub-section and should be heard.

Activity 12.2

Considering the various groups and individuals that may approach a court alleging a violation of a right contained in the Bill of Rights, think about a current event in the country that might lend itself to a class action, and how this may play out in reality. For example, is it possible that a class action of students, or persons acting on their behalf, could challenge the government in court alleging a violation of the right to education (as a result of the present arrangements in relation to fee payment for tertiary studies)? Discuss and debate your view on such an issue with a classmate.

12.4 Introducing some important rights

Although all the rights in the Bill of Rights are important, we are going to focus on just some of them in this chapter. Rights in the Bill of Rights often relate to each other and a challenge based on the Constitution frequently relies on more than one particular right. Here we are going to look at when and how some important rights find application in practice – in the order that they appear in the Constitution.

12.4.1 Right to equality

One of the aims of the Constitution is to lay the foundations for a democratic and open society in which every citizen is equally protected by law. Under the Constitution, the new South Africa is founded on a number of values – one of these is the achievement of equality. Section 9 of the Constitution confirms that everyone is equal before the law and has the right to equal protection and benefit of the law.

Real equality

What does the right to equality really mean? For example, would the President of the country, violate the right to equality by acting in terms of his constitutional powers to pardon only 'mothers in prison with minor children under the age of 12'? This is precisely the situation that came before the Constitutional Court in *President of the Republic of South Africa and Another v Hugo* (1997) ZACC 4 (discussed below in further detail), after President Mandela decided, as an act of mercy, to pardon this particular group. A single *father* of a child under 12 at the time challenged the constitutionality of the pardon, arguing that this amounted to unfair discrimination against him and his son on the grounds of sex or gender. The Constitutional Court confirmed that the President had not acted unfairly in deciding to benefit particularly vulnerable groups in society – persons with disability also enjoyed the pardon. Such groups had previously (under apartheid in particular) been victims of discrimination.

In other words, some laws are allowed to favour certain groups of people because history has treated them so badly in the past that they need some assistance to enjoy the same opportunities as people who, as a group in general, have not been treated poorly. The equality provision does not stop the state from treating some people differently to others. Although people in the same position should be treated equally, it would not make sense for everyone to be treated exactly the same, no matter what the circumstances.

The concept of equality implies the full and equal enjoyment of all rights and freedoms. This is not possible if groups of people who have been disadvantaged in the past are not put in a position to enjoy

these rights and freedoms. Laws and policies are therefore designed to protect or advance certain persons who have been disadvantaged by unfair discrimination. This is frequently known as 'affirmative action'.

An example of a law that aims to advance certain previously disadvantaged people is the Broad-Based Black Economic Empowerment Act 53 of 2003 (BBBEE Act). The Act is meant to promote true equality rather than simply to equalise everything in a technical sense. In other words, even though the BBBEE Act defines 'broad-based black economic empowerment' in such a way as to benefit only **black people**, the preamble of the BBBEE Act states that the Act is trying to promote the achievement of the constitutional right to equality.

The term '**black people**' includes all African, Indian and coloured people.

Another example is the Employment Equity Act 55 of 1998, which tries to address past discrimination in employment by favouring certain groups of people (disabled people, women and black people), in order to promote the constitutional right of equality. In *Minister of Finance v Van Heerden* (2004) ZACC 3, the Constitutional Court established a three-pronged test to determine whether an affirmative or restitutionary measure was acceptable. It indicated that the question is whether the measure:

- targets persons or categories of persons who have been disadvantaged by unfair discrimination
- is designed to protect or advance such persons or categories of persons
- promotes the achievement of equality.

There is an important difference between formally treating everyone the same way, and real equality. Our law tries to achieve real equality, by taking steps to address past problems, even if this favours one group over another. Real equality is sometimes referred to as 'substantive' equality. With substantive, rather than formal, equality as a goal, laws that treat people differently can be allowed as long as they are linked to a proper government purpose (such as the employment of more disabled people). The relationship between the law that is passed and the purpose it is trying to achieve must be rational. Treating people differently may well amount to discrimination in the sense that one group is not getting the same benefits as another, but there is nothing wrong with this in terms of the law. The right to equality states that it is only 'unfair' discrimination that is not allowed.

Grounds of unfair discrimination

So, when will treating people differently amount to discrimination and when will this discrimination be unfair? The Constitution says that the state may not unfairly discriminate against anyone for any reason. Common reasons that amount to unfair discrimination are listed in the Constitution and include a person's race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. These reasons are known as the listed grounds of discrimination. There are also other, unlisted grounds of unfair discrimination.

Different treatment on one of more of these listed grounds is considered to be discrimination and will be presumed to be unfair unless it is shown that the discrimination is fair. Treating people differently on a ground not listed in this sub-section (such as on the basis of their citizenship) will not automatically be considered to be discrimination and will not be presumed to be unfair. But, if the reason for the different treatment is based on a quality that could affect a person's dignity as a human being (even though that reason is not a listed ground), the court will consider this to be discrimination. Unfairness would still need to be established by the person claiming unfair discrimination.

The case study below illustrates how a claim of unfair discrimination may be dealt with.

Case study — Treating foreigners differently

In the case *of Larbi-Odam v MEC for Education (North-West Province)* 1998 (1) SA 745 (CC), a rule had been passed preventing all non-citizens of South Africa from being appointed into permanent teaching posts. The court held that the rule differentiated between citizens and non-citizens to the disadvantage of non-citizens. Although there may have been a rational reason for this, the court had to decide whether this differentiation amounted to discrimination, since the

Case study (continued) Treating foreigners differently

ground of citizenship is unlisted. The court held that foreign citizens were a minority in all countries and had little political muscle. Citizenship also involved personal characteristics that are difficult to change and, in this case, incidents of threats and intimidation had taken place concerning the appointment of foreign teachers that showed how insecure non-citizens generally were in society. The court found that basing decisions to appoint teachers on the ground of citizenship focused on qualities that had the potential to hurt the fundamental human dignity of persons. Therefore, it amounted to discrimination against non-citizens.

To decide whether the discrimination in this case was unfair, the court looked, among other things, at the impact the discrimination had on the people affected and on the nature of this group. Non-citizens were a vulnerable group and a person's profession was an important part of her life. The court held that it did not make sense to allow people to stay permanently in the country, and then to exclude them from a job they were qualified to perform. The discrimination was therefore unfair.

Applying the equality clause

The Constitutional Court has set out a test for deciding whether the equality clause of the Constitution has been contravened. The test was first set out in the case of *Harksen v Lane* NO 1998 (1) SA 300 (CC) and so it is often referred to as the *Harksen v Lane* test. The test is applied in four steps.

1. Is there different treatment of people in the law or in the conduct that is being challenged? If not, there is no discrimination and therefore no inequality.
2. If there is different treatment of people, is there a rational link between this different treatment and a proper government purpose? If there is no rational link, then the right to equality has been broken by the law, or by the conduct in question, and the person or group of people will be entitled to some relief.
3. Even if there is a rational link between the different treatment and a proper government purpose, this might still qualify as discrimination. The way in which the enquiry proceeds from here depends on whether the different treatment is on a listed or unlisted ground. If the different treatment is on a listed ground, discrimination is accepted and the only remaining question is whether or not the discrimination is unfair. If the discrimination is on a listed ground, unfairness is presumed, but the discrimination could still be shown to be fair – for example, certain affirmative action laws could be shown to be fair. If the discrimination is found to be unfair, a decision will have to be made as to whether or not the **unfair discrimination** is reasonable and allowed in terms of the **limitations clause**, which will be explained in detail below.
4. Where the different treatment is on an unlisted ground, it will only amount to discrimination if the ground contains qualities that have the potential to damage a person's dignity. Because the ground is unlisted, there is no presumption that the discrimination is unfair. The applicant will therefore have to show that the effect of the discrimination on people like her is unfair. As with a listed ground, if the discrimination is proved to be unfair, a decision will have to be made as to whether or not the unfair discrimination is allowed in terms of the limitations clause.

There is some academic debate as to whether a court could ever find that **unfair discrimination** was reasonable under the limitations clause.

The **limitations clause** in the Constitution states that all rights in the Bill of Rights may be restricted in certain circumstances.

Case study 'Get out of jail free' or a presidential pardon?

As indicated above, on 27 June 1994, President Nelson Mandela granted a special reduction of sentence to certain categories of prisoners, including 'all mothers in prison on 10 May 1994 with minor children under the age of 12 years'. This reduction was set out in a law made by the president, known as the Presidential Act No. 17.

Case study (continued) 'Get out of jail free' or a presidential pardon?

In the case of *President of the Republic of South Africa and Another v Hugo [1997] ZACC 4,* a prisoner who was the father of a child under 12 years challenged the Presidential Act on the basis that it unfairly discriminated against him on the basis of his gender – had he been the mother of the child and not the father, he would have been released from prison.

The court confirmed that the Presidential Act discriminated on the basis of sex (a listed ground) and on the basis of 'parenthood of children below the age of 12' (an unlisted ground). Because one of the grounds was listed, this discrimination was presumed to be unfair and the **onus** was on the president to prove the opposite. In his affidavit, the president argued that the discrimination was fair. In exercising his power, he had carefully considered the likely results of the pardon and the interests of the public. The president felt that he could not release all fathers of children under 12 who were in prison, as well as all mothers, as this would have meant that a very large number of male prisoners would have gained their release.

The court found that although the Presidential Act did constitute a disadvantage to male prisoners who were fathers of young children, it did not restrict or limit their rights or obligations as fathers in any permanent way. The Act only deprived them of an early release – something that they did not have a right to. The court held that the pardon was for a group of people (women) to give them an advantage, as an act of mercy at a time of great historical significance. The impact of the Presidential Act, therefore, although discriminating between men and women, was not unfair discrimination in all the circumstances and the Presidential Act was therefore declared to be in line with the provisions of the Constitution.

The Equality Act

Section 9(4) of the Constitution states that no person may unfairly discriminate against anyone and that national law should be passed to prevent or prohibit unfair discrimination. This sub-section is concerned with behaviour, not of the state, but of other persons, that has the effect of unfairly discriminating against other people. The national law that was passed in this regard is the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, also known as the Equality Act.

The party that has the **onus** in a court case is the one that has the responsibility to prove something.

The Equality Act aims to give more detail to the equality provision in the Constitution and provides for measures to rid the country of unfair discrimination, particularly on the grounds of race, gender and disability. It also provides remedies for victims of unfair discrimination and for persons whose right to equality has been infringed. Equality courts have been created in terms of the Equality Act to deal with complaints based on the Act's provisions. Grounds of discrimination listed in the Equality Act are similar to those listed in the Constitution.

Without taking away from the general nature of the Equality Act, a schedule to the Act provides some specific examples of widespread practices that may be unfair and that need to be tackled.

The following examples of unfair discrimination in education are listed in the schedule:

- unfairly excluding learners from educational institutions, including learners with special needs,
- unfairly withholding scholarships, bursaries, or any other form of assistance from learners of particular groups identified by the prohibited grounds, and
- the failure to reasonably and practicably accommodate diversity in education.

Case study Wearing a nose stud in school

Mrs Pillay's daughter returned from a school holiday, having had her nose pierced and wearing a nose stud. The school's code of conduct provided that earrings could be worn with one 'in each ear lobe at the same level' and that no other jewellery was allowed except for a watch. One of

Case study (continued) Wearing a nose stud in school

the reasons that Mrs Pillay gave for allowing her daughter to wear the nose stud was that this was in line with a tradition that women in their family (of South Indian origin) had followed for many years. In terms of this tradition, a young woman would have her nose pierced as a sign of her coming of age and to indicate that she was now eligible for marriage. Although this reasoning no longer applied, Mrs Pillay explained that the tradition was still followed to honour daughters as responsible young adults and to symbolise the relationship between a family's daughters and the Hindu goddess of prosperity, Lakshmi. The daughter was not wearing the nose stud to conform with fashion or to follow a trend.

The school took a decision that Mrs Pillay's daughter should not be allowed to wear the nose stud. Mrs Pillay challenged this decision in the Durban equality court, which held that the school's actions did not discriminate unfairly against Mrs Pillay's daughter. When the case was taken to the Natal Provincial Division of the High Court on appeal, in *Pillay v KwaZulu-Natal MEC of Education and Others (2006)* 10 BCLR 1237 (N), the court held that the equality court had failed to consider whether the school's code of conduct was in line with the Constitution and with the Equality Act. The appeal court found that the cultural and religious rights of Mrs Pillay's daughter had been disregarded in a way that amounted to discrimination in terms of the Equality Act.

The court allowed the appeal to succeed and overruled the school's decision to prohibit the wearing of a nose stud in school by Hindu/Indian learners.

This decision was taken on appeal (by the school and the department of education) to the Constitutional Court.

In October 2007, the Constitutional Court dismissed the appeal. It held that the school had interfered with Pillay's religion and culture, since the wearing of a nose stud was a voluntary practice that formed part of her South Indian Tamil Hindu culture, which could not be separated from the Hindu religion. The court held that the rule prohibiting the wearing of jewellery had the potential for indirect discrimination since other learners were not subjected to similar cultural or religious restrictions. The majority also decided that there was no evidence to support the argument that this exemption to school rules would impede school discipline. The school's discrimination was unfair and Pillay should have been granted an exemption from the Uniform Code. The court ordered the school to amend the Code in consultation with learners, parents and staff, so as to provide for a procedure to reasonably accommodate religious and cultural practices.

12.4.2 Right to human dignity

Section 10 of the Constitution states that everyone has inherent dignity and has the right to have their dignity respected and protected. Dignity is a difficult concept to pinpoint in South African human rights law. We discuss it here both as a value and as a right.

Dignity as a value

As with the concept of equality, human dignity is a founding value of the new South Africa and is at the core of our constitutional democracy. Section 39 of the Constitution states that when interpreting the Bill of Rights, a court must promote the values that underlie an open and democratic society based on human dignity, equality and freedom.

A number of rights contained in the Bill of Rights, including equality, freedom and security of the person, the right not to be subjected to slavery or forced labour, privacy, religion, culture and language, come from the concept of dignity. Wherever possible, these other rights will be interpreted first, with dignity (as a value) playing a central role in this interpretation. Even when rights are limited in terms of the limitations clause, dignity plays an important role. Because many other rights come from the right to dignity, dignity is not often enforced as a right on its own in court proceedings.

Dignity as a right

In addition to being a value that assists us in deciding and interpreting various constitutional problems, dignity is also a right that can be directly enforced and which must be respected and protected on its own. The case of *Dawood and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) is an example where it was not possible to find a more specific right to protect the people requesting the court's assistance.

Case study Dawood's case and the right to human dignity

In this case, Mr and Mrs Dawood were married according to Islamic law. Although Mr Dawood was a South African citizen, his wife was a Thai national. She was granted a temporary residence permit while waiting for application forms for an immigration permit. These forms required the submission of a police clearance certificate from Thailand, which took some time to obtain. Meanwhile, a new law had been introduced requiring the payment of a fee of R7 750 for submission of a complete application for an immigration permit after 30 June 1998. The Dawoods asked the court for an order declaring the law that imposed the fee to be inconsistent with the Constitution.

The court found that there wasn't a specific right that protected people who wanted to enter into and keep permanent intimate relationships alive than the right to dignity in s 10. There was no specific provision protecting family life in our Constitution, as there was in some other constitutions and in many international human rights instruments. The primary right involved in this case was the right to dignity. The court held that the decision to enter into a marriage relationship and to maintain such a relationship was very important to most people and that to prevent such a relationship, by imposing high fees, stopped people from enjoying a life of personal fulfilment. A central aspect of marriage was the right and duty to live together and any law that made it difficult for spouses to honour that obligation amounted to a limitation of the right to dignity.

12.4.3 Right to life

Section 11 of the Constitution states that everyone has the right to life. This is the most basic, yet important, of all human rights recognised by the Constitution. And yet, the majority of the public in South Africa has always favoured keeping the **death penalty** – probably because of South Africa's high crime rates. In one of its earliest decisions, the Constitutional Court had to decide whether the death penalty was consistent with the right to life. Read the following case study to learn what the court decided.

The **death penalty** is the legal punishment of death. In countries where the death penalty is allowed, the state may put a person to death as a punishment for his misconduct.

Case study Right to life

In the case of *S v Makwanyane* 1995 (3) SA 391 (CC), two accused people had been convicted of murder and sentenced to death. They challenged the death penalty as being against the provisions of the Constitution. Most of our understanding of the right to life comes from the court's judgment in this case.

Before coming to its decision, the court was referred to a number of books, articles and judgments of courts of foreign and international tribunals. The court considered these to be important in assisting it to come to a decision. It found that there was an element of chance at every stage of the criminal process: the investigation of the crime by the police, the way in which the case was presented by the prosecution, the effectiveness of the defence, the personality and attitude of the trial judge, as well as of those judges selected for the appeal could all affect the outcome of a case. The court referred to the difficulties experienced in the United States in

Case study (continued) Right to life

designing a system that could avoid random decisions and delays in the process of imposing the death penalty. These were good reasons for not allowing the death penalty to remain.

The court considered it to be important that the right to life in South Africa was not qualified at all in the section of the Constitution that simply gave everyone the right to life. This was a major difference between South Africa and countries that had kept the death penalty. The court was also influenced by the fact that even in those countries that still applied the death penalty, the death sentence was sometimes not carried out because it would have been cruel to do so in certain circumstances. This showed the court how important the value of life really was. The court found that public opinion was not the main factor to consider and that the real question was whether the Constitution allowed the death sentence. Clearly, the death sentence destroyed life and human dignity. The court concluded that, in the context of our Constitution, the death penalty was a cruel punishment and unfit for human beings. Very important to this finding was that the state had not been able to prove that the death sentence was much more effective in stopping people from committing terrible crimes than the other available option of life imprisonment.

Limiting the right to life

Although s 11 of the Constitution gives everyone the right to life and does not qualify this right in any way, all rights in the Bill of Rights can be limited in terms of the general limitations clause, which we will deal with below. Because this is such an important right, the court will not easily accept an excuse for a violation of the right to life. A possible reason for properly limiting a person's right to life would be where a person takes the life of another in self-defence.

The right to a life worth living

What use is the right to life if millions of people live in such poverty that their daily lives are filled with nothing but misery? There is an argument in favour of interpreting the right to life broadly, so that people can use the right to life to press for those things that would allow them to live a decent life as all human beings should do. The practical problem with this argument is that the poorest people are unable to provide properly for themselves and need the state's help to achieve a life worth living. The state has limited funding available to meet this need.

12.4.4 Freedom of religion

Both the Constitution and the national anthem of South Africa refer explicitly to God. The Preamble to the Constitution ends with the words 'May God protect our people … God bless South Africa'. The national anthem of South Africa includes the following words (translated from isiXhosa, isiZulu and Sesotho): 'God bless Africa … Hear our prayers, God bless us, us the family, God save our nation …'.

Although almost 80 per cent of South Africa's population follow the Christian faith, there are a number of other religions that are practised in South Africa. There are also a number of people who do not believe in God at all.

Section 15 of the Constitution states that everyone has the right to freedom of conscience, religion, thought, belief and opinion. This is one of the characteristics of a free society and is directly linked to a person's dignity.

What does freedom of religion mean?

Richard is a **Buddhist** who has just moved to South Africa. Richard has not met any other Buddhists yet and is worried about whether he has any rights related to his religious beliefs. What is his position in South Africa?

Buddhists believe that earthly desires should be eliminated and that the inner self should be awakened.

Freedom of religion is the right to follow whatever religious beliefs or system a person chooses to follow. Richard therefore has the right to be a Buddhist and to follow the

teachings of Buddhism, if he chooses to do so. More than this, Richard enjoys the right to tell others openly of his support for Buddhism and his belief in a Buddhist way of life, without any risk of a backlash. In addition, Richard may also display his religious belief by praying and doing other things that Buddhists believe in doing. Finally, Richard will even be allowed to teach other people about Buddhism and give them pamphlets and other documentation should they be interested in learning more about the religion.

Because the words 'conscience', 'religion', 'thought', 'belief' and 'opinion' have been used in the Constitution, Richard does not need to worry about whether Buddhism is considered to be a religion or belief system, for example. The protection given by the section is wide and should cover non-religious believers, such as **atheists** and **agnostics**.

Atheism is the belief that God does not exist. An **agnostic** believes that people cannot know whether God exists or not.

Reading s 15 together with the equality clause, the state must ensure that it treats all religions equally and that it does not discriminate in favour of (or against) any particular religious group. Freedom of religion also implies that the state may not force anyone to do something against their religious beliefs.

A community right

Religious practice often involves people who believe in the same things coming together to worship. Section 31 of the Constitution states that persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community, to enjoy their culture, practise their religion and use their language.

However, these rights may not be used in a way that goes against any other provision in the Bill of Rights. This ensures that practices that offend the Bill of Rights will not be protected by the fact that people enjoy a community right. For example, the ancient Indian custom that widows whose husbands die before them should burn themselves to death on their husband's funeral pyre will not be protected or endorsed.

The court used both s 15 and s 31 in coming to its decision in the case of *Christian Education South Africa v Minister of Education* (2000) 4 SA 757 (CC); (2000) 10 BCLR 1051 (CC). Read about this case in the following case study.

Corporal punishment is punishment that involves hitting someone.

Case study 'Six of the best' not allowed in school

The South African Schools Act 84 of 1996 does not allow **corporal punishment** in schools. The court was asked to answer the question whether the Act contravened the rights of parents at independent schools who agreed that teachers could use this punishment. The Christian parents believed that corporal punishment was a key part of their Christian belief system and that the ban on children being beaten infringed their rights as individuals, parents and a community, to practise their religion freely.

The minister of education argued that administering corporal punishment breached the constitutional rights of children who were the victims of this punishment, since it involved subjecting children to violence and a punishment that humiliated them.

The court decided that the case involved a number of constitutional rights and values. Some of these rights and values overlapped while some competed with other rights and values. The court assumed that both ss 15 and 31 were in issue and also assumed that the corporal punishment practised by schools involved did not go against any provision of the Bill of Rights. Because of this, the court found that the Schools Act was a limitation of the parents' religious rights under both ss 31 and 15.

The court then applied the limitations test in terms of s 36 of the Constitution to see whether or not the impact of not allowing corporal punishment in schools on the religious beliefs and practices of the parents could be permitted. The court concluded that although the parents

Case study (continued) 'Six of the best' not allowed in school

concerned were no longer entitled to give teachers the power to apply the parents' beliefs by implementing corporal punishment, this did not take away parents' rights and powers to bring up their children according to Christian beliefs at home. The effect of the Schools Act was only to prevent parents from giving schools the power to beat their children on their behalf, which was not allowed. The court also looked at what was in the best interests of children and tried to balance this with parents' rights. Except for this one exception to the parents' beliefs, nothing stopped the parents from keeping to their Christian way of life.

Activity 12.3

1. Access the Southern African Legal Information Institute online (www.saflii.org) and search for the decision of *Organisasie vir Godsdienste-Onderrig en Demokrasie v Laerskool Randhard and Others* [2017] ZAGPJHC 160. Read the judgment of the court. You will note that it was declared offensive for a public school to promote or allow its staff to promote that public schools adhere to only one or predominantly only one religion to the exclusion of others; and to hold out that it promotes the interests of any one religion in favour of others.
2. Debate with classmates regarding whether the position should be the same in private schools.

12.4.5 Right to have access to social assistance

Socio-economic rights have already been introduced to you earlier in this chapter in the discussion on second generational rights on page 251. One of these rights is the right to have access to social assistance for people who are not able to support themselves and for the people who depend upon them for financial support. This right is contained in s 27 of the Constitution.

What is social assistance?

The term 'social assistance' refers to a group of various grants that are provided by the state for people in need. The grants include:

- a child support grant, which is paid to a person who takes the main responsibility for looking after the daily needs of a child who is under 18 years of age
- a disability grant, which is paid to a person who is not fit to work for her livelihood because of a physical or mental problem
- an older person's grant, which is paid to a person who has reached the age of 60 years.

When is a person entitled to get a grant?

The person must be resident in South Africa and must generally be a South African citizen or permanent resident. The proper application form must be completed and the person must meet the definitions referred to above. For example, in the case of a person who looks after a child and is trying to access a child support grant, that person should be over the age of 16. The minister of social development is also allowed to impose extra conditions, such as:

- the amount of money that a person is allowed to earn while still being entitled to the state's financial assistance
- the types of medical problems that will allow a person to obtain a disability grant
- age limits – for example, there is no plan in place to provide any grant for a youth of 18 years of age or older who is unable to find a job
- the proof that is required to show a person's identity, gender, age, citizenship or disabilities.

Over 17 million persons in South Africa are presently accessing some form of social assistance grant.

What is the state's duty?

The state does not have enough money to provide people with all the socio-economic rights they may need. For this reason, for example, not everyone has a house and not everyone who is unable to support their family enjoys social assistance through one of the grants mentioned above. A key question in this area of law is when the government contravenes a person's right to social assistance because of a lack of money.

The state must take reasonable steps, within its available resources, towards giving people social assistance. The Social Assistance Act 13 of 2004 (which provides for the different types of grants and requirements mentioned above) and the agency created in terms of the South African Social Security Agency Act 9 of 2004 (which is responsible for administering the actual payment of social assistance) are examples of the state taking reasonable steps to help people by passing laws.

There are some interesting questions that remain in our law regarding the state's duty.

A problem that has already been addressed by the Constitutional Court explains the rights to social assistance of non-citizens who are permanently resident in South Africa. Read the following case study and answer the questions.

Case study The right of non-citizens to social assistance

In the case *of Khosa and Others v Minister of Social Development and Others* 2004 (6) SA 505 (CC), the applicants (Khosa and Others) were Mozambican citizens who had acquired permanent residence status in South Africa. They were poor and would have qualified for social assistance under the Social Assistance Act except for the fact that they were not South African citizens.

The applicants argued, among other things, that the exclusion of all non-citizens from the Act was not in line with the state's duty in terms of s 27 of the Constitution (the right to social assistance) and that it infringed their rights to equality and dignity. The state argued that it had a duty towards its own citizens first (since resources were limited) and that keeping welfare grants for citizens would only encourage non-citizens to become South African citizens.

The majority of the court found that the rights in question could not be interpreted as referring only to citizens. The court explained that the rights of equality and social assistance were linked in this case. Although the state was allowed not to pay grants to 'everyone' because of the cost of doing so, the reasons that the state used to limit the payment of grants had to be in line with the Bill of Rights as a whole. In this case, the state had chosen to use citizenship as a reason for treating people differently.

The court could not find any support for the state's argument that there would be an unreasonable cost to making social assistance available to permanent residents. It also applied the *Harksen v Lane* test (citizenship being an unlisted ground) to the matter. In this regard, the court stated that it was unfair for permanent residents to contribute in the same way as citizens to the welfare system by paying taxes and then not be allowed to reap the benefits of the system. This created an impression that permanent residents were less worthy as people than citizens were. For these reasons, excluding non-citizens who were permanent residents of South Africa from receiving social assistance (which they would otherwise be qualified to receive) was unconstitutional.

1. Write a two-page document arguing why the right to life should include the right to a livelihood/the right to work in South Africa.
2. As part of this exercise, try to do some research (try 'google scholar', for example) to see if you can find any material on this topic.

12.5 Limitation of rights

It is not practical for rights in the Bill of Rights to be absolute. All rights may be restricted or limited in terms of **s 36 of the Constitution**:

Section 36 of the Constitution is known as the limitations clause.

> "in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including:
> (a) the nature of the right
> (b) the importance of the purpose of the limitation
> (c) the nature and extent of the limitation
> (d) the relation between the limitation and its purpose
> (e) less restrictive means to achieve the purpose".

Some rights, such as the right to have access to social assistance, contain what is known as an 'internal limitation' because the right is restricted in its own section. When it comes to this right, the state only needs to take 'reasonable' steps within its 'available resources' to achieve the right. The right is therefore not absolute and a number of people still do not enjoy this right even though it is meant to be for 'everyone'.

Here we will discuss what is known as the 'general limitations clause' – the section of the Constitution that can limit all rights in the Bill of Rights in certain circumstances.

12.5.1 Has a right been infringed?

Before we can investigate whether a right can be validly limited (in terms of s 36) in a particular situation, we must establish that a right has indeed been infringed.

Let's study a real example. In the case of *Prince v President, Cape Law Society and Others* (2002) 2 SA 794 (CC); (2002) 3 BCLR 231 (CC), Prince, who wished to become an attorney, had two convictions for the possession of dagga and he openly intended to continue possessing this drug. Prince argued that this was because he was a Rastafarian and use of the drug was part of his religion. The court found that Rastafarianism was a religion and that the Drugs and Drug Trafficking Act 140 of 1992 did stop Rastafari from using something that was part of their religious practices. The court therefore established that Prince's right to practise his religion had indeed been infringed. The only way for the state to escape having to change its law at this point would be for it to show that the restriction was allowed in terms of the general limitations clause in s 36.

12.5.2 Limitation by a law of general application

One of the requirements in s 36, if a law is validly to restrict a right in the Bill of Rights, is that it must be a law of 'general application' – in other words, the restricting law must apply to the general public. In the *Prince* case, the Cape Law Society refused to allow Mr Prince to take a step towards becoming an attorney, because possessing dagga was prohibited by the Drugs and Drug Trafficking Act. This Act applied to everyone and the court was therefore satisfied that this part of the s 36 requirements had been met.

12.5.3 Factors to be considered

The question the court had to answer in the *Prince* case was whether Mr Prince's right to practise his religion could be fairly limited by a law – in this case, the Drugs and Drug Trafficking Act. The rights in the Bill of Rights can only be restricted if this would be reasonable and justifiable in an open, democratic society that is based on human dignity, equality and freedom. All relevant factors are considered before a court makes its decision. The factors that will be considered include:

- the nature of the right – in the *Prince* case, religion is an important part of a person's dignity
- the importance of the reason for limiting the right – drugs are a major problem facing our society and there is a good reason for not allowing people to possess and use dagga

- how much the restriction takes away from the right – for example, is the possession and use of dagga everything Rastafarianism is about or can other parts of the religion remain even if the drugs are not allowed?
- the link and balance between the restriction and the purpose it is trying to achieve – in the *Prince* case, does preventing Rastafari from possessing dagga achieve the objectives of the Drugs and Drug Trafficking Act?
- whether there is any way of achieving the purpose without taking so much of the right away.

In the *Prince* case, the court said that the legislature had the power and duty in our society to make laws that prevented certain behaviour. In doing so, it had to act in line with the Constitution. The court emphasised that dagga was a drug in which there was a big illegal trade. There was no fair way in which a police officer would be able to tell the difference between people using the drug as part of the Rastafarian religion (if an exception was going to be given to them) and other people who would still be breaking the law. Such other people might falsely claim that they were using it for Rastafarian purposes. The court concluded that limiting Mr Prince's right to practise his religion by not providing a special rule allowing Rastafari to possess dagga was, therefore, a fair restriction of his right.

Activity 12.4

South African law makes prostitution a criminal offence.

1. Which rights, if any, in the Bill of Rights are affected by a law that stops people from being prostitutes? Find a copy of the Constitution if you do not already have one (you should be able to obtain a copy from a post office), and go through the Bill of Rights highlighting the rights that may be affected.
2. Consider whether or not limiting these rights by a prohibition on prostitution is constitutionally valid using the criteria described above.
3. Look up the case of *S v Jordan and Others* 2002 (6) SA 642 (CC) to see how your answers match up to the judgment given by the Constitutional Court in a case involving this issue.

12.5.4 Suitable relief

When a right in the Bill of Rights has been infringed, a court should make an order granting suitable relief to the victim of the violation. Any remedy that will serve the purposes of the Constitution given the circumstances of the case would be considered to be appropriate.

If an Act of Parliament is considered to be unconstitutional, a court may issue an order setting aside the Act, or part of the Act. This is known as a declaration of invalidity. Any law or conduct that goes against the Constitution must be declared invalid. A court enjoys the power to make any order that is fair. For example, it may be fair to make such an order forward-looking only, so that unconstitutional actions that happened before the court's decision cannot be challenged. The court may also give the state a chance to fix an unconstitutional Act by making an order that suspends the declaration of invalidity for a period of time.

In some cases, the most suitable relief to be awarded is a simple statement of what a person's rights are. This is known as a declaration of rights. The advantage of this remedy is that while the court is able to make a statement of the law, the government can be given a chance to fix the problem. Although this is sometimes an easy option in cases involving socio-economic rights, the courts do have the power to issue interdicts. Interdicts are orders forcing a person either to do something specific or not to do something. When a court wants to supervise what is being done (or not done), this is known as a structural interdict.

Imagine that Jody is not enjoying his right to education because there are no public schools in the town in which he lives. The court could simply make a statement that Jody has

Only the High Court, the Supreme Court of Appeal and the Constitutional Court may declare legislation and conduct to be unconstitutional. If an Act of Parliament is declared invalid, the Constitutional Court must confirm such invalidity.

the right to primary school education. In place of this, however, the court can make an order stating how the government is not meeting its constitutional duties and directing the government to take steps to do so. If the court asks the government (through the Minister of Education) to submit a report to it after a few months explaining what it is doing to build schools in the town, this will be a structural interdict. If the minister fails to produce the report to court, the court will have the power to find the minister to be in contempt of court. The minister may then be arrested – not, because the government has no money to build schools, but because the minister has disobeyed the court's order to provide a report.

Although nothing stops a court from making an order of damages in favour of the person whose rights have been infringed, the courts seem to be hesitant to make this award for violations of rights in the Bill of Rights.

What do you think?

Socio-economic rights, such as the right to have access to social assistance, depend a lot on how much money the state is willing to spend on the right. Some people have argued that such rights should not have been included in the Bill of Rights because they take something away from the rights that can actually be made effective. For example, although everyone has the right to housing, not everyone has a house. The case of *Republic of South Africa v Grootboom and Others* 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) is a useful case to research in this connection. Do you agree with the inclusion of socio-economic rights in the Bill of Rights? How well do you think the government and the law protect our human rights in practice?

Chapter summary

In this chapter, we have learned the following about Constitutional law and human rights:

- Constitutional law is that field of the law that prescribes the functions of the branches of government and state organs and regulates the relationships between these branches and organs.
- Constitutional law also regulates the relationship between government and society, as well as amongst persons (and interest groups) within a society.
- Constitutional law focuses mainly on principles, values and human rights.
- The challenge of constitutional law is to make sure that governmental power is effectively applied so as to serve the interests of all within society.
- Examples of the values of the Constitution are human dignity, equality and freedom.
- The rule of law is a constitutional principle that confirms the superiority of the law (which in turn includes values, principles and human rights) as well as the independence of the courts in deciding on matters related to the effective application of constitutional principles and values, as well as human rights protection.
- Democracy also constitutes an important constitutional principle and mainly supports governance by and for society. More specifically, one finds representative, participatory and direct democracy.
- The Constitution guarantees basic human rights to all citizens.
- Human rights are the basic rights and freedoms for which all human beings qualify.
- The Bill of Rights is one of the most important chapters in our Constitution.
- The government must respect, protect, support and carry out the rights contained in the Bill of Rights.
- Traditionally human rights have been classified into three categories: first generation rights (such

as the right to life, human dignity and freedom of religion), second generation rights (such as the right of access to housing and health care) and third generation rights (such as the right to a clean environment and the right to peace).

- Before 1994, South African courts took a restricted view of who could approach them for assistance. A person needed to be personally affected by a matter before she enjoyed standing. Section 38 of the Constitution allows for a generous or broad approach to standing when it comes to enforcing rights contained in the Bill of Rights. In terms of this section, the persons who may approach the court are:
  - anyone acting in his own interest
  - anyone acting on behalf of another person who cannot act in her own name
  - anyone acting as a member of, or in the interest of, a group or class of persons
  - anyone acting in the public interest
  - an association acting in the interest of its members.
- The Constitution does not allow people to be discriminated against unfairly and tries to promote the achievement of equality.
- The rights to dignity, life, social assistance and freedom of religion are examples of other rights contained in the Constitution.
- The right to equality is contained in s 9 of the Constitution. Because not all people enjoyed the same advantages in the past, the right to equality does not mean that everyone must be treated in exactly the same way.
- Only unfair discrimination is not allowed by the Constitution. Section 9 lists certain grounds that are presumed to be unfair reasons for treating people differently. The listed grounds are race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- If discrimination is based on a listed ground, then the onus will be on the state or other person treating people differently to prove that this is fair for some reason.
- If discrimination is for an unlisted reason, there is no presumption of unfairness and a complainant will have to prove that the different treatment contains characteristics that can hurt a person's dignity and that it is unfair.
- The Promotion of Equality and Prevention of Unfair Discrimination Act, known as the Equality Act, was passed to prevent or prohibit unfair discrimination and is especially concerned with the conduct of people other than the state. Equality courts have been created in terms of this Act.
- Everyone has the right to have his dignity respected and protected according to s 10 of the Constitution. Dignity is an important value that is used in interpreting other rights in the Bill of Rights. Dignity is also used as a tool in limiting a person's rights fairly.
- Section 11 of the Constitution states that everyone has the right to life, but even this right, probably the most important of all rights, can be limited in terms of the limitations clause.
- Freedom of conscience, religion, thought, belief and opinion is closely linked to people's dignity and is one of the characteristics of a free society. This freedom is guaranteed by s 15 of the Constitution and may be read together with the right, in s 31, to enjoy a cultural, religious or linguistic community. Section 31 rights may not contravene other rights in the Bill of Rights.
- People who are not able to support themselves and their dependents are entitled to social assistance in terms of s 27 of the Constitution. The Social Assistance Act makes provision for various grants to be given to different categories of people such as children, disabled persons and older persons.
- All rights may be limited by a law of general application, to the extent that this is allowed by the Constitution, taking into account things such as the nature of the right and the reasons for limiting the right.
- If a right has been unreasonably infringed, the court may order any suitable remedies to be awarded. Any remedy that will serve the purposes of the Constitution is considered to be appropriate. Suitable relief includes:
  - the power to declare conduct or an Act of Parliament to be invalid
  - a declaration of a person's rights
  - an interdict forcing a person or the state to do something or not do something
  - a structural interdict, where the court wants to supervise its order.

Review your understanding

1 Briefly explain the focus area of constitutional law.
2. Critically distinguish between constitutional principles and values.
3. Is the Rule of Law reflected in the Constitution? Explain.
4. Does democracy only mean that which is supportive towards majoritarian rule? Explain.
5. Critically explain the closely connected relationship between the Constitution of South Africa (which was dealt with in Chapter 3) and constitutional law.
6. Draw a mind map in which you show the foundations of the South African Constitution. Include details of the values and principles of the Constitution on your map.
7. Then draw a second mind map showing the human rights that the Bill of Rights protects and their different categories. You may wish to study the Bill of Rights and include further examples of rights not given in this chapter.
8. How important is the Bill of Rights for the law in South Africa? Explain.
9. The head of the Universal Church of the Kingdom of God consults with you. Its application for a private sound broadcasting licence has been refused by the Independent Broadcasting Authority (IBA). Your client needs a licence in order to operate its radio station, Kingdom Radio (Pty) Ltd. The IBA was established by s 3 of the Independent Broadcasting Authority Act 153 of 1993 (the 'Act') to regulate broadcasting in the public interest and to 'ensure fairness and diversity of views broadly representing South African society'. The IBA, according to your client, has taken the view that it would not be in the public interest to grant a licence to an entity controlled by only one religious group, as this does not promote diversity of views and ownership as envisaged by the Act. The Church believes that its constitutional rights have been unjustifiably violated. Write an opinion on the matter with reference to applicable case law.
10. Read the case of *Jayiya v Member of Executive Council for Welfare, Eastern Cape* 2004(2) SA 611 (SCA), which held that a government official cannot be held in contempt of court for failing to pay a debt owed by the state. Do you think that it would be fair for the Constitutional Court to agree with this decision?

Further reading

Brand, D. and Heyns, C. (eds). 2005. *Socio-economic Rights in South Africa.* Pretoria: University Law Press
(This book focuses on socio-economic rights in particular.)

Currie, I. and De Waal, J. 2013. *The Bill of Rights Handbook,* 6th edn. Cape Town: Juta and Co. (Pty) Ltd
(This handbook will give you a more thorough understanding of the rights contained in the Bill of Rights.)

De Vos, P. and and Freedman, W. (eds). 2014. *South African Constitutional Law in Context.* Cape Town: Oxford University Press Southern Africa

Govindjee, A. and Vrancken, P (eds). 2016. *Introduction to Human Rights Law*, 2nd edn. Durban: LexisNexis South Africa
(This book provides a basic introduction to human rights law in South Africa.)

Rautenbach, I. and Malherbe, E. 2012. *Constitutional Law*, 6th edn. Durban: LexisNexis South Africa

Administrative law

Chapter 13

The main ideas

- What is administrative law?
- Sources of administrative law
- The constitutional right to just administrative action
- The Promotion of Administrative Justice Act (PAJA)
- What is administrative action?

The main skills

- Define and explain administrative law.
- Identify the sources of administrative law.
- Familiarise yourself with the constitutional framework of administrative law.
- Understand basic principles governing the right to just administrative action.
- Know what the Promotion of Administrative Justice Act is and what it deals with.
- Understand the importance of s 33 of the Constitution for administrative law.
- Explain whether the common law principles of administrative law still apply.
- Discuss the tools available for making the public administration accountable to the people.
- Explain the meaning of 'administrative action'.

Apply your mind

In *Vumazonke v MEC for Social Development, Eastern Cape, and Three Similar Cases* 2005 (6) SA 229 (SE) public servants in the Department of Social Welfare failed to perform their administrative duties properly and timeously by not considering applications for disability grants. As a result of this, many persons are suffering real hardship through the ineffectiveness of the public service. This was one of the first cases where judges were no longer silent and began to express their extreme dissatisfaction with the sheer volume of applications complaining of maladministration in the Eastern Cape. Many similar cases throughout the country came before the courts after that. Do you think that these administrative failings infringe or threaten the fundamental rights of large numbers of people to have access to just administrative action?

In this chapter, we will look at another branch of public law. Administrative law governs the public administration in South Africa and affects administrative procedures by administrators. It is therefore important that we define administrative law and explore the sources of administrative law and administrative power, the constitutional framework of administrative law and the importance of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

Before you start

Have you or any of your family and friends ever applied for an ID document, birth certificate or old-age pension? When a person applies for this kind of document, the department of home affairs must decide whether or not to award it. The department of home affairs, together with all the other government departments, the police and the army, and organisations, such as ESKOM and Telkom and the SABC, form part of our country's public administration. The administration does the day-to-day work of government and is commonly known as the 'public service' or 'civil service'. It is made up of:

- all government departments at national, provincial and local levels
- the police and the army
- the 'parastatals', which are organisations such as public enterprises and regulatory boards.

We often apply for services, licences or documents from the public administration and sometimes our applications are turned down, although we may not be given a reason for the decision. When the administration takes a decision that affects people's rights, it is performing an administrative act. Section 1 of PAJA says an **administrator** is:

> "an organ of state or any natural or juristic person taking administrative action".

Administrators are required to follow the rules of administrative law whenever they make their decisions.

An **administrator** is any person within the administration who takes decisions that amount to an administrative action. This could include Ministers, Directors-General, Directors, Assistant Directors and clerks.

13.1 What is administrative law?

Administrative law is the branch of law that deals specifically with and governs the administration. As explained above, the administration in South Africa is made up of all the different national, provincial and local departments (including municipalities) and also includes the army and police and organisations, such as the South African Broadcasting Corporation (SABC) and Telkom.

There are two types of administrative law: general administrative law and particular administrative law.

- General administrative law. This type of law applies to the whole of the government administration in South Africa. It sets out all the rules and principles that must be followed by organs of state and their administrators when they make a decision that affects people's rights. It also sets out the remedies, or assistance and applicable procedures for people whose rights have been affected by administrative decisions.
- Particular administrative law. This kind of law law governs a specific area of the administration. For example, when you apply for a passport or birth certificate, a particular statute or law gives a specific administrator or administration the power to act. This specific law forms part of particular administrative law and will give the official in the department of home affairs the power to issue a passport or birth certificate.

A thorough examination of the legal literature reveals further that various legal commentators have divergent views on what is meant by administrative law. They do, however, agree on its purpose. For example, all the legal commentators agree on the following three points:

1. Administrative law is concerned with attaining administrative efficacy;
2. It is concerned with ensuring that the power exercised by the administration is tightly controlled so that human rights are not abused;
3. There is agreement that administrative law is part of public law. This view is also expressed in the case of *Pharmaceutical Manufacture Association of South Africa In re: the ex parte application of the President of the Republic of South Africa* 2002(2) SA 674 (CC) para [45] where Chaskalson P (as he then was) said:

> "… administrative law, which forms the core of public law, occupies a special place in our jurisprudence. It is an incident of the separation of powers under which courts regulate and control and the exercise of public power by other branches of government, their inter-relationship and the boundaries between them".

To sum up, it can be said that administrative law:

- regulates the activities of bodies that exercise public powers or perform public functions
- empowers administrative officials so that they can implement policies and programmes
- limits the exercise of power by officials by requiring all administrative action to meet certain minimum requirements of lawfulness, **reasonableness** and fairness.

Reasonableness means there must be a good reason for the decision.

The Promotion of Administrative Justice Act 3 of 2000 (PAJA) will be discussed in more detail later in this chapter. It forms part of general administrative law. It applies to the entire government administration, but does not give specific powers to the administrators. Rather, it tells them how to exercise their powers. We have to look at other laws that form part of particular administrative law, to tell us more about the specific powers of administrators.

Let us take an example. The South African Passports and Travel Documents Act 4 of 1994 (the Passports Act) deals with passports. It is a specific piece of legislation that gives the minister of home affairs the power to issue passports and to make regulations to cover things like what forms need to be used; what application fees need to be paid and similar matters.

Suppose the minister refuses to issue you with a passport. Must a hearing be held before the decision is taken by the minister? Must reasons be given for the decision? If the Passports Act does not answer these questions for you, you must turn to general administrative law (in the form of PAJA) to tell you how the specific powers of the administrator under the Passports Act must be exercised.

Before the administrator makes a decision, he must follow the specific law that applies to his function (for example, the Passports Act), as well as PAJA, which contains rules about how the decision must be made.

You may realise now that administrative law overlaps to a considerable extent with constitutional law. This is because constitutional law and administrative law deal with organs of state, their interactions and their relationship with individuals. However, administrative law differs from constitutional law, because administrative law focuses on a particular branch of government – the public administration and on a particular activity of the state – administrative action, while constitutional law is more concerned with the establishment and structuring of government and with the division of state power between the legislature, the executive and the judiciary.

Activity 13.1

Does PAJA form part of general administrative law or particular administrative law? Give a reason for your answer.

13.2 Sources of administrative law

What or who gives an administrator a specific power or tells her to exercise it in a particular manner? There are different sources of administrative law in general, but also different sources of administrative power. It is important to differentiate between the two.

Administrative power, as the word suggests, is the power of an administrator, or the administration, to perform certain administrative acts. The source of administrative power is the specific law that gives the administrator the power to act. In the example above, it is the Passports Act that gives the minister of home affairs the specific power to issue a passport. Other sources of administrative power are all forms of legislation, such as the Constitution, Acts of Parliament, provincial Acts and ministerial regulations.

The sources of administrative law are more general in nature. They are the places where you can find the legal rules that govern the administration in general and that state the powers and functions of the public administration.

The most important sources of administrative law are:

- legislation
- **judicial precedent**
- common law.

The rule of **judicial precedent** means that the lower courts must follow the decisions of higher courts.

Let us look at these sources in more detail.

13.2.1 Legislation

After 1994, the Constitution and PAJA, which gives effect to the Constitution, have become the most important sources of both administrative law and administrative power.

The Constitution is the supreme law of South Africa. This means that all other statutes that give administrators powers must be in line with the Constitution and may not violate any of its provisions. It also contains the Bill of Rights, which lists all the human rights that are protected and that all people in South Africa have. It forms part of the Constitution as an important source of administrative law and makes sure that people are treated fairly. The Constitution, together with PAJA, determines the powers, functions and organisation of the administration.

Many other rules of administrative law can be found in other Acts of Parliament – for example, the Passports Act. As we have seen, legislation is also an important source of administrative power, since administrators receive their power to act from these statutes.

13.2.2 Judicial precedent

Courts are often in a position where they develop the law. Sometimes the Constitution or a statute does not have an answer to a specific question. In these cases, the courts must reach their own conclusion and provide an answer to the legal question. These decisions by the courts are an important source of administrative law and can guide the government and administrators when they have to make decisions.

We have seen that the principle of judicial precedent means that lower courts are bound by the decisions of higher courts. For example, the High Court is bound by the decisions of the Supreme Court of Appeal and Constitutional Court, and all Magistrates' Courts are bound by the decisions of all higher courts.

Let's go back to our example. Suppose your friend applies for a passport on your behalf and your application is not successful. It may be that the Passports Act, the regulations or even the Constitution cannot provide you with an answer to your problem and that you have to go and look somewhere else. A decision from a court on a similar matter can then possibly provide an answer. Judicial precedent, in the form of decisions by our courts, can be an important and useful source of administrative law.

13.2.3 Common law

Common law is known as the unwritten law in South Africa, in the sense that it is not found written down in statutes, documents or even the Constitution. As we know by now, Roman-Dutch law and English law form the basis of South Africa's common law. They have both contributed to the development of administrative law in South Africa.

Some of the administrative-law principles that had their origin in the common law are now written down in the Constitution or in legislation. An example of this is the common-law principle of reasonableness, which is contained in both the Constitution and PAJA. Under common law, reasonableness had the same meaning as it does under the Constitution and PAJA. An administrator had to make a decision on the information before him and had to understand and correctly apply the provision that empowered him to act. The decision had to be supported by sound reasons and should not have led to unfair or uncertain consequences. Previously, the court had to come to its own conclusions or had to look at other court decisions to determine what the content and the requirements for an unreasonable action or decision was.

Some principles are still not written down in the Constitution or other legislation, like the principle of proportionality. The principle of proportionality requires that when, for example, the Minister of Home Affairs rejects an application for a passport, there must at least be a reasonable relation between why the passport was rejected and the circumstances that were taken into account by the minister – for example, the applicant may have been a foreigner or a child. In this case, the common-law principle of proportionality provides the necessary guidelines to the court and will be an important source of administrative law.

It is important to note that although a lot of our common-law principles now form part of the Constitution and other legislation, they can still provide judges with important information where that information is not set out clearly in the Constitution or legislation.

13.3 The constitutional right to just administrative action

Before 1994, South African administrative law developed within a system of **parliamentary sovereignty**. The courts had no right to enquire whether actions by the state administration were for the benefit of the public or for the benefit of private individuals. The apartheid parliament had the power to make any laws, however unreasonable or unacceptable, and the administration was given all the power to exercise such unreasonable laws.

Parliamentary sovereignty meant that Parliament, or the legislature, was the highest authority and not the Constitution, as it is now.

We entered a new phase of administrative law when we adopted the Interim Constitution. We did away with parliamentary sovereignty and the Constitution is now the supreme law in South Africa. With the implementation of the 1996 Constitution and PAJA, the public administration is required to exercise its powers and functions in accordance with the Constitution and in a manner that is fair and for the benefit of all people in South Africa.

As you now know, the Constitution contains the Bill of Rights that protects the rights of all people in South Africa, as well as the rules by which government must function. Chapter 10 of the Constitution deals with the public administration. We will look at two particular provisions of the Constitution that have an important impact on good administration. These are ss 33 and 195.

13.3.1 Section 33: the right to just administrative action

Section 33 of the Constitution gives everyone the right to **just** administrative action. If something must be just, it means that it must be fair. More particularly, the section provides as follows:

Just means that something is fair.

- It guarantees that administrative action will be reasonable, lawful and procedurally fair. Administrators must act within the law and follow fair procedures. For example, people should be told in advance what action is being planned and they must be allowed to tell their side of the story.
- The section says that people have the right to request written reasons for administrative action that negatively affects them.
- Section 33 also says that national legislation must be enacted to give effect to these rights. (PAJA was enacted to give effect to these rights.)

Briefly, this means people have a right:

- to fair and reasonable administrative action that is allowed by the law;
- to be given reasons for administrative action that affects them in a negative way; and
- to challenge decisions that they believe are wrong.

The effect on administrative law of s 33 of the Constitution is that the right to just administrative action is guaranteed to every person as a fundamental right in the Constitution. Administrators must comply with all the requirements for valid administrative action when they take decisions or perform their functions. The exact meaning of administrative action is explained in the section below.

13.3.2 Section 195: basic values and principles governing public administration

Section 195 states that the public administration must be governed by the democratic values and principles enshrined in the Constitution. The following principles are included in the section:

- The public administration must promote and maintain a high standard of professional ethics.
- Efficient, economic and effective use of resources must be promoted.
- The public administration must be development-orientated.

- Services must be provided impartially, fairly, equitably and without bias.
- People's needs must be responded to, and the public must be encouraged to participate in policy-making.
- The public administration must be **accountable**.
- Transparency must be fostered by providing the public with timely, accessible and accurate information.
- The public administration must cultivate good human-resource management and career-development practices to maximise human potential.
- The public administration must be broadly representative of the South African people.

In the past, government often took decisions that affected people's live without having to explain what they were doing. **Accountable** government takes responsibility for its decisions and is able to answer to the public for its conduct and obligations.

Activity 13.2

Find some news reports about the government being accountable for its actions and, also some instances where the government did not conduct its actions in an accountable manner.

13.4 The Promotion of Administrative Justice Act (PAJA)

PAJA gives effect to s 33 of the Constitution. Section 33(3) requires the enactment of legislation to give effect to the right to just administrative action. To this end, Parliament passed PAJA, which was signed in February 2000. PAJA is a very important law because it makes the administration accountable to people for its actions and it ensures that:

- people's rights are protected
- people are treated fairly
- people know why decisions have been taken
- an accountable public administration is developed.

What, specifically, does PAJA deal with? Among other things, it:

- requires an administrator to act lawfully and reasonably, and to follow fair procedures when making decisions
- requires an administrator to give adequate reasons for his decisions
- requires an administrator to inform people about the rights to appeal or review and to request reasons
- gives members of the public the right to challenge administrative decisions in court on a number of grounds
- lays down the procedures that must be followed by people seeking judicial review.

We saw that s 33 of the Constitution says that everyone has the right to just administrative action. PAJA gives effect to this right by setting out rules and guidelines to ensure that administrative action is **lawful**, **reasonable** and procedurally fair and that reasons are given for administrative action. For example, people should be told in advance what action is being planned and they must be allowed to tell their side of the story. Decisions should not be taken that have a negative effect on people without consulting them first. To ensure fairness, the AJA sets out procedures that you must follow before you make decisions.

Lawful means that administrators must obey the law and must be authorised by the law for the decisions they make.

Reasonable means that the decision taken must be justifiable.

To understand how PAJA works, it is necessary to understand what administrative action is. Section 1 of PAJA defines this expression and in short, administrative action is:

- a decision. This includes a proposed decision and a failure to take a decision. An administrative decision must be taken without unreasonable delay or within the time period that may be prescribed for the particular administrative action.
- of an administrative nature. Most decisions that administrators take as part of their official functions are of an administrative nature.

- made under an empowering provision. This is usually a specific law that authorises you to make a decision.
- not specifically excluded by the Act. PAJA specifically excludes some decisions of administrators, such as executive or legislative decisions or decisions taken by a court. This means that PAJA does not apply to those decisions.
- made by an organ of state or by a person or body exercising a public power or performing a public function. PAJA applies to all departments of state at national, provincial and local level, to organs of state and to state enterprises such as the Post Office. It also applies when a private company performs public functions such as supplying water on behalf of a municipality.
- that adversely affects the rights of any person. This means that the decision must have a negative impact on someone – giving someone a benefit might have a negative impact on the rights of someone else.
- that has a 'direct, external legal effect'. This means that decisions must be final and have an impact on a person's rights. 'External' usually means that the decision must affect the rights of someone outside the administration. However, sometimes a decision affecting the rights of people within the administration qualifies as administrative action. An example is the following decision to discipline a public servant.

Case study Foreign student visa 'disaster'

Read the following newspaper article and then debate the questions set out on the next page.

Minister must act to end foreign student visa 'disaster'

Karen MacGregor 22 August 2015

International student officers are to call for urgent ministerial intervention to end problems with visas for hundreds of foreign students in South Africa, due to government incompetence. Students who have tried to comply with visa rules have been criminalised and many arrested.

In a session on migration on Friday, angry international office staff spoke of having things thrown at them by frustrated international students who shifted the blame for visa woes onto them, and of having to spend great chunks of time trying to sort out visa problems caused by 'chronic' ineptitude in the Department of Home Affairs. Promises of improved service and processing of visas that have been pending for months are repeatedly made – and repeatedly broken.

Scale of the problem

South Africa's higher education sector is experiencing a sharp drop in international student numbers, said Orla Quinlan, one of the session presenters and director of the international office at Rhodes University.

"We have feedback from one university that international student numbers have dropped by 600 this year due to these issues. At another, rural-based university there has been a decline of 25% in international student numbers. Visiting scholars, postdocs, international staff and university guests are also affected."

There were 226 students in the 10 universities with pending visa appeal cases. Some people had blamed the international offices for not being able to unstick visas, but in reality the problems were entirely out of their hands. "We can shout and lobby and have meetings, as we have done with the Department of Home Affairs. But unless somebody gets serious about this issue inside Home Affairs, it is out of our hands."

Personal suffering

Serious delays in issuing visas regularly result in students enrolled for degrees being unable to return in time to continue their studies, legal students being rendered illegal, students

unable to leave the country without being declared undesirable, and lack of freedom of movement within the country.

Other problems include lack of understanding of new visa regulations among staff in South African embassies around the world, and no consistency of staff handling visa queries. There is also no system regarding handling the backlog of visas, and lack of communication regarding visa issues. Students with visa problems "are very restricted and feel very insecure", said Quinlan. Some international students were missing out on opportunities, being offered jobs on completing their studies but unable to accept them because they are living in a no-visa 'twilight zone'.

Threat to internationalisation

The combined effect of the visa problems posed a 'serious threat to the internationalisation of higher education', said Quinlan.

"Also, a lot of people are experiencing this as intentional and it is feeding into the idea of South Africa being xenophobic. There is no level at which this is helping South Africa or the higher education system."

Cornelius Hagenmeier, a law lecturer and director of international relations at the University of Venda, described fertile grounds for legal challenges to the visa mess – to be found in South Africa's progressive constitution, in laws and in numerous international conventions. However, IEASA had concerns that such action could rebound and clog up the visa processing system further.

Instead, the decision had been made to continue working with Home Affairs to resolve problems and to call for ministerial intervention and the support of vice-chancellors to resolve the visa crisis.

Source: http://www.universityworldnews.com/article.php?story=20150821174658622

1. Has something similar happened to you before?
2. Do you think this problem forms part of administrative law? Why do you say this?
3. How do you think the students can challenge this visa problem?

Professor says The right to challenge an administrative decision

The right to challenge the decision of administrators in court is called judicial review. It is a way in which the right to administrative action can be enforced. Any member of the public who is unhappy with the decision of an administrator can challenge the decision in court. If the court finds that the decision is unlawful, unreasonable or procedurally unfair it can make any of a number of possible orders to rectify the situation.

PAJA therefore helps ensure that the government is democratic, accountable, open and transparent.

What do you think?

Imagine that you go to the Department of Home Affairs to apply for your first passport. You fill out the forms correctly, pay the necessary fees and await the notice to come and collect your passport. The notice never arrives in the mail and when you go back to the Department of Home Affairs to find out the reason for the delay, you are told that your application for a passport was unsuccessful. When you ask why, they refuse to give you reasons and tell you to come back later. Does this sound familiar? Have you ever applied for anything from the government? Were you provided with reasons for the refusal of any of your applications? Were you given a chance to have your side of the story heard? And were you told that you could challenge this decision if you think that it is wrong? Talk to your friends and see whether this has ever happened to them and discuss what you can do in future if you feel that an administrator does not follow fair procedures when making decisions.

Chapter summary

In this chapter, we learned the following about administrative law:

- Administrative law is the branch of law that sets out all the rules and principles that must be followed by the public administration.
- Administrative law governs the public administration in South Africa. It can be divided into general administrative law and particular administrative law. General administrative law sets out the general rules and principles that must be followed by the administration. Particular administrative law governs a specific area of the administration.
- The main sources of administrative law are legislation, judicial precedent and the common law.
- The Constitution guarantees the right to just administrative action to all in South Africa. Everyone has the right to fair and reasonable administrative action and to be given reasons for those actions.
- PAJA provides the detail on how this right works in practice. People can expect to be told in advance of any planned action that may affect their rights, be allowed to have their side of the story considered before a decision is made, be told what the decision is and of their right to internal appeal or review, be told that they have the right to request reasons, and be able to challenge the decision in court.

Review your understanding

1. Your application for a work permit has been refused by the Department of Home Affairs. How can PAJA assist you with your problem?
2. What is the difference between the administration and an administrator?
3. Explain the difference between the Passports Act and the Bill of Rights as sources of administrative law.
4. You feel that the rejection of your grandmother's application for an old-age pension was totally unreasonable. What sources of law will the court look at to determine whether the decision was in fact unreasonable or not? Why do we need a right to administrative justice?
5. When the Traffic Department decides whether or not to grant you a driver's licence, does that amount to a decision taken by the administration?

6. Could a failure to take a decision amount to administrative action that one could challenge?
7. Consider and discuss the importance of s 33 of the Constitution for administrative law.
8. What tools are available for making the public administration accountable to the people?

Further reading

Burns, Y. 2013. *Administrative Law.* 4th edn. Durban: LexisNexis South Africa
(A very useful book; it serves mainly as a students' text and is written with a view to making complex subjects accessible to the reader.)

Hoexter, C. 2012. *Administrative Law in South Africa.* 2nd edn. Cape Town: Juta and Co. (Pty) Ltd
(Also a very useful book, it serves mainly as a more advanced students' text and for purposes of advanced reading and research.)

Quinot, G. (ed.) 2015. *Administrative Justice in South Africa – An Introduction.* Cape Town: Oxford University Press Southern Africa

Department of Justice and Constitutional Development, http://www.justice.gov.za/paja/new.htm.
(You will find valuable information on recent developments and legislation on this website, including PAJA newsletters and booklets, information sheets and applicable forms.)

Criminal law

Chapter 14

The main ideas

- What is criminal law?
- Unlawful voluntary conduct
- Causation
- Criminal capacity
- Fault

The main skills

- Define and explain the different theories of criminal law.
- Distinguish between a common law crime and a statutory crime.
- Explain when conduct is unlawful.
- Discuss when you have a legal duty to prevent harm to another.
- Compare and discuss the defences you could raise to exclude unlawfulness.
- Apply knowledge of causation, criminal capacity and fault.
- Describe and explain the test to determine negligence.

Apply your mind

In the case of of *Masiya v Director of Public Prosecutions and Another* 2007 (5) SA 30 (CC) the Constitutional Court recognised that anal penetration of a female constituted rape and not indecent assault. They would, however, not extend this protection to males. What Act has since been passed to recognise that anal penetration of both males and females constitutes rape? What do you think this change tells us about the nature of South African law?

This chapter will give you a basic introduction to criminal law. We will begin by discussing what we mean by criminal law. We will look at how criminal law differs from civil law and will investigate what makes up a criminal offence. We will also explore some of the defences that criminal offenders may use in court to argue their innocence.

Before you start

South Africa is often described as having a high crime rate. Consider the newspaper article on the next page before we learn more about the nature of a crime in our law.

Why is crime and violence so high in South Africa?

Chandre Gould, ISS

It should come as no surprise that crime and violence remains disturbingly high in South Africa. What is surprising is that there isn't even more crime and violence, considering how we have dealt with our violent past, that we have increasing poverty and inequality, and have failed as a country to secure confidence in and respect for the rule of law.

On 19 September, the police will present the crime statistics for the 2013/14 financial year.

Using the *previous 12 months as a yardstick*, we can expect that interpersonal violence and property crime will have affected hundreds of thousands more South Africans.

For some crimes, such as rape, domestic violence, and assault –

including assaults against children – the cases recorded are a small fraction of the incidents that actually occur.

Horrifying murder statistics

There were 827 children murdered in South Africa in 2012/13. That is more than two a day. Added to that is the 21,575 children who were assaulted, with almost half of those assaults being severe.

In the same year 2,266 women were murdered, and 141,130 women were victims of attempted murder, assault GBH and common assault. As horrifying as these statistics are, the number of women and children who fell victim to violence is dwarfed by the number of similar attacks on men. In 2012/13 alone, 13,123 men were murdered. At best, half of these cases would have made it to court, and not all of those that make it to court result in a guilty verdict and the perpetrator being punished.

There are several consequences of this. With each year that violence remains so prevalent, the number of South Africans who have experienced and witnessed violence increases, and so does the extent of national trauma. This has serious consequences the health system; our ability to work as a nation, and our ability to raise a new generation of safe and healthy children.

But this is only one aspect of the very serious problems we face.

The historical context of crime

We have to look back to our recent history to understand the context for crime and violence in South Africa, and in particular South Africans' attitudes to the law, policing and the criminal justice system.

Until 1994 South Africans had little reason to respect the law, and no reason to believe in the rule of law.

During apartheid, not only were many of the laws unjust and intended to entrench white domination, but unfair laws were also applied unfairly. In addition, the security forces, particularly the police, were used by the state to ensure that all South Africans lived in in fear of the state, regardless of their race.

The apartheid state was deeply corrupt at all levels, and those who held positions of power, whether as politicians or functionaries, were very seldom called to account before a court for acts of corruption or the abuse of power.

The situation was no different in relation to inter-personal violence and crime. Black men who murdered were more likely to face harsher sentences than white men who murdered, especially if the white murderer's victim was poor and black. Black women who were raped were less likely to have their cases investigated than cases in which white women were the victims. In this context, who could be expected to have much respect for the law, or the rule of law?

A lack of respect for the law

In 2009, then Constitutional Court Judge Kate O'Regan asked in a paper about justice and reconciliation what the implications were of the arrest and imprisonment of so many South Africans for deeply unjust reasons over so many years for our modern attempt to establish a shared conception of justice in a constitutional democracy founded on the rule of law?

She argued that the implications must, at least in part, be the absence of a deep, value-based commitment to respect for law in our society and deep scepticism about the possibility of justice. The enforcement of unjust laws with the effect of sending hundreds of thousands of people to jail over many years must have weakened any sense that law-breaking or imprisonment are of and in themselves wrongful.

She warned that developing respect for the law would take time, and concerted effort.

South Africa began that process badly, by not holding to account those who were responsible for gross human rights violations under apartheid. The promise that amnesty would be offered in exchange for the truth, and that failure to apply for amnesty would result in criminal charges, was simply not kept.

We thus entered our new dispensation with impunity entrenched, and so it has remained for those who hold positions of power and influence.

Inequality before the law

While our laws have substantially changed for the better, and our Constitution protects the rights of all South Africans and establishes the principle that all are treated equally before the law, in practice this has been very difficult to achieve.

For example, it is relatively easy for Oscar Pistorius and Jacob Zuma, and others with access to wealth, to pay for good lawyers, to be driven to court, or to see a psychologist to help them deal with trauma or stress. It is also much easier for a middle-class victim of crime to get to a police station to report their case to the police, insist it be investigated, and follow up to ensure that the case receives attention. These are all necessary for a case to make its way through the criminal justice system.

But these privileges are not available to most of the 650 000 victims of violent crimes each year.

No easy solutions

South African attitudes towards the law are demonstrated in small things such as the high number of people who drive without seat belts and who drive under the influence of drugs or alcohol; the many teachers who still beat children at school; police officers who break traffic rules even when it is not necessary; drivers who ignore red traffic lights and so on.

It is difficult to slow this steady erosion of the law when respect for, and confidence in, the institutions of state, including the police, are undermined by the daily experience of citizens in their interactions with the criminal justice system.

Perhaps even more significantly, attempts to change attitudes towards the rule of law are stymied by the disrespect demonstrated for the law and the value of life by the very people responsible for making and enforcing the law.

For as long as those holding political office appear to act with impunity, or cynically use the criminal justice system to dodge very serious allegations of the abuse of power and state resources, we cannot reasonably expect South African citizens to respect the law.

Just as there is no single cause of violence and crime, there is no single solution.

There is an urgent need to develop a coherent programme to prevent and respond to violence. This would need to include at the very least the implementation of evidence-based programmes to support parents; and strategies to reduce inequality.

However, unless those responsible for making and enforcing laws themselves show respect for the rule of law, we have very little chance at succeeding in reducing violence and crime.

– Dr Chandre Gould is a senior researcher at the Institute for Security Studies (ISS)

Source: http://www.news24.com/Columnists/GuestColumn/Why-is-crime-and-violence-so-high-in-South-Africa-20140918

After you have read the article above do you agree with the authors statements regarding the erosion of respect towards justice in South Africa? What do you think can be done to remedy this situation?

14.1 What is criminal law?

Criminal law is the branch of the law that deals with behaviour that is considered criminal or against the law. Criminal law is a branch of substantive public law.

Substantive law (in contrast to procedural law) refers to the actual content of the law. Criminal law is an area of substantive law that deals with what the law regards as a crime, how a person could be guilty of a crime and what defences an accused person could **raise**.

If you have been accused of a crime and you argue in court that you are innocent, we say you are **raising** a defence.

Procedural law refers to the procedure that must be followed in order to enforce the law. Criminal procedure refers to the procedures that must be followed in all criminal cases. Examples of criminal procedure include:

- the procedure to be followed when taking a confession from a suspect
- the procedure when arresting a suspect
- the procedure when obtaining a blood sample
- the procedure to be followed during a criminal trial.

Criminal law is a vital part of the law in every society. As more and more of us live close together in cities, it is essential to have a criminal justice system to ensure stability and peace in a country. The aim of criminal law is to define individual behaviour that goes against the law, so that offenders who break the law can be punished. Writers have developed various theories about the purpose of punishing criminals.

Some writers believe in the retributive theory. You may recognise this theory of justice from the biblical saying, 'an eye for an eye'. In terms of this theory, the main aim is to punish the guilty person for having committed a crime. The perpetrator should theoretically be punished in a proportional manner to the crime that he has committed. The people who believe in this theory believe that this form of punishment will ensure that society is not overwhelmed by crime because criminals believe they can get away with criminal actions. This helps to maintain an even balance of life in society.

Other writers believe that we should punish the offender in order to prevent future crimes. This is the **deterrence** theory.

Deterrence happens in three ways.

1. Because the offender of the crime is removed from society by being placed in jail, he will not be a threat to society.
2. Once the offender is released from prison, the expectation is that he will not wish to commit crimes again in the future because he has been punished in the past.
3. Other people who are tempted to commit crimes might be deterred if they see that society punishes people who break the law.

To **deter** a person from doing something is to discourage him from acting in a particular way.

The aim of criminal law and procedure is to punish offenders who break the law and to deter other would-be criminals. The aim of criminal law is not ordinarily to **compensate** the victim.

Compensate in this context means to pay money to someone who has suffered loss because of crime.

Even so, s 300 of the Criminal Procedure Act 51 of 1977 does allow either the victim or the prosecutor to apply for an award of compensation in favour of the complainant. It does not cover claims for bodily injuries. In practice, prosecutors and victims seldom use this section due to the lack of legal knowledge of the victims and because prosecutors are too busy with heavy workloads. But if the complainant is Telkom, for example, and someone is found guilty of damaging a public telephone, Telkom will usually ask the prosecutor for a compensatory order in terms of s 300.

To **press** or lay **charges** against someone means that you officially accuse the person of a crime by filling in the necessary paperwork at a police station.

Being given **bail** means that the accused is allowed to stay out of jail until the court can hear the case.

Case study Criminal and civil remedies for assault

If Sipho punches Njabulo in the face, Sipho is guilty of assault. Njabulo needs medical attention because he has a black eye and a cut that needs stitches. He may also have suffered pain and a loss of dignity. However, Njabulo cannot use criminal law to compensate himself for these losses. In terms of criminal law, all Njabulo can do is **press a charge** of assault against Sipho.

The police will investigate the charges and refer the matter to the local prosecutor who will consider whether there is sufficient evidence to proceed with the matter in court. The matter is then between the state and Sipho – Njabulo is not involved in the criminal case (except as a witness).

If the case goes to court, there is usually a long period of time between an accused being charged with a crime and the case being heard in court. For this reason, after Sipho has been charged, he will usually be given **bail**. In return, Sipho will have to pay a sum of money to the court. There may be certain conditions attached to being released on bail. The bail money will ordinarily be returned to the accused after the hearing of the matter, but he will only get the bail money back if he has complied with all the conditions attached to his bail. For example, the accused may have to agree that he will hand in his passport or that he will not leave the area or that he will report at a local police station at specified times. If Sipho does not appear at court at the next hearing date or if he breaks any of his bail conditions, then he loses or forfeits the bail money and will be put in jail.

Once the case gets to court, if the presiding officer finds Sipho guilty of assault, the court will punish Sipho, either by imprisoning him or fining him.

If Njabulo wishes to be compensated, or to recover damages, for his losses, he must launch a civil claim in delict. This is a completely separate process from the criminal process. The law of delict allows a person like Njabulo to sue the party who has caused him loss. The aim of delictual law is to place a person in the position he was in before the wrongful act occurred and to compensate him for his loss.

If Njabulo's injuries cause him to lose money or cost him money (for example, he has medical expenses), we say that he has suffered patrimonial loss. You can calculate how much financial

Case study (continued) Criminal and civil remedies for assault

loss the victim has suffered, such as the cost of visiting a doctor. The courts will award Njabulo an amount equal to this loss as compensation for the damages he has suffered. Njabulo has also suffered non-patrimonial loss, such as pain or suffering or loss of dignity. Non-patrimonial loss is damage that a person has suffered and that cannot easily be measured in monetary terms because he has not had to spend any money. In order to place a monetary value on the damage suffered, the court will have to consider the nature of the non-patrimonial loss and what sort of amounts previous courts have awarded other litigants who suffered similar losses.

Professor says Compensation for victims of crime

There have been calls for the government to set up a **fund** – a reserve of money set aside for a certain purpose – to compensate victims of crime. As we have seen, obtaining compensation for the victim of a crime is usually an action that occurs civilly through the law of delict. However, in South Africa, the victims of crimes often do not have the money to undertake costly civil court cases against people who have harmed them criminally. In addition, offenders who have committed crimes, and who are now jailed, often do not have the money to pay for any damages they have caused. The purpose of the compensation fund would be to allow victims of crime to submit their claims to the fund in order to obtain compensation without having to resort to expensive legal proceedings. The government had instituted a commission to investigate the possibility of creating a fund to compensate victims. The commission in 2011 concluded that a sum of approximately R4.7 billion would be needed annually for such a fund. However, because the government doesn't have enough money, it is unlikely that such a fund will come about in the near future.

14.2 Sources of criminal law

If we want to know what is in the criminal law, where should we look to find it? As with so much of our law, our criminal law is found in both common law and statute. Some crimes in our law, therefore, are known as common law crimes – those that are found in the common law. Others are statutory crimes, which are defined in statutes. All of our criminal law is also affected by the Constitution. Let's look at these sources in more detail.

A **fund** is a reserve of money set aside for a certain purpose.

14.2.1 Common law crimes

Common law crimes are not defined in statutes. They are only found in the common law. We will now explore the concept of a common law crime by considering some examples.

- Murder is the unlawful and intentional killing of a human being.
- Culpable homicide is the unlawful, negligent killing of another human being. The guilty party here does not intend to murder anyone, but she is judged to have been negligent. Because the test for negligence in our law is objective, we use the reasonable person yardstick. This test says that if a reasonable person in your position would not act in the way that you did, your actions will be considered negligent. Would a reasonable person have foreseen that her conduct would be unlawful and if so would she have taken steps to prevent an act from occurring. We are not concerned with what the accused actually (subjectively) believed at the time of the crime or whether he foresaw that his actions would be criminal.
- **Assault** is the unlawful and intentional applying of force to the **person** of another.
- Assault with the intent to commit grievous bodily harm refers to a situation where the assault involves physical injury that is not sexual in nature.

To see how a court decides whether your actions make you liable for murder or culpable homicide read the Pistorius case study on page 305.

Sometimes we use the word '**person**' to mean the body of a human being. **Assault** is applying force to the body of another person.

Professor says — Common law crimes may become statutory crimes

In the past the common law crime of rape only encompassed unlawful sexual intercourse with a woman through vaginal penetration. It did not include oral sex or anal penetration, nor did it allow men any protection against non-consensual oral sex or anal penetration in terms of the definition. This situation was clearly unsatisfactory and in order to amend this situation the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 was passed. This Act aims to extend the traditional definition of rape from vaginal intercourse to include oral and anal intercourse. In the existing common law definition, only a woman can be a victim of rape. In order to meet the constitutional requirement of equality, the Act also gives men who are sexually assaulted the protection of the law. The crime of rape has therefore ceased to be a common law crime and has now become a statutory crime. So we see that the legislature can decide at any time to change or expand common law crimes and convert them to statutory crimes.

14.2.2 Statutory crimes

Statutory crimes are crimes that are created by the passing of a new law by Parliament. An example of a statutory crime is the criminalisation by statute of the sale of drugs. The Drugs and Drug Trafficking Act 140 of 1992 makes it an offence to deal in drugs. This means that if John sells dagga to people outside a local nightclub, he is **contravening** the Drugs and Drug Trafficking Act.

In legal language, when we break a law we talk about **contravening** that law.

Another example is the National Road Traffic Act 93 of 1996, which makes it an offence to drive a motor vehicle while under the influence of drugs or alcohol.

Professor says — The difference between a criminal and civil case

The state is always the prosecutor in a criminal case and the suspect is always the accused. In a civil case, we have a plaintiff and a defendant. So, for example in a case called *S v Singh*, S, the state, is the prosecutor and Singh is the accused. This is a criminal case. In a case called *Hlatshwayo v Zuma*, Hlatshwayo is the plaintiff and Zuma is the defendant. This is a civil case since one individual launches a civil claim against another.

In a civil case, the plaintiff can decide whether or not to take legal action against the defendant to recover her damages. In a criminal case, the state may decide to prosecute the accused, even though the victim of a crime may not wish the offender to be prosecuted. In a criminal case, the state must prove that the accused is guilty beyond a reasonable doubt. In a civil case, the standard of proof is only on a balance of probabilities. In a criminal case, if the accused is found guilty, he could be sentenced to a combination of imprisonment, a fine or **correctional supervision**. The accused may also be given a warning and be discharged or released.

14.2.3 Criminal law and the Constitution

The principles embodied in the Constitution must permeate all the branches of our law. This also applies to criminal law. In terms of s 39(2) of the Constitution, the common law must be developed in light of the rights granted to all of us in the Bill of Rights.

An example of this can be seen in the case of ***Masiya v Director of Public Prosecutions and Another*** 2007 (5) SA 30 (CC) where the Constitutional Court was asked to extend the common law definition of rape to include the anal penetration of a person without consent. In terms of the law prior to this case, **non-consensual anal penetration** did not constitute rape, but qualified rather as indecent assault. In this case, the court extended the definition of rape to include the anal penetration of a female.

Correctional supervision means that the person is released from prison on certain conditions, before she has completed her sentence. If the prisoner breaks her conditions of release, then she is sent back to prison to complete the entire term of her original sentence.

The Constitutional Court also had to recently consider issues relating to the criminalisation of consensual sexual intercourse with a person under the age of the 16 in the case of *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* 2014 (2) SA 168 (CC). Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 was enacted to extend the traditional definition of rape from vaginal intercourse to include oral and anal intercourse of male or female. Section 15 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 criminalised the act of sexual penetration if any of the parties was over the age of 12 but under the age of 16 years. Section 16 of the same act also criminalised conduct with a person under the age of 16 (and over the age of 12) which was sexual in nature but which did not involve penetration. It was irrelevant if consent had been provided or that the act of intercourse occurred between two people under the age of 16 years. In the latter instance, both the teenagers under the age of 16 years would be guilty of a criminal offence even if they were participating in a completely consensual act of sexual penetration. This could result in both teenagers being found guilty of a criminal offence and having their names registered on the Register of Sexual Offenders. The criminal offence and the listing on the Sexual Offenders Register could have serious economic, social and personal consequences for the teenager. The Constitutional court held that ss 15 and 16 of the Act unjustifiably infringed a teenager's right to privacy and dignity and that this provision was not in the best interests of a child. They therefore declared these sections to be unconstitutional and suspended the operation of these two sections for a period of 18 months to allow the legislature to amend the legislation.

After this case was heard, the statutory definition of rape was amended so as to include **non-consensual anal penetration of a male.**

The Act was amended in July 2015 to address the invalid sections as identified by the Constitutional Court. The new amended section does not criminalise sexual acts in which both participants are over the age of 12 but under the age of 16. If a 16- or 17-year-old participant engages in sexual acts with a participant who is under the age of 16 then such an act will not be criminal provided the difference in age between the two participants does not exceed two years. For example, it would be criminal for a 17-year-old to sleep with a 14-year-old as the age difference exceeds two years. However, it would not be criminal for a 16-year-old person to sleep with a 14-year-old person as the age difference between the two of them does not exceed 2 years. The amendment only decriminalises consensual sexual intercourse or acts that fall within its confines. Non-consensual intercourse or sexual acts are still criminal conduct.

14.3 Elements of a crime

In a criminal case, in order to convict the criminal offender, the state has to prove all the **essential elements** of a crime beyond a reasonable doubt. In other words, each of the elements that constitutes the crime must be present. If one is missing, then the offender cannot be found guilty of the crime. For the judge to be able to convict an accused of a crime, the state must be able to show the judge, beyond a reasonable doubt, that the offender has committed the crime. For there to be no reasonable doubt, the behaviour or conduct must contain all the essential elements of a crime.

An **essential element** is a necessary part of something. For example, a soccer ball is an essential element in a game of soccer.

The four essential elements of every crime are:

- unlawful voluntary conduct, which is conduct that lies within a person's control and which the law regards as being unlawful in nature
- causation, which refers to the fact that the accused's conduct caused the unlawful consequence, or made it happen
- criminal capacity, which is the accused's ability to understand the difference between right and wrong and his commission of the act with full knowledge of this difference
- fault, which refers to the fact that the accused must either have intended the wrongful conduct, or must negligently have allowed the consequence to occur.

We will look next at each of these essential elements in more detail. Because there is a lot to say about each element, we will discuss each one under a separate heading.

14.3.1 Unlawful voluntary conduct

In order to meet the requirement of unlawful voluntary conduct, the conduct, or behaviour, of the accused must have the following characteristics:

- The conduct must be against the law of the country at the time it was committed.
- The accused must have been capable of making a decision that controlled his conduct and must have been able to act in accordance with that decision.
- The conduct is either an action, or a failure to act, by the accused.

Let's look at these characteristics in more detail.

What do we mean by unlawful?

In order for an individual to be convicted of a crime, her actions must go against the laws of our country. We then say that her actions are unlawful in our country. The requirement of unlawfulness is based on the principle of *nullum crimen sine lege*, which means that there is no crime without a law. In other words, a person's conduct cannot be a crime if there is no law prohibiting it. The law must recognise the accused's actions as a crime at the time that she performed the actions.

Morality refers to our personal beliefs about right and wrong. **Ethics** refer to an accepted standard of behaviour.

Professor says — When is a crime no longer a crime?

Be aware that an unlawful action is based on the common law or statute law, not on an individual's or society's idea of what is wrong. For example, many people believe that abortion is **morally** and **ethicall**y wrong. However, the Choice on Termination of Pregnancy Act 92 of 1996 allows women to obtain an abortion legally.

The idea of what is lawful often changes. Take sodomy, for example. The common-law definition of sodomy is anal sex committed by a man with another man. Sodomy was once regarded as a common-law crime in South Africa. However, in the case of *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC), the Constitutional Court declared that the common law was wrong and that the common-law crime of sodomy between two consenting adult men was unconstitutional. The court decided that the law that made sodomy an offence was unfair and went against the human rights of **sexual orientation**, equality, dignity and privacy, which are protected in the Constitution.

What do we mean by voluntary?

An individual will only be held liable for a crime where his conduct is voluntary, since it is only voluntary conduct that is punishable in terms of South African law. In order for an act to be voluntary, the accused must be capable of making a decision that controls his conduct.

Sexual orientation refers to the choice people have in deciding whether they want to have sex with men or women.

The accused must then be able to act according to that decision. In other words, he must have conscious control over his actions.

If the accused performs a criminal act while having a nightmare or an epileptic fit or while sleepwalking or having a **blackout**, the person cannot be liable for the crime, as in these situations he is not in control of his actions.

A **blackout** is a momentary loss of consciousness or memory.

Case study — The nightmare

The accused in the case of *R v Dhlamini* 1955 (1) SA 120 (T) was sleeping in a room with six other people. Dhlamini, the accused, fatally stabbed a 15-year-old boy to death when the deceased came to pick up a sleeping mat which was located quite close to where the accused was sleeping. Dhlamini had been having a nightmare while he was asleep and stabbed the

Case study (continued) The nightmare

deceased as he had half woken out of this nightmare. He had no motive to kill the boy; neither did he have any recollection of stabbing him. The court held that Dhlamini could not be held criminally responsible for his act as his conduct was not voluntary conduct.

Professor says 'R' for Rex or Regina

In the case study above, we looked at a case called *R v Dhlamini*. Do you know what the 'R' refers to? 'R' refers to the crown of the British monarchy and more specifically either to Rex (male) or Regina (female), depending on the gender of the king or queen who sat on the throne of England at the time the case was heard. We used this method of citation for criminal cases until South Africa became a Republic in 1961. Before 1961, prosecutions were instituted in the name of the British crown. After South Africa became a Republic in 1961, prosecutions were instituted in the name of the 'state' as in *S v Brown*.

What do we mean by conduct?

In criminal law, we are concerned with punishing the behaviour of the accused. In other words, criminal law deals with human conduct. But it is possible to punish a human being who has used an animal to harm another person – for example, where Roy gets his dog to attack Rakesh. Simply wishing that your law lecturer would die a slow and horrible death is not a crime. You will only be guilty of a criminal offence if you have actually taken steps to carry out this act.

For a crime to take place, the accused must commit some kind of unlawful conduct. Conduct can be one of two things: an act or an **omission**. An act consists of *positive action* by the accused, such as stabbing a person with a knife or shooting someone with a gun. An omission refers to a situation where the accused has failed to act in a certain manner.

To **omit** something is to leave out something.

The general rule in criminal law is that criminal conduct falls into one of two categories:

1. An act that is positive in nature – something active must have been done.
2. An omission or failure to act – the accused must have failed to act in a situation where there was a legal duty upon him to act.

Omissions raise some interesting questions. For example, can a person who failed to rescue a drowning swimmer be accused of murder? The answer, briefly, is that the accused can only be guilty of a crime if she was under a duty to act in a particular way in the situation and she failed to do so. There are many complex issues concerning whether a person accused of an omission had a duty to act in the particular circumstances. We will discuss these in more detail under a separate heading.

When is there a legal duty to act?

Let's say you're eating in a restaurant and see someone choking on food. You have taken a course in first aid and could easily help your fellow diner. There is no danger to yourself if you decide to help her. However, there is **no legal obligation** on you to help that person. Because there is no legal duty on you to do anything, the law will not be able to find your failure or omission to act to be a crime.

You could have a moral duty to help, but the choice is yours. You are **not legally obliged** to help.

However, a failure to act can certainly be a crime – if there was a legal duty upon someone to act. A person usually has a duty to act where the legal convictions of the community demand that she act. In this case, the **legal convictions** of a community refer to the omissions that society believes should be legally punishable in terms of the law. In such a situation, if a person fails to act, the legal convictions of the community would demand that she be criminally charged and punished, if convicted.

When we refer to the **legal convictions** of the community, we are not referring to what the community thinks of as socially, ethically and morally wrong, but what they consider to be legally wrong.

Read the case study below to get a better understanding of the legal convictions of a community and their consequences on a person's legal duty to act.

Case study A legal duty to act

In the case of *Minister van Polisie v Ewels* 1975 (3) SA 590 (A), Ewels was assaulted by an off-duty policeman on the steps of the charge office of the police station. This assault occurred in the presence of several on-duty policemen who did not try to help Ewels. Ewels then sued the Minister of Police for his damages. The main issue in the case was whether the on-duty policemen owed Ewels a duty of care. The court found that generally a person is not under a legal duty to protect another from harm, even though he can easily do so and ought morally to do so.

In this case, the court held that it 'appears that the stage has been reached where an omission is regarded as unlawful conduct when the circumstances of the case are such that the omission not only occasions moral indignation, but where the legal convictions of the community require that the omission be regarded as unlawful and that the loss suffered be compensated by the person who failed to act positively'. In other words, the court concluded that we had reached a stage in South African law where an omission would be regarded as wrongful if the community's legal convictions required that:

> the person's failure to act should be regarded as being legally wrongful the person should be punished for her failure to act.

In such cases, the community is not only morally outraged – it has gone one step further and wants the wrongdoer to be legally punished.

The court held that the on-duty policemen had a legal duty to prevent the plaintiff from being assaulted. Furthermore, the Minister of Police was liable for the failure of the on-duty policemen to stop the assault. The fact that a statute imposed certain related duties on policemen was one of the factors that influenced the court in coming to its decision. This decision means that if there is a statute that places a duty on you to do something, and you fail to do it, then it is almost certain that your conduct – that is your omission – will be wrongful.

The law does not list the kinds of situations where there is a legal duty to act. However, the categories listed below are the kinds of situations where a legal duty might arise in a specific **situation**.

- Prior conduct: where your previous actions create a new source of danger to another person or his property.
- Control of a potentially dangerous thing or animal: where you are in control of an animal or another object that could prove dangerous to others.
- Special or protective relationship: where your relationship with another person is so close that the community's legal convictions will demand that that person act to protect you from harm.
- Public office: where you have a position of responsibility in a government department.
- Contract or other undertaking: where you have agreed that you will have a legal duty in certain circumstances.

You will often see the expression '**the court held**' in discussions about court cases. It simply means that the presiding officer declared or stated his decision on a particular point of law.

A particular set of facts might lead to liability under more than one of the kinds of **situations** described here.

Let's look more closely at the kinds of situations where the courts may decide that you have a **legal duty** to act.

We are still discussing the essential elements of a crime. If you fail to act when there is a **legal duty** to do so, then this omission will fall into the category of potentially criminal 'conduct'.

Prior conduct

If an accused has, through his positive action, created a situation that could prove to be potentially dangerous, this is known as prior conduct. The accused is then under a legal duty to prevent the danger from occurring. If he fails to act, then he has committed an unlawful omission.

Take the following example: you decide to have a braai in the local park with a couple of your friends. You light a fire in an area that has a lot of dry grass. After your braai has ended, you fail to put out the fire. The fire spreads, burning a section of the park and acres of surrounding farmland.

Because you created the danger by lighting the fire, there was a legal responsibility on you to prevent the fire from spreading. If you had not started the fire for your braai, then the surrounding acres of farmland would not have burned. It was therefore your legal duty to prevent the potential danger from occurring, by ensuring that you put out your braai fire completely before leaving.

Be sure to analyse this example carefully. Lighting the fire is positive, prior conduct because you physically lit the fire. But lighting the fire is not wrongful, because the park or municipality does not have a law against making a braai. However, your failure to put out the fire after your braai is an unlawful omission, because you failed to put out the fire and you were under a legal duty to do so.

Are Knysna fires the result of arson?

Katharine Child and Farren Collins
08 June 2017 – 18:01

Simultaneous fires starting at the same time, "raises a big red flag" and suggests "deliberate agency", says forensic investigator David Klatzow.

On Tuesday, it was reported fire fighters were battling 26 separate fires in the Knysna area.

Klatzow said an investigation was needed whenever there were multiple fires simultaneously.

But when asked for comment about the cause of the fires, James-Brent Styan – spokesman for the MEC of Local Government, Environmental Affairs and Development Planning – said it is unlikely that they will ever know the cause of the fires.

He said arson is not suspected or being investigated.

More than 10 000 people have now been evacuated from various Knysna suburbs and 150 homes destroyed by flames fanned by heavy winds.

"It is unusual for fires to start simultaneously," said Klatzow, one of the leading fire investigators in the country. He said "hard questions needed to be asked".

"When you start an investigation, you need an open mind. You start looking for an innocent source [for a fire]. You look at negligence such as cigarettes tossed away and carelessness … somebody who was welding, a camp fire not put out properly.

"There could be an Eskom power line that fell down and short circuited. This could start two fires."

But he said "once there are three, four, five, 20 fires [at the same time] you need an investigation [into the cause of the fires]".

News24 previously reported an acting municipal manager Bevan Ellman as saying that fires in Knysna in December were arson.

Helicopter pilots battling blazes last year spotted children starting forest fires. More than 40 fires were reported in the Knysna area in December.

Children who started them returned to help firemen put out fires, according to Ellman. Some of the fires in Cape Town in the past year have been arson, said Klatzow. Some were caused by negligence. A fire in January this year in Signal hill was arson, according to JP Smith, member of Cape Town's mayoral committee. A teenage boy was identified by Bo Kaap locals as starting the Signal Hill blaze.

When several fires broke out in the Western Cape in January, Premier Helen Zille also asked if the fires were the result of arson.

TMG Digital/TimesLIVE

Source: https://www.timeslive.co.za/news/south-africa/2017-06-08-are-knysna-fires-the-result-of-arson/

Control of a potentially dangerous thing or animal

In a situation where an accused person has a potentially dangerous object or animal in her control, she has a legal duty to act to prevent harm to others. If, for example, you own dogs, but do not keep them fenced and your dogs attack someone, you may be guilty of attempted murder or assault. This is because you were in control of potentially dangerous dogs and you did not keep the animals under your control.

Case study The escaped baboon

In the case of *S v Fernandez* 1966 (2) SA 259 (A), the accused owned a small shop. Next to the shop, he kept a baboon in a cage. On arriving at the shop one morning, he found the baboon outside the cage. When he inspected the cage, Fernandez found that the cage had been damaged. After arming himself with a gun, he persuaded the animal to re-enter the cage. Fernandez then decided to repair the cage. While he was busy repairing the cage, the baboon got out again. The animal snatched a baby from a pram, bit the baby and then threw the child to the ground and went back into the cage. The baby died because of the baboon attack.

The court found that the baboon was in the custody and under the control of Fernandez and that it was his duty to see that the animal was not allowed outside its cage. However, Fernandez had failed to make sure that the baboon did not get out of its cage while he was busy repairing the cage. He had allowed the baboon to attack someone during this period. Therefore, he was guilty of culpable homicide.

Dogs kill boy (8)

Kailene Pillay and Stephanie Saville
13 December 2015 – 22:43

Pietermaritzburg – An eight-year-old Merrivale boy has died after a vicious attack by his neighbours' dogs that took place inside his yard.

James, the son of Witness booksedditor and previous arts editor Estelle and Graydon Sinkins, was playing in his yard in Geekie Road on Thursday afternoon when he was attacked by the two German Shepherd-cross dogs who mauled him severely.

His distraught mother last night paid tribute to her son.

"James brought immeasurable joy into our lives and to the many other lives he touched in the eight-and-a-half years he walked on this Earth. He was taken away too soon and in a way which left us devastated. We hope that by sharing our story, it won't happen ever again."

Earlier, when James was clinging to his life in hospital, his mother said: "I was in my car when I saw our dog jumping all over and barking. I realised something was wrong and ran to look over the fence and saw one dog had grabbed my son by the neck and the other was biting his leg."

Sinkins said she immediately rushed over to pull the dogs off her son but they would not let go.

"Even as I was running toward him, the dogs did not let go. I had to pull them off him. My son's little body was covered in blood," wept Sinkins.

James was rushed to the Howick Mediclinic Hospital and underwent extensive surgery to try and repair the damage caused by the dog bites on Thursday. Yesterday, he was transferred to the ICU at St Anne's Hospital for a blood transfusion and possibly another operation.

However, he suffered a major setback and died yesterday afternoon.

Before James died, Sinkins said: "I am so angry and in shock. I just cannot get that image [of the dogs attacking him] out of my head. I don't think I ever will."

She added that the same dogs had attacked and killed the family's Labrador a few years ago.

"When that happened, I wanted those dogs put down but they begged me and I was too soft-hearted and let it go," added Sinkins.

Owner of the dogs Shanaaz Alladin said she was not at home when the incident occurred and is still unsure of the details. When contacted by Weekend Witness yesterday, she conceded that she would remove the dogs from the property by late yesterday.

She said the two dogs, Seth and Titus, had run out of their property and onto the road.

Before James died, Alladin said: "No one has told me what actually happened and until then I don't really know what to do. I know that I love my dogs and I feel terribly sorry for the child but it's an incident between two innocent parties and I am torn because I feel for both."

Sinkins said she had reported the incident to the Howick police.

Police spokesperson Captain Gay Ebrahim confirmed that a criminal case of keeping a ferocious dog was registered at SAPS Howick and was

under investigation. Later, after James died, police confirmed that an inquest docket had been opened.

After Umgeni SPCA manager Dudu Abrahams was informed late yesterday that James had died, she said the dogs would be removed from the property immediately. She later confirmed that the owners had surrendered the dogs and that they had been taken to the SPCA and would be euthanased today.

Source: http://www.news24.com/SouthAfrica/News/dogs-kill-boy-8-20151211

Special or protective relationship

A legal duty to act arises where one person stands in a special or protective relationship towards another person. In such a situation, the accused may be under a legal duty to act to prevent harm to the other person. Examples of special or protective relationships include the relationship between a parent and a child, between a prison warder and a prisoner or between a policeman and a citizen of the country.

Recently, we have seen our courts increasingly relying on the Constitution to increase the legal duty owed by the **state** to private citizens – as will become clear in the following three case studies.

The **state** consists of government officials and officials of the legal system.

Case study — You shouldn't have given him bail

The facts in the case of *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC); 2004 (3) SA 305 (SCA) were that Coetzee savagely assaulted Carmichele, a 28-year-old woman, in a small village near Knysna. Coetzee had been involved in other crimes before this attack. At the time of the attack, he was out on bail as he waited to come to trial on charges of the rape and attempted murder of a 17-year-old girl. Coetzee attacked Carmichele in the home of Coetzee's mother's employer, a Ms Gosling. Gosling had spoken to both the policeman and the prosecutor handling the case on many occasions. She had voiced her concerns about the danger that the community faced from Coetzee, if Coetzee were granted bail. Despite these concerns, neither the police nor the prosecutor opposed bail. After Carmichele was attacked by Coetzee in Gosling's home, she sued the state. The Constitutional Court found that there was a duty on the state not to actively **violate** Carmichele's constitutional rights to life, dignity, security and privacy. The judges decided that there was a legal duty in the circumstances and referred the matter to the High Court for further hearing. The High Court found that both the police and the prosecutor had a legal duty towards Carmichele to prevent her constitutional rights from being infringed. The High Court decided that the police and the prosecutor had failed in this duty. They had not given the magistrate enough information to enable him to make an informed decision about granting bail to Coetzee.

In the *Carmichele* case, we see that it is no longer only policemen who can be said to have a special relationship with private citizens. This relationship now definitely also exists between private citizens and prosecutors, even though the prosecutor may not know or have met the victim of a crime.

Violating or infringing someone's rights can occur through a positive action or an omission, for example, by ignoring someone's rights.

Case study — A shooting incident

In the case of *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA), Brooks owned two licensed firearms. He regularly became drunk and threatened and abused his family while he was drunk. The police were aware of Brooks's behaviour, as they had been called to his

Case study (continued) A shooting incident

house on previous occasions. On one such occasion, Brooks had locked himself in his house in the presence of a dozen police officers. Brooks had threatened to shoot anyone who came near the house. The police only managed to enter the house after a long time. When the police got into the house, they discovered that Brooks had lined up at least twenty boxes of extra ammunition. He had also destroyed furniture and other belongings inside the house.

Under s 11 of the Arms and Ammunitions Amendment Act 117 of 1992, the commissioner of police may remove a person's firearms if a person has threatened to kill or injure himself or another person with the firearm. The commissioner may also remove a person's firearm if that person has shown that he is unfit to possess a firearm because of his mental condition, his violent attitude or his reliance on alcohol or drugs. All the commissioner needed in order to begin the procedure to remove the guns was a statement made under oath in the form of an affidavit that there was reason to believe that a person was unfit to own a firearm. None of the policemen handed in a sworn statement, although it would not have taken them a long time. Nor would it have been difficult for them to submit the required statement.

One day a fight began after Brooks had been drinking. He loaded his guns and shot at his wife. She escaped across the road with their young son to Van Duivenboden's property. After shooting his daughter, Brooks ran after his wife and son. He killed his wife and shot Van Duivenboden in the ankle and shoulder.

In this case, the court found that although private citizens do not have to act when constitutional rights are threatened, the state has a positive duty to protect the rights given to us by the Bill of Rights. The court decided that the policeman in question had a legal duty to submit the sworn statement in order to prevent harm to Brooks's family and neighbours. The policeman had failed to act in terms of this legal duty.

This case shows that although, in the past, policemen had to get involved if they saw a crime happening, society now also expects policemen to be proactive. The South African public expects policemen to prevent crime before it actually happens, especially if their failure to act proactively results in actual foreseeable harm to people.

Professor says Telling the truth

An affidavit is a statement that a person makes in which she promises that she will only make truthful statements. If it later turns out that a person has made untruthful statements in her affidavit, she will be guilty of the crime of perjury and will be legally punished.

If a person *takes an oath*, it means that he swears by God that he will tell the truth. If he affirms that something is true then it means that he swears on his conscience that he is telling the truth. A religious person will swear an oath, whereas an atheist will affirm an oath.

We look now at another case that shows that the courts and society want policemen to behave proactively.

Case study Who gave her a gun?

In the case of *Minister of Safety and Security v Hamilton* 2004 (2) SA 216 (SCA), Hamilton, a 22-year-old student, was shot in a public parking area in Stellenbosch. He was shot by McArdell, after Hamilton and McArdell had a fight about a parking bay. The police had issued McArdell with a firearm licence less than a year before. It later became clear that McArdell suffered from

Case study (continued) — Who gave her a gun?

a serious psychological disturbance and that she had suffered from this disturbance when she had applied for and been granted her firearm licence. The court held that there was a legal duty on the police to investigate the information supplied by McArdell in her application, in order to determine whether she was a **fit** person to receive a firearm licence.

Here, **fit** means capable or good enough, rather than in good physical condition.

Public office

If the accused is the holder of a **public office**, he may have a legal duty to act to prevent harm. For example, a lifeguard would have a duty to prevent someone from drowning in a pool while he is on duty. In the same way, a policeman has a duty to prevent someone from being assaulted in his presence, while he is on duty.

Public office, in this case, means a position of responsibility. For example, policemen and firemen are in public office.

Statute

A statute may place a legal duty upon the accused to act. For example, according to s 42 of the Child Care Act 74 of 1983, any doctor, nurse, teacher, dentist or social worker who suspects a child has been **ill-treated** must report this suspicion to the relevant government department.

To **ill-treat** someone or something is to behave cruelly towards that person or animal.

Contract or other undertaking

An accused may also be under a legal duty to act where she has agreed to be responsible for that legal duty by express or implied contract.

Professor says — Written and unwritten agreements

An express contract refers to a contract that clearly sets out the details of the agreement. In an express contract, the parties to the contract have clearly agreed to the conditions of the contract. It is also clear what the duties of each party are according to the contract. An express contract is usually in writing, although it does not always have to be.

In an implied contract, the parties do not have a written contract. However, a contract is created through the actions of the parties. For example, if you remove a tin of fish from the shelf of a supermarket and pay the cashier at the till, who accepts the money, there is an implied contract of sale. Although you have no written contract, the contract is implied by your actions.

Let's look at a case that shows how contracts create a legal duty.

This is what an English case reference looks like.

Case study — Liable to act by agreement

In the English case of *Pitwood* [1902] 19 TLR 37 the accused and a railway company had agreed that the company would pay the accused to close a gate every time a train went over a certain crossing.

The accused failed to close this gate on one occasion. This resulted in an accident for which the accused was held legally responsible. Here, his legal duty came from the agreement that he had with the railway company.

14.3.2 Defences excluding unlawful voluntary conduct

As we have seen, conduct may be lawful or unlawful. In order for conduct to result in **criminal liability**, the conduct has to be unlawful. For example, punching the person sitting next to you makes you criminally liable. However, a boxer punching another boxer in a

Criminal liability means that you are guilty of committing a criminal act and are subject to the relevant punishment.

boxing ring will not lead to a criminal charge of assault. The definition of assault is 'unlawfully and intentionally applying force to the person of another.' The second part of the definition applies in both these cases: '… intentionally applying force to the person of another.' However, it is only the first situation that will result in criminal liability because it is only in this example that the accused's conduct is unlawful.

In order for an act to be criminal, it must meet the definition of the crime in question. As can be seen in the previous example, different situations may amount to the conduct described in the definition of assault, but they will not all amount to the crime of assault. While somebody's conduct may match conduct described in the definition of the crime, it will not be a crime if:

- that conduct is not unlawful
- the conduct occurs in circumstances that **justify** the particular action.

If an action is **justified**, it is acceptable in the circumstances.

Defences, justifications and excuses are all different words used to refer to the same thing. Defences exclude unlawfulness. This means that while your conduct might meet the definitions of the crime your conduct will not be unlawful because one of the defences explained below will cause your conduct to be regarded as lawful in the circumstances. If your conduct is regarded as lawful then you cannot be convicted of a crime. These defences exclude unlawfulness:

- private defence, which refers to the protection of your **legal interests**
- necessity, which refers to circumstances that force you to break the law through no fault of your own
- consent, which refers to a complainant agreeing to the conduct complained of.

A **legal interest** is any right that the law allows you to protect. Examples are your right to personal property or your own life.

We will discuss each of these in greater detail.

Private defence

An accused person usually uses private defence, also known as self-defence, in order to protect a legal interest that is under attack. For example, if I slap you, I have attacked your legal interest of bodily integrity – the right to keep your body free from harm. The action of the accused will only qualify as private defence if it meets the following requirements:

- The attack on the accused must have been an unlawful one.
- The defender may only direct his defence against the attacker. For example, if you are attacked by A, you can only defend yourself against A – you cannot use this opportunity also to punch B who has not attacked you.
- The defensive action must be reasonable. You may not use unnecessary force to defend yourself. If I slapped you and you then grabbed your gun and shot me, you would not be acting reasonably.

Private defence is usually used in situations where a person is attacked and needs to defend himself from the attacker. For example, if you are hijacked and in protecting yourself, you shoot the hijacker, you could use the defence of private defence to argue that the shooting was lawful conduct.

Let's look at two cases in which the accused used, or raised, private defence as his defence. The first case deals with whether you should run away or stand and fight. The second case is a modern example that shows in what circumstances you can raise this defence and what our courts count as reasonable.

Case study The beer hall fight

In the case of *R v Zikalala* 1953 (2) SA 568 (A), Zikalala had stabbed and killed the deceased, Alpheus Tsele, in a crowded beer hall. The accused claimed that the deceased had attacked him with a knife. Zikalala said that he had stabbed the deceased in order to defend himself. The prosecution argued that Zikalala should have run away and not tried to defend himself. However, the court accepted that it would not have been easy for Zikalala to run away, as the

Case study (continued) The beer hall fight

bar was very crowded. The court found that it was not fair to expect Zikalala to risk his life on 'a reasonable chance to get away'. If he had tried to run away, Zikalala may well have been the deceased at the trial instead of the accused.

Case study The mistaken robber

The court dealt with a different situation in *Coetzee v Fourie and Another* 2004 (6) SA 485 (SCA). Coetzee had gone out to dinner with his friends. He returned home late at night. He was parking his car in the garage when he saw a man approaching him in the dark. The man was walking quickly and swinging his hands. He could not clearly see the man in the dark, so Coetzee asked him who he was and what he wanted. The man did not answer and Coetzee shot and injured him. It later turned out that the unidentified man was Fourie, the son of Coetzee's neighbour, a university student. He had wanted to find out whether a trailer on Coetzee's property was for sale. Although Coetzee and Fourie were neighbours, they did not know each other. The father of the victim sued for the damages his son suffered when Coetzee shot him. Coetzee defended the matter on the basis that he was acting in private defence. The court found that Coetzee's subjective belief of endangerment was not reasonable. The fact that Fourie had not identified himself did not mean that Coetzee was in immediate danger. If Coetzee had felt threatened, the circumstances required that Coetzee at least warn Fourie before he started shooting. A firearm was a weapon that could kill and therefore should be directed at a person and fired only as a last possible course of action. Coetzee's negligent actions led to Fourie's son being injured.

It should be noted that there is no legal duty to flee in South Africa as it may not always be safe or possible for a person to flee when she is attacked. A person may thus be justified in using private defence where it is unsafe or not possible to flee.

A situation may arise in which an individual believes she can use force to protect her interests as she is under attack. However if she is mistaken about the attack on her and in the process injures another she may use the defence of putative private defence.

Read the case study of Pistorius later in this chapter on page 305. He also attempted to raise a 'putative private defence' argument. He could not use the private defence ground as there was no intruder in the bathroom and he was not under attack, The court held that he could not use 'putative private defence' as he did not have a reasonable basis to believe that he was being attacked.

Necessity

The defence of necessity is usually used in situations where a person's legal interests are under attack through no fault of her own and it is necessary to hold off the attack. In other words,the accused did not cause the situation that led to her conduct and there was no other way to prevent the threat against her life or property or other legally recognised interest. To defend herself, a person may be forced to commit acts usually regarded as criminal acts by, for example, killing an innocent third party or taking something that does not belong to her. Imagine that someone forces you to kill another person in order to protect your own life or that of another person.

The defence of necessity has the following characteristics:

- The threat to the accused may arise due to the actions of another person or by circumstances beyond her control.
- The attack or threat against the accused is so serious that it required her to break the law.

- Usually, when an accused raises the defence of necessity, an innocent person has suffered harm as a result of a defender's actions. Contrast this to private defence, where the defence is usually directed against the attacker.

Case study The gangster

The case of *S v Bradbury* 1967(1) SA 387(A) dealt with Bradbury, who was a member of a dangerous gang of criminals. He wished to leave the gang, but the gang threatened him and his family if he did not take part in criminal activities with them. The gang planned a murder in which Bradbury was to be the getaway driver. On being arrested, Bradbury was charged with murder for being an **accomplice** to the crime. Bradbury claimed that he acted out of necessity as the gang had threatened himself and his family and he was afraid not to take part in the crime. You might think that Bradbury's necessity defence is valid in these circumstances. However, the court found that Bradbury was guilty of murder. The reasoning used by the court was that a man who willingly becomes a member of a criminal gang knows that such gangs use revenge to discipline their members. Therefore, Bradbury could not rely on necessity as a defence. We can see in this case that Bradbury could not escape liability as he had placed himself in that situation through his own fault.

Consent

An **accomplice** is a person who helps someone else to commit a crime.

A **maxim** is a brief expression of a general truth.

The Latin **maxim** *volenti non fit injuria* means that an injury is not done to someone who agrees or consents to being injured. For example, you are playing squash and your partner hits the ball into your face, causing you to suffer a black eye. Technically, he has assaulted you. However, in defence, he can state that you accepted the risk of an injury when you agreed to play squash.

Let us take the example of a 14-year-old girl agreeing to have sexual intercourse with a 30-year-old male. While she has technically consented to the sexual intercourse, this will not be regarded as a valid consent by the law, which states that only a girl above the age of 16 may validly consent to sexual intercourse. The 30-year-old man will thus have contravened the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 if he had intercourse with the 14-year-old girl and he could be convicted of statutory rape. We can see here that while the girl may have consented to the act of sexual intercourse, society and the state have deemed a girl of 14 not to be mature enough to understand the consequences that could follow from sexual intercourse and so her consent to the act is not a valid consent.

Consent will only be a valid defence where it is in the interests of society as a whole that the act of the attacker should be labelled lawful by the consent of the victim.

Let us take sport as an example. If someone tackles you while you are running, this would normally count as assault. However, if someone tackles you while you are running on the sports field with a rugby ball, then it would not be an assault. The reason that it would not be an assault is that before you began playing the game you knew that you could be tackled during the game. By agreeing to play the game, you consented, or agreed, to the risk of being tackled. This consent is regarded as valid because it is to the benefit of society as a whole – it encourages the playing of sport in society. Not many people would want to take part in sporting activities if they could be charged for assault at the end of the game!

The defence of consent is usually used in situations where a person has agreed to a risk arising out of sport, entertainment or medical treatment.

Professor says — Voluntary euthanasia

South African common law does not allow a person to consent to his death. This means that if you hired a person to kill you that person cannot use your consent or wish to die as a defence. This also means that if you are suffering from a terminal disease and wish to commit suicide and if another person assists you that person cannot use your wish to die as a defence to a charge of murder.

Case study — Assisted suicide

In the case of *Minister of Justice and Others v Estate Stransham-Ford* 2017 (3) SA 152 (SCA) the court had to deal with the issue of liability in an assisted suicide case or as it more commonly known, euthanasia. Stransham-Ford was suffering from terminal cancer and he applied to court for an order that his doctor could administer a lethal injection ending his life without the doctor being prosecuted for assisting him. The High Court granted this order. Stransham-Ford had died two hours prior to the order being granted. The court was unaware that he had already died at the time that the court order was granted. On appeal, the SCA held that the High Court order should not have been granted as Stransham-Ford was already dead at the time and his claim had died with him. The SCA also held that the High Court had not canvassed the law and issues sufficiently, nor had they adequately examined Stransham-Ford's factual situation. They therefore upheld the Appeal. This means that assisted suicide or euthanasia is still not regarded as legal in South Africa. The court held that this decision may be reconsidered should a more appropriate case be brought to court and stated that it may also be appropriate for the legislature to consider passing legislation dealing with this issue.

14.3.3 Causation

The second element of criminal liability is causation. In order for the accused to be guilty of a crime, her act or omission must have caused a particular consequence. In other words, the action taken, or not taken, must have caused something to happen.

In order for the accused to be liable, her conduct must be both the factual and legal cause of the criminal act. Factual causation means that the behaviour of the accused must factually have caused the consequence. Legal causation means that the law must also recognise that the facts caused the consequence. The accused's conduct must be both the factual and legal cause of the consequence.

Let's look at an example that shows the importance of causation. Mzwandile and Dakalo are involved in a fight. Mzwandile stabs Dakalo in the hand. Mzwandile calls the ambulance. The ambulance arrives to take Dakalo to the hospital for stitches. The ambulance driver is drunk and is driving carelessly. On the way to the hospital the ambulance is involved in an accident and Dakalo is killed. Who is the cause of Dakalo's death? Is it Mzwandile or the ambulance driver?

The answer to this question is important. Only if the accused is both the factual and legal cause of the crime, can he be found guilty.

Factual causation

Factual causation means that the accused's conduct must have resulted in the criminal consequence. In order to determine whether the accused's conduct is the factual cause of the crime we use the *conditio sine qua non* test. The Latin phrase translates as 'But for the action of the accused would the consequence

have followed?' The test requires us to ask whether the consequence occurred because of the accused's actions. Or more specifically, if it were not for the action of the accused, would the consequence have followed? If the answer to this last question is no, then the accused is the factual cause of the consequence. If the accused had not acted, the consequence would not have occurred. The victim of the crime would not have had to experience the consequence. Since the accused caused the consequence, he should be responsible for the consequence.

Let's go back to our example. Our question would be as follows: If Mzwandile had not stabbed Dakalo, would Dakalo have died? The answer to this question is no. Dakalo would not have needed to go in the ambulance to the hospital if he hadn't been stabbed and he would not have died in the accident. Mzwandile's action was thus the factual cause of Dakalo's death.

If the accused's conduct is not a positive action, but is an omission, then the question is slightly different: If the accused had acted, rather than failing to act, would the consequence still have occurred?

Let's return to that braai you were having in the park. Your failure to put out your fire resulted in the fire spreading and burning huge sections of neighbouring farmland. Your failure to act was an omission. If you had put out the fire rather than just leaving it to burn, would the fire have spread and destroyed huge sections of farmland? If the consequence would still have happened, even if you had acted, then the accused's omission is not the factual cause of the consequence. However, if the consequence would not have happened if he had acted, then he is the factual cause.

In our example, if you had acted and put out the flames then the fire would not have spread and damaged the park and farmland. Therefore, you are the factual cause of the fire damage.

Legal causation

In order to be found guilty of a crime, it is not enough that the accused is the factual cause of the criminal consequence. He must also be the legal cause. Therefore, the requirements of legal causation serve to limit, rather than expand, legal liability. The reasoning behind this is that events follow every action. In order to find someone guilty of a crime, there must be a sufficiently close legal connection between the person's action and the crime.

Let's look at Mzwandile and Dakalo again. There is no doubt that Mzwandile is a factual cause of Dakalo's death, since if Mzwandile had not stabbed Dakalo in the hand then Dakalo would not have been in the ambulance when it had the accident. However, it is not usual that someone who is stabbed in the hand during an argument later dies in an accident caused by a drunk driver.

Was Mzwandile the legal cause of Dakalo's death?

There are many tests used by the court to determine whether an accused is the legal cause of the consequence. We will focus on two different tests sometimes used by the courts:

1. the adequate cause test, which says that if an act has the tendency to bring about the consequence that has occurred, then the accused will be the legal cause of that consequence, and
2. the *novus actus interveniens* test, which says that if a new cause intervenes then the consequence will have been legally caused by the new intervening cause and not by the accused's act.

Adequate cause test

According to the adequate cause test, an act will be the legal cause of a consequence if the act has the tendency to bring about, or usually brings about, that consequence in the normal progression of human experience.

If we use the example of Mzwandile and Dakalo, we can reason that if you die after someone stabs you, then you usually die because of a loss of blood – you would not usually die in an accident caused by an ambulance driver who is driving while under the influence of alcohol. In terms of the adequate cause test, Mzwandile is not then the legal cause of Dakalo's death.

Let's look at the following Appeal Court case for a further example of the adequate cause test.

Case study — Shooting and pressure sores

In *S v Mokgethi en Andere* 1990 (1) SA 32 (A), one of the accused shot the deceased, a bank teller, during a bank robbery. The deceased in this case did not die immediately, but only six months later. The deceased became a paraplegic as a result of the shot and had to make use of a wheelchair. The bank teller's condition improved to such an extent that he later resumed his work at the bank. However, later he had to go back to hospital because he was suffering from serious pressure sores.

Because he had not moved around enough in his wheelchair, as doctors had advised him to do, the pressure sores had resulted in blood poisoning, which led to his death.

The accused (the men involved in the bank robbery and their accomplice, Mokgethi) were then convicted of the murder of the deceased bank teller. Although Mokgethi was only the getaway driver, in the eyes of the law he was an accomplice and equally guilty. In an appeal, the Appellate Division reversed the conviction – that is, it overturned the initial judgment that Mokgethi was guilty of murder.

The court decided that, although the wounding of the deceased was a factual cause of his death, the injury could not be regarded as the legal cause of his death. By applying the adequate cause test, the court found that if you were shot, you would usually die from the wound or from blood loss, not from blood poisoning. There was not enough of a connection between the act of shooting the deceased and his death.

The bank teller's death was not the result of being shot, but was because of his own failure to follow his doctor's advice. His negligence served to break the chain of causation. The Appeal Court thus replaced the murder convictions with convictions of attempted murder. The bank teller got shot, but he got medical treatment and should have lived. So the crime was not murder, but attempted murder.

Novus actus interveniens test

An accused will not be the legal cause of the consequence if there is a new **intervening** act that causes the **chain of causation** to break. A new intervening act could be:

- the act of the victim – in the case of *Mokgethi*, the deceased's failure to follow his doctor's advice on preventing pressure sores was an intervening act that broke the chain of causation
- the act of a third party – in our example with Mzwandile and Dakalo, the drunk ambulance driver was the third party
- the force of nature, such as a storm, a flood, a wild fire or an earthquake.

When something **intervenes**, it means that something happens in between other events in time. The act here is referred to as a *novus actus interveniens*.

A **chain of causation** is a series of related or connected events beginning with an act and ending in the ultimate consequence.

The intervening act is more likely to qualify as a *novus actus*, if the consequence (the death of the victim from bedsores, in *Mokgethi's* case) is unlikely to follow the act (shooting someone). The deceased's failure to listen to the doctor's advice is likely to be a *novus actus* because a link between the consequence and the act was unlikely.

Where the accused causes a wound that is unlikely to cause death, and another act intervenes causing death, then the second act is likely to be regarded as a *novus actus interveniens*.

Let's take the example where Mzwandile stabbed Dakalo in the hand. A hand wound is unlikely to cause death. Therefore, the law is likely to regard the act of the ambulance driver in driving the ambulance while he was drunk and getting into an accident as a new intervening act. Mzwandile would not be legally responsible for Dakalo's death because the action of the ambulance driver in driving negligently while he was drunk serves to break the chain of causation. Since we require both factual and legal causation for an accused to be guilty of a crime, Mzwandile is not guilty if he is only a factual cause of a crime, but is not the legal cause of the crime.

What if a victim's death or injury was caused or made worse by medical treatment? When deciding whether the medical treatment is a *novus actus*, you must determine whether the medical conduct was negligent or improper. When we say that treatment was negligent, we mean that the doctor failed to behave as a reasonable doctor would have in the circumstances. Improper treatment means that the doctor gave the incorrect treatment. If the medical treatment was negligent or improper, then the medical treatment is likely to be a new intervening act that breaks the chain of causation.

Where the victim has a pre-existing physical weakness, then this weakness does not count as a *novus actus*. This is known as the thin skull rule. The thin skull rule states that an accused must take his victim as he finds him. To go back to our example, let's say Dakalo had been a **haemophiliac**. When Mzwandile stabbed him in the hand, Dakalo bled to death. A normal person would only have suffered some discomfort from this kind of wound. Mzwandile cannot successfully argue that he is not guilty of murder because Dakalo's haemophilia was a new intervening act. Mzwandile must take his victim as he finds him.

A **haemophiliac** is a person with an inherited disease whose blood does not thicken as it should when he is injured.

14.3.4 Criminal capacity

A third essential element of criminal liability is criminal capacity. In order for a person to be criminally liable for her actions, she must possess criminal capacity at the time she acted. Criminal capacity means that the person must have understood that her actions were wrongful. In addition, the person must have been able to act in accordance with that appreciation. This means that, not only must the accused know that what she did was wrong, but she must also be able to control her actions in order to prevent the wrong from happening. A person will lack criminal capacity if:

- she does not understand that what she is doing is wrong, or
- although she knows that she is doing something wrong, she cannot stop herself from performing that wrongful action.

Originally, the only people who did not possess criminal capacity according to the law were youths below a certain age and mentally ill people. If such people were accused of a crime, they could raise a defence that they lacked criminal capacity. However, during the 1980s the South African courts allowed this defence to be widened to include other categories of persons such as those who acted:

- under the influence of alcohol and other intoxicating substances, such as drugs, under circumstances of provocation, when they are motivated by extreme and uncontrollable feelings of rage or anger to commit a crime.

In law, to **presume** something is to take something as proved until evidence is produced that shows otherwise.

We will look next at the categories of people who lack criminal capacity.

Youth

Children under the age of 10 years are irrebuttably **presumed** to lack criminal capacity. They cannot be held criminally liable for their actions. An **irrebuttable presumption** means that you cannot under any circumstances **lead evidence** to disprove the presumption. The law will not recognise any evidence you might bring to try to show that a child under the age of 10 was able to understand that his actions were wrongful and that he could act in accordance with that appreciation.

Initially the common law only allowed children under the age of 7 years to be **irrebuttably presumed** to lack capacity. This age limit was increased to 10 years on 1 April 2010 by the Child Justice Act 75 of 2008.

To **lead evidence** means to produce witnesses or documents in court to prove your point.

With children between the ages of 10 and 14, there is a rebuttable presumption that they do not possess criminal capacity. A **rebuttable presumption** means that it is possible to disprove this presumption of lack of criminal capacity by leading evidence to the contrary. In order to rebut this presumption of lack of criminal capacity, evidence will need to be led to prove that the child could understand the wrongfulness of her actions and could have stopped herself from performing the action. The presumption weakens the

Prior to the Child Justice Act this **rebuttable presumption** extended to children between the age of 7 to 14.

closer a child gets to the age of 14. This means that the closer a child gets to 14 years old, the more likely it is that the court will come to the conclusion that he possessed criminal capacity. Once a child is over the age of 14, the law treats him as an adult for purposes of criminal capacity.

Mental illness

Our courts have defined mental illness as an illness that affects a person's ability to understand the wrongfulness of his actions or to act in accordance with that appreciation. In other words, a person suffering from a mental illness may not appreciate the wrongfulness of his actions or may lack the ability to act in accordance with that appreciation. A person suffering from mental illness may be unable to understand that his actions are illegal. Or he may be unable to stop himself from doing something illegal. The accused must have suffered from the mental illness at the time of the criminal conduct if he wishes to argue that he lacked criminal capacity on this basis.

Section 78(1) of the Criminal Procedure Act 51 of 1977 reads as follows:

> "A person who commits an act which constitutes an offence and who at the time of such commission suffers from a mental illness or intellectual disability [See Criminal Procedure Amendment Act 4 of 2017] which makes him incapable –
> of appreciating the wrongfulness of his act; or
> of acting in accordance with an appreciation of the wrongfulness of his act, shall not be criminally responsible for such act."

A defence of lack of criminal capacity due to mental illness must have reference to s 78(1).

It is up to the accused to prove that he lacks capacity due to mental illness. The accused will have to prove, on a balance of probabilities, that he suffers from a mental illness that excludes criminal capacity. What this means is that if it is more likely that the accused is **insane** than sane, then he will lack criminal capacity. So, while a court must believe that the accused is guilty beyond a reasonable doubt for it to find him guilty, you must only believe on a balance of probabilities that the accused is insane.

In South African law everyone is sane, until it is proved that a particular person is **not sane**.

If an accused succeeds in this defence, he will be found not guilty by reason of mental illness. But this does not mean that the accused will be free to re-enter society. If a court finds an accused not guilty because of mental illness, then the court has to order that the accused be sent to a psychiatric institution. The accused will have to remain in the institution until a judge in chambers, after hearing evidence from psychiatric experts, has ruled that the accused may be released. This means that there is no new trial and the judge's ruling on release is simply done in the privacy of the judge's office.

Intoxication

Alcohol or drugs may cause intoxication, which, in turn, may cause someone not to understand that what she is doing is wrong. The accused may also not be able to stop herself from doing the wrongful action. In other words, the drugs or alcohol may temporarily take away her criminal capacity. However, if a person deliberately gets drunk in order to commit a crime, the court will find him guilty of the crime even though he was very drunk when he committed the crime. This is known as the *actio libera in causa* rule.

Read the case study below.

Case study — The drunk partygoer

The case of *S v Chretien* 1981 (1) SA 1097 (A) dealt with an accused who had been very drunk when he committed a criminal act. At a party, Chretien had drunk vast amounts of alcohol. At the end of the party, while he was still drunk, he drove his car into a crowd of partygoers who were standing on the side of the street. One person was killed and five people were injured. The accused was charged with one count of murder and five counts of attempted murder. The

Case study (continued) The drunk partygoer

Appellate Division held that voluntary intoxication was a complete defence to criminal liability. This meant that a person lacked criminal capacity if he chose to drink alcohol or otherwise become intoxicated, and then committed a criminal action while so intoxicated that he did not know that what he was doing was wrong, and while he could not control his actions.

The appeal court judges, however, stressed the importance of the degree of intoxication – that is, how drunk or how high the accused was at the time of committing the crime. A person who was dead drunk, or extremely drunk – sometimes to the point of unconsciousness, would have a criminal defence. On the other hand, a person who was only slightly intoxicated would have no criminal defence, because the intoxication would have a limited effect on his mental state. The reasoning behind this way of thinking is that someone who was extremely intoxicated would either not know the difference between right or wrong or would be unable to stop themselves acting criminally. However, someone who was only slightly intoxicated would still be able to appreciate the difference between right and wrong and would be able to act in accordance with that appreciation.

In reaction to the court's ruling in *Chretien*, the government introduced the Criminal Law Amendment Act 1 of 1988. The effect of this Act is that even if a person was so intoxicated that he lacked criminal capacity, that person could still be guilty of **contravening** the Criminal Law Amendment Act.

When we speak about breaking the law we say that someone **contravenes** a particular law.

It should also be noted that you will only be liable in terms of the Criminal Law Amendment Act if you knew what the effect of consuming the intoxicating substance would be. This means that you must know that you are consuming alcohol or drugs and that it would have a physical effect on you. If you thought, incorrectly, that you were drinking non-alcoholic fruit punch, you would not be liable in terms of the Act.

The penalty for contravening the Act is equivalent to the punishment that the accused would have received had he not been intoxicated. In addition, the fact that the accused was intoxicated at the time that he committed the crime is regarded as an aggravating factor for sentencing. An aggravating factor is something that results in the accused receiving a harsher punishment than he would in other circumstances. Here, the fact that the accused is drunk at the time he commits the crime means that he will receive a much harsher sentence from the court than he would otherwise have received.

Provocation and emotional stress

To provoke someone is to cause someone to get angry or frustrated. A person who finds herself in situations of severe provocation and emotional stress may lack criminal capacity. When someone becomes very angry, she may want to hurt the person who is provoking her. If she then harms the person, she possesses criminal intention, since she wanted the consequence to occur and her actions ensure that the consequence occurs.

The general approach in most countries is that society expects the individual to be able to control her emotions. Therefore, provocation does not usually serve as a defence to criminal capacity. In order for a defence of provocation to be successful, the accused must act suddenly, in the heat of passion, before she has time to cool down and rethink the situation rationally. When using the defence of provocation, the important question that must be answered is: did the provocation cause the person to lose self-control?

Let's look at two cases in which the defence of provocation was used with different results.

Case study — I wanna be a stripper!

In *S v Arnold* 1985 (3) SA 256 (C), a 41-year-old man, Arnold, was charged with murdering his wife, an attractive 21-year-old woman. Prior to the shooting the accused had been suffering a great deal of emotional stress. The relationship between the accused and his wife was tense. During a fight between them, the gun went off. However, no one was hurt at this time. The conversation carried on. Then the wife bared her breasts and informed the accused that she wished to return to her previous employment as a stripper. A second shot was fired and the wife was struck and killed by this second bullet. In court, the accused stated that he could not remember reloading the pistol, but he agreed that he must have done so. The accused stated that he could not remember pointing and firing the gun. The accused claimed that he was extremely angry with the deceased and that he was under a great deal of emotional stress at the time.

The court accepted his evidence as truthful. The court could not find beyond a reasonable doubt that when the accused killed the deceased he was acting consciously and not subconsciously. Even if he was acting consciously, criminal capacity on his part had not been proved. The accused was accordingly **acquitted**.

To be **acquitted** of a crime is to be found not guilty and released.

Case study — Road rage

In another case involving provocation as a defence, *S v Eadie* 2002 (3) SA 719 (SCA), Eadie had been involved in an incident of road rage in which he killed another driver. He had been driving home late at night with his family when another driver overtook him and flashed his lights at him. The driver then drove at a very slow speed in front of Eadie's car. When Eadie overtook him, the driver continued to overtake Eadie's car and then slow down. When both cars stopped at a traffic light, Eadie got out of his car and assaulted the driver with a hockey stick, eventually killing him. Eadie was charged with murder. Eadie's story in court was that at the time of the murder he lacked capacity. He claimed he was acting in a situation of severe emotional stress, provocation and intoxication. However, the court disagreed. The court concluded that the deceased's aggressive and provocative behaviour did not entitle Eadie to behave as he did. An accused could only lack self-control where he was acting in a state of automatism.

Automatism refers to actions committed by an accused while he is unable to control his actions. Automatism may be sane automatism or insane automatism.

- Insane automatism refers to a situation where the accused is unable to control his actions because of a mental condition such as we have seen above when considering mental illness.
- Sane automatism refers to a situation where the accused claims that he was unable to control his actions but where this lack of control arises from something other than a mental illness.

Compare these two cases. Arnold was found not guilty because the court concluded that he was so provoked at the time that he killed his wife that he did not know what he was doing and nor could he control his actions. Eadie, however, was found guilty because the court held that he possessed capacity at the time he killed his fellow motorist. The court reasoned that he could control his conduct as his actions indicated that he acted in a focused and goal-oriented manner. Arnold's conduct, on the other hand, could not be said to be goal-oriented, since he did not intend to hurt or kill his wife.

14.3.5 Fault

Fault is an important element of every crime, since the law does not wish to punish people for consequences that they did not intend or expect to happen. Fault is the mental side of a crime, in that we punish the accused for intentionally causing harm to another or for causing harm to another through his negligence.

Fault can take one of two forms. You only need to prove the existence of one of the forms.

1. Intention *(dolus)* is the type of fault that applies to an accused who meant to commit the crime or **foresaw** that the crime would result from her action and carried on anyway.
2. Negligence *(culpa)* is the type of fault that applies to an accused who fails to behave the way a reasonable person would have done in the circumstances.

To **foresee** something is to see or know beforehand.

All common-law crimes require intention, or *dolus*, except for the crime of culpable homicide. As you know by now, culpable homicide is the killing of someone accidentally out of carelessness. In statutory crimes, fault can take the form of intention or negligence (*culpa*).

Intention

In order to be convicted of a crime, it is not necessary that the intention be specific. For example, if you throw a bomb into a crowded room, you may not have a specific intention to kill John Doe who is present in the room. The intention may be general – that is, you foresee that someone will be killed or injured.

Intention can take one of three forms.

1. *Dolus directus* (direct intention): Here, the accused meant to commit the crime.
2. *Dolus indirectus* (indirect intention): Here, the accused did not mean to commit the crime, but realised that his actions would probably result in a criminal consequence.
3. *Dolus eventualis* (eventual intention): Here, the accused did not mean to commit the crime, but knows that her actions will possibly result in a crime, but still carries on with her actions.

Direct intention

The kind of intention that an accused has when she fully means to commit the crime is dolus directus. For example, you want to shoot someone and you go ahead and do it. Or you want to punch someone and you do so.

Indirect intention

The mindset of an accused where the prohibited act or outcome was not the aim of the accused is called *dolus indirectus*. However, the accused realised that the illegal act or outcome would almost certainly result from his conduct. For example, you decide to give a boy you do not like a black eye by punching him. If you punch him, you have *dolus directus* in relation to the crime of assault, because you meant to assault the boy and you did just that. However, this boy wears spectacles. Because he wears spectacles, you know that it is very likely that you will damage the glasses when punching him. If you do damage the glasses, then this is *dolus indirectus* in relation to the crime of malicious damage to property. Damaging the glasses was not your aim, but you knew that in order to inflict a black eye on the boy you would have to damage his glasses.

Eventual intention

Dolus eventualis refers to the mindset of an accused who does not wish to do the prohibited act or bring about the criminal outcome. However, she foresees the possibility that her actions will result in a crime and she carries on with her actions nonetheless. An example of this would be where the owner of a run-down and abandoned house decides to burn down the building to collect the insurance money dishonestly. Up to this point, the scenario reflects *dolus directus*. However, unknown to the owner, a

homeless person is sleeping in the house and is burnt to death in the building. The owner of the building did not intend to kill the homeless man. However, since the building has been abandoned for a long time, she could foresee that people might be present in the building when she burnt it, but despite this knowledge, she set the house on fire anyway. Her burning of the building reflects *dolus directus*. Her killing of the homeless man demonstrates *dolus eventualis*.

Case study *Director of Public Prosecutions, Gauteng v Pistorius* 2016 (2) SACR 317 (SCA)

This case involved the highly publicised trial of Oscar Pistorius for the death of his girlfriend Reeva Steenkamp. Pistorius had shot Steenkamp through a closed door believing her to be an intruder. The High Court had convicted him of culpable homicide as it held that Pistorius did not intend to kill his girlfriend but rather intended to kill the 'intruder'. On appeal, the State argued that Pistorius should be convicted of **murder** and not **culpable homicide**. They argued that intention was present in the form of *dolus eventualis* and that the high court had erred in concluding that no intention was present. The SCA held that for *dolus directus* to be present you must have intended to kill the actual person you killed. However for *dolus eventualis* it was sufficient if you foresaw the possibility of death arising and still acted. The court held that Pistorius had forseen the possibility that by firing a gun through the door he might kill the person behind the door and that he had reconciled himself to that possibility. It was irrelevant that he thought the person behind the door was an intruder and did not think it could be his girlfriend, Steenkamp. As intention was present in the form of *dolus eventualis,* the SCA found Pistorius guilty of murder.

Negligence

Refresh your memory by looking at the difference between the charges of **murder** and **culpable homicide** as examined earlier in this chapter.

Where fault took the form of intention, we looked at what the accused intended or foresaw. In the case of negligence, the question becomes what the reasonable person would have done in the same circumstances. This imaginary reasonable person is the so-called average person in any society – an ordinary man or woman of average intelligence, strength and bravery.

Our South African courts have used the reasonable person test to determine whether an accused has been negligent. They ask the following questions:

- Would a reasonable person, in the same position as the accused, have foreseen the reasonable possibility of the outcome occurring?
- Would a reasonable person have taken steps to guard against this possibility?
- Did the accused fail to take the steps that he should reasonably have taken to guard against the outcome occurring?

If the answer to all three questions above is yes, then the accused is negligent.

Let's look at an example. Jai and Lungile are both first-year law students. They are busy studying for their first test of the semester at Jai's house. During a break, Jai shows Lungile his father's gun. Jai believes the gun is unloaded. He proceeds to point the gun at Lungile's head and playfully pulls the trigger. A shot goes off and Lungile dies.

A reasonable person in Jai's position would have foreseen the possibility of Lungile dying if a person pulled the trigger while holding a gun to his head. A reasonable person would also have taken action to prevent this by examining the gun to see if it was loaded or by not playing with the gun at all. Since Jai did not do this and since he failed to behave like a reasonable person in the circumstances, Jai was negligent.

What do you think?

Do you think that criminal law in South Africa strikes the right balance between protecting the rights of victims of crime as well as the rights of accused persons?

Chapter summary

In this chapter, we learned the following about one of the branches of substantive law – criminal law:

- There are many theories as to why we should have a system of law that deals with the punishment of criminal offences.
- The idea behind the retributive theory is that an offender must be punished in order to restore social balance to society.
- Other writers believe that an offender should be punished in order to deter the offender and other would-be offenders from committing future crimes.
- Criminal law does not usually aim to compensate the victims of crime.
- Criminal law is found in both common law and statute.
- Criminal offences may be either common law offences or statutory offences.
- A common law offence is one that has not been created through legislation.
- A statutory crime is an offence that is created in terms of a statute.
- The legislature can expand or alter common law crimes by passing legislation that will take over from the common law.
- Section 39(2) of the Constitution requires the courts to develop the common law in accordance with constitutional principles.
- The four essential elements of a crime are unlawful voluntary conduct, causation, criminal capacity and fault.
- Unlawful conduct is behaviour that goes against the laws of our country.
- An individual will only be held legally responsible for voluntary conduct. Voluntary conduct is behaviour that the accused can control through making a conscious decision.
- Conduct can take the form of an act or an omission. An act is a positive action. An omission is a failure to act in a situation where there is a legal duty upon you to act.
- Situations in which there is a legal duty to act generally fall into the following categories: prior conduct, control of a potentially dangerous thing or animal, special or protective relationships, public or semi-public office, statute, and contract or any other agreement or promise.
- If an accused has committed the conduct described in the definition of a crime, but has a valid defence, he will not be guilty of a crime.
- Some of the defences that exclude unlawful voluntary conduct are private defence, necessity and consent.
- For an accused to be found guilty of a crime, the accused's act or omission must have caused the consequence that is described in the definition of the crime.
- The accused's action or omission has to be both the factual and legal cause of the consequence.
- To determine factual causation, we use the *conditio sine qua non* test. We ask, but for the action of the accused, would the consequence have followed?
- To determine legal causation, we use two tests: the adequate cause test and the *novus actus interveniens* test.
- The adequate cause test holds that you are the legal cause of a consequence, if, in the usual course of human experience, your act has the tendency to bring about that consequence.
- The *novus actus interveniens* test states that if a new intervening cause breaks the chain of causation, then your action is no longer the legal cause of the consequence.
- A person must possess criminal capacity in order to be held liable for a crime.
- Capacity refers to a person's ability to appreciate the wrongfulness of his actions and his ability to act in accordance with that appreciation.

- Children under the age of 10 are irrebuttably presumed to lack capacity. Children between the ages of 10 and 14 are rebuttably presumed to lack capacity. Anyone over the age of 14 possesses criminal capacity, unless she falls into another category lacking such capacity.
- A person who suffers from a mental illness that affects his ability to appreciate the wrongfulness of his actions or the ability to act in accordance with his appreciation of wrongfulness does not possess criminal capacity.
- According to the common law, if a person is under the influence of alcohol or other intoxicating substances at the time that he committed the crime and is so intoxicated that he does not understand the difference between right and wrong, or he cannot act in accordance with that appreciation, then that person does not possess capacity.
- According to the Criminal Law Amendment Act, a person who commits an act while under the influence of alcohol or drugs may still be held liable for the crime.
- Where a person's actions are caused by provocation, or where a person acts under extreme emotional stress, the facts will determine whether she has criminal capacity.
- Fault may take the form of intention or negligence.
- There are three kinds of intention. These are *dolus directus*, *dolus indirectus* or *dolus eventualis*.
- Negligence is the failure to live up to the standard of the reasonable person.
- In order to determine if a person is negligent, we use the reasonable person test.

Review your understanding

1. Explain what is meant by the justice or retributive theory.
2. Give reasons why some writers believe that punishing an offender will prevent future crime.
3. Distinguish between a common law crime and a statutory crime.
4. List the four elements of a crime and explain briefly what each element means.
5. Explain when conduct is regarded as unlawful.
6. Discuss when there will be a legal duty on you to prevent harm to another.
7. Briefly compare and discuss, in writing, the defences you could raise to exclude unlawfulness.
8. Brainstorm other situations in which the defence of consent could apply.
9. Briefly explain the three forms of intention.
10. Describe and briefly explain the test to determine negligence.
11. In point form, briefly state what elements need to be proved in every criminal action.
12. Briefly explain the difference (if any) between the criminal capacities of two youths aged 6 and 12 respectively.
13. Janet and Suvuyisiwe are camping in woods belonging to the Natal Parks Board. Feeling cold one night, they decide to light a fire to keep warm. They sit around the fire drinking tequila and eventually fall asleep. The fire starts spreading and by the time the smoke and fumes awaken them, the fire has spread over a large area. They do not attempt to stop the fire. Instead they run to their motor vehicle and drive off. The fire spreads further and causes immense damage to the national park and the wildlife that live there. The damage is estimated to be approximately R750 000. The Natal Parks Board presses charges of malicious damage to property against Janet and Suvuyisiwe. Janet and Suvuyisiwe claim that no legal duty rested on them to prevent harm to the Natal Parks Board and that they were not negligent. Discuss their liability in these circumstances.
14. Thabo is showing off his new gun to his neighbour, John. The gun accidentally goes off and wounds John in the arm. Thabo immediately rushes John to the hospital. At the hospital, Dr Deepa, who has been a practising doctor for the last thirty years, treats John. Dr Deepa stops the bleeding but decides that there may be a risk of further bleeding. She decides to operate on John immediately. During the operation, John has an

allergic reaction to the anaesthetic used to make him sleep and he dies. The decision to operate was a medically proper decision, uninfluenced by any personal interest and was not motivated by a desire to do harm. The doctor performed the operation with normal care. Thabo is charged with murder. Thabo argues that Dr Deepa is the cause of John's death. Discuss in small groups whether Thabo or Dr Deepa is liable for John's death. Then write a summary of your conclusions giving reasons for your answer.

15. Achmat, Joey's friend, wishes to play a trick on him. He makes a cup of coffee and, without Joey being aware of it, puts a drug into his coffee. Joey drinks the coffee. The drug makes him aggressive. As a result of the drug, he assaults Ross. Joey is charged with assaulting Ross. Discuss with a partner whether Joey will succeed with his defence that at the time of the act he was under the influence of a drug. Explain your answers individually.
16. Imagine that you wake up in the middle of the night to the sound of glass breaking. You walk into your lounge to find a thief in the room. He threatens you with a gun and the two of you struggle. During this struggle, you break a vase over the thief's head. The thief is injured and falls unconscious to the ground. You call the police and when they arrive, they find that the thief has died. They arrest you on charges of murder. You are very confused as to why you are facing charges of murder, when you were defending yourself against a thief who tried to assault you. Also, you only tapped him with the vase and don't understand how he could have died. Medical evidence later reveals that he had a piece of his skull missing due to a knife wound he received in a fight three years ago. It was this pre-existing injury that caused the injury you gave him to result in his death. You believe that this pre-existing weakness means that you did not murder him. Your attorney disagrees. You cannot understand why you are facing criminal charges for defending yourself. Based on what you now know about the essential elements of unlawful voluntary conduct and causation, discuss in small groups whether a court would find you guilty of murder in the circumstances described above.

Further reading

Burchell, J. 2016. *Principles of Criminal Law,* 5th edn. Cape Town: Juta and Co. (Pty) Ltd
(This is an extensive work, which deals with all the elements of criminal law in great detail. It also deals with the specific requirements of different types of crimes.)

Kemp, G., Walker, S. et al. 2013. *Criminal Law in South Africa.* Cape Town: Oxford University Press Southern Africa
(This textbook is a comprehensive examination of the law relating to crimes committed in South Africa.)

Snyman, C.R. 2014. *Criminal Law,* 6th edn. Durban: LexisNexis South Africa
(This book provides a good overview of criminal law with many useful examples.)

The law of persons, family law and law of succession

Chapter 15

The main ideas

- What is private law?
- Law of persons
- Family law
- Law of succession

The main skills

- Understand legal subjects, objects and rights.
- Understand the law of persons.
- Solve problems related to the law of persons.
- Apply your knowledge of the law of persons.
- Distinguish between marital systems.
- Understand family law.
- Solve problems related to family law.
- Understand the law of succession.
- Solve problems related to the law of succession.

Apply your mind

In *Hassam v Jacobs NO and Others (Muslim Youth Movement of South Africa and Women's Legal Trust as amici curiae)* 2009 (5) SA 572 (CC) the Constitutional Court allowed a Muslim woman married by Islamic rights to be recognised as a spouse for the purposes of intestate succession from her husband's estate, despite the fact that she was a spouse in a polygamous marriage. This right to inherit intestate has also been afforded to a Hindu woman married by traditional rites only. What do you think this tells us about the nature of South African law?

In Chapters 12, 13 and 14 we looked at branches of public law. In this and the next three chapters, we will explain private law and its branches. This chapter focuses on the areas of private law that deal with family law, the law of persons and the law of succession. We begin with an overview of private law, explaining important terms and ideas, before we explore the branches of private law in more detail.

Before you start

You may think that private law has nothing to do with you, but it affects many areas of our lives and every stage of our lives. Can you answer these questions?

- Do you **enjoy rights** only when you are born or do you enjoy rights from the time that you are conceived?
- Who can you marry? What sort of marriage may you enter into? Must it be a civil marriage? In other words, how does marriage affect your rights and your status?
- What are the consequences of a marriage?
- Who has guardianship over children born of a marriage?
- If a marriage is not working out, how may you end the marriage?

In law, we say '**enjoy rights**', rather than 'have rights'.

You will find the answers to all these questions in the various branches of private law that we explore in this chapter.

15.1 What is private law?

Private law deals with the status of persons and with their relationship with each other and with legal objects. Private law is divided into separate subjects. For example, the law of succession deals with the relationship between a person who has died and the people to whom she has left her property. Other branches of private law deal with other sorts of relationships between people. For example, family law deals with the rights and duties of family members to each other. Before we explain the various branches of private law, we must first understand the legal concepts explained below.

15.1.1 Legal subjects

In private law, the legal term for a person is a legal subject. You are a legal subject from birth to death. A legal subject enjoys legal status. Legal status is a legal subject's ability to **enjoy legal rights** and to **owe legal duties** to other legal subjects. Each person enjoys rights but also owes duties to other persons. These rights and duties may, for example, come from the parent-child relationship, through a marriage, or because two people are in close contact with each other.

The person sitting next to you **enjoys the right** of bodily integrity and you **owe** her a **duty** not to infringe this right by slapping her.

There are two types of legal subject:

- natural persons
- juristic persons.

Natural persons

In law, a natural person is a human being. So, you and I are natural persons.

Juristic persons

A **juristic** person is not a human person but is regarded as a person in terms of the law. Examples of juristic persons are companies, close corporations, banks or universities. They are not human, but the law gives them a legal personality. This means that they enjoy the rights of a legal subject and they have legal status. We know that a juristic person, such as your university, needs natural persons, such as professors, lecturers and secretaries, to run it, but the university will still exist as a juristic person, even when the natural persons leave or die.

Juristic means to do with the law.

15.2 Legal objects

A legal subject can have legal rights over legal objects, but what are legal objects? We look next at the four types of legal object:

- Things are movable and **immovable property** and objects, including land, houses, furniture, motor vehicles and books.
- Intellectual property is created by the work of the human mind. For example, the text of this book, a song and an invention are all intellectual property.
- Performances are the actions that a legal subject does, or does not do. For example, if someone (a legal subject) agrees that he will mow your lawn for a year, the mowing service for a year is a performance. A different example of a performance would be my agreement that I will not open a hair salon within 500 m of your hair salon – the 'not opening' of such a hair salon will be the performance.
- Personality refers to a person's good name or reputation, as well as to her dignity and privacy. A legal person enjoys rights over her personality. Other legal subjects must respect these rights, as they have a duty not to infringe them. For example, they may not infringe your right to personality by calling you rude names.

Immovable property, such as land and buildings, cannot be moved.

A natural person, or a juristic person, may have a legal right over legal objects, such as cars or houses that belong to them. Legal objects are valuable to the legal subject, either because they have a **monetary** value or because the owners value the object for sentimental reasons.

Monetary value is what the object is worth in terms of money.

Although a legal subject has duties to other legal subjects, a legal subject cannot owe duties to legal objects. For example, you do not owe your bicycle any duties. The legal object itself does not have any rights. A legal subject has the right to be treated with dignity, but a house, as a legal object (and not a legal subject), does not have the right to dignity. So, a house cannot sue a human for **infringing** its dignity by painting it a hideous colour. But a person can sue another person who damages his car, for example.

Infringing is doing something that is against a law or someone's legal rights.

It is important to identify clearly the two sorts of legal relationship that a legal subject can have:

1. A relationship can exist between a legal subject and a legal object, such as between a natural person (legal subject) and a motor vehicle (legal object).
2. A relationship can exist between a legal subject and one or more other legal subjects. For example, you (a natural person) enjoy a legal relationship with your employer (another legal subject who may be a natural person or a juristic person).

15.2.1 Legal rights

We have said that a legal subject enjoys legal rights over legal objects. These can be:

- real rights
- intellectual property rights
- personal rights
- personality rights.

We will now explain each of these different types of rights in more detail.

Real rights

Rights that legal subjects enjoy in regard to things are called real rights. Real rights must be respected by every other legal subject. So, for example, if Tom owns a bicycle, he has a real right over that bicycle and every other legal subject must respect that right. Bheki cannot just take Tom's bicycle because he likes it, although he could so with Tom's permission.

Intellectual property rights

A person enjoys intellectual property rights over the things she has produced by using her mind. So, for example, if you have painted a picture or composed a song, you will enjoy intellectual property rights over the material you have created. These kinds of rights ensure that people cannot simply steal your song and record it without your permission.

Personal rights

Legal subjects can have personal rights over performances, which are one of the types of legal object that we have mentioned. For example, if I agree to mow your lawn, you have a personal right to expect me to perform in terms of our agreement. In return, I will have a duty to mow your lawn in terms of the agreement.

The law of obligations, i.e. delict and contract, is linked to personal rights.

Personality rights

A legal subject enjoys personality rights over his personality. These include the rights that a legal subject has over his good name, privacy or dignity.

Personality rights are regulated by the law of delict.

15.3 Legal capacity

When legal subjects enjoy rights over legal objects and owe duties to other legal subjects, we call their ability to do so legal capacity. Legal capacity also refers to the ability of a legal subject to take part in the legal process. Generally, natural persons over the age of 18 who do not suffer from insanity have full legal capacity. Most legal subjects have legal capacity, but sometimes there are limitations on a legal subject's capacity to act. This means that the person may not be able to perform certain acts in terms of the law, such as getting married.

Children under the age of 7 and people who are mentally ill do not have legal capacity. They cannot enter into contracts by themselves, cannot make a will or enter into a marriage. **Minors** between the age of 7 and 18 have a limited capacity. This means that they may perform some, but not all, **juristic acts** by themselves. For example, a minor may make a will when he turns 16, but may not enter into a contract, without his parents' or guardian's permission, until he turns 18.

People who are mentally ill do not have the legal capacity to perform juristic acts. Usually, the court will appoint a person known as a **curator** to perform juristic acts on behalf of the mentally ill person. For example, a curator may enter into a contract with a nurse to look after the mentally ill person or may sell or buy property on her behalf. However, there are limits to a curator's power. A curator may not make a will for the mentally ill person or enter into a marriage on her behalf. This is because making a will and getting married both involve personal choices that only the relevant person can make. When the person recovers and is no longer mentally ill, she has full legal capacity again.

Juristic persons have legal capacity to enter into contracts and to own property, but may not enter into marriage, adopt children or make wills.

We will now explain in more detail some of the branches of private law. As mentioned in the introduction to this chapter, we will look at the law of persons, family law and the law of succession.

Minors are natural persons who are under the age of 18 years. In the past minors only attained majority when they turned 21. However, as of 1 July 2007 in terms of s 17 of the Children's Act 38 of 2005, minors now attain majority at the age of 18.

A **juristic act** is an act that has legal effects and which is recognised by the law, such as getting married.

A **curator** is appointed by the court to perform juristic acts on behalf of a mentally ill person.

15.4 Law of persons

The law of persons deals with the characteristics and status of legal subjects (juristic and natural persons). The status of a legal subject is the legal subject's standing in law and deals with the ability of a legal subject to exercise rights and duties in terms of the law. We will explain the beginning and the end of legal personality.

15.4.1 The beginning of legal personality

A natural person acquires or gets a legal personality at birth. A foetus is not regarded as a legal subject and it only acquires legal personality when it is born alive.

So what happens if the father of a foetus dies before the foetus is born? Does the foetus lose all rights to inherit the father's estate?

After all, if the baby is born one minute before the father dies, the baby will be able to inherit. What about damage caused to a foetus while he is still ***in ventre matris***?

Once the foetus is born alive, is he prohibited from suing a guilty party because he was a foetus when the damage was inflicted?

And what happens if a healthy foetus of 39 weeks is shot and killed by a third party? Is this murder, if the foetus is not yet a legal subject? If the baby had been born one hour before being shot, it would be murder. In order to solve problems like these, the law has developed the ***nasciturus*** fiction.

In ventre matris is a Latin phrase, which means 'still in his mother's womb'.

Nasciturus is the Latin word for foetus.

The *nasciturus* fiction ensures that the foetus is treated fairly in our law. In terms of the *nasciturus* fiction, a foetus is regarded as being alive and enjoying legal personality from the time of conception, when it is to the advantage of the foetus. However, the foetus must then be born alive.

So if the father of the foetus dies, without leaving a will, after the foetus has been conceived, but before it has been born, then the foetus has a right to inherit. If the father of the foetus has left a will, leaving his estate to his children, the foetus, who is conceived, but not yet born at the time of the father's death, will also have a claim, if he is later born alive. The same applies to the wills of other persons, such as the foetus's grandparents.

Case study The injured foetus

The case of *Pinchin and Another NO v Santam Insurance Co Ltd* 1963 (2) SA 254 (W) concerned a pregnant woman who was involved in a car accident. When the foetus was born, they discovered that the baby had cerebral palsy. The parents claimed that this was caused by the injuries the foetus suffered during the accident. The court had to decide whether a foetus could have an action for injuries inflicted on him while he is still in the womb and, strictly, had no legal personality. The courts extended the *nasciturus* fiction allowing it to apply to non-patrimonial interests of the foetus as well and held that a foetus does have a right to recover damages inflicted on it before its birth. However, the court held that the facts of this case could not support the conclusion that the cerebral palsy of the child was a result of the accident.

In the recent case of *Road Accident Fund v Mtati* 2005(6) SA 215 (SCA) the Supreme Court held that the *nasciturus* fiction does not need to be used in delictual matters as damages would be due once all delictual requirements were satisfied.

In the recent case of *Stewart and Another v Botha and Another* 2008 (6) SA 310 (SCA) the SCA utilised the *nasciturus* fiction in deciding whether to grant an action in a wrongful life claim. The appellant's son had been born with severe congenital defects that required lifelong medical treatment. In addition, he would always require special schooling and many other expenses would arise as a result of his defects. The parents alleged that the doctors were negligent in not detecting and informing them that their son had congenital defects. If they were aware that the foetus had defects they would have terminated the pregnancy and their son would not have been born. The court held that while the *nasciturus* fiction could be used for injuries a foetus sustains prior to birth the appellants here were not asking for damages for pre-birth injuries but rather asking the court to conclude that it would have been better had the foetus not been born at all. This question was not an appropriate one to ask the court and the case was dismissed

This same issue came before the Constitutional Court in the case of *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC). In this case, the Constitutional Court concluded that it was possible for our law to be developed to allow such a claim and referred the matter back to the lower court to see if the law could be developed to allow such a claim.

Mom seeks justice in 'wrongful life' claim

2014-12-11 05:05

Johannesburg – The Constitutional Court will on Thursday deliver its ruling in a damages claim laid by the mother of a child born with Down's syndrome.

The mother, named Ms H to protect the child's identity, alleged that while pregnant, she approached the Kingsbury Foetal Assessment Centre, the respondents in the case, for a scan of her foetus to assess the possible risk of the child being born with certain congenital conditions.

She claimed the centre failed to interpret the scan correctly and negligently failed to warn her of the very high risk of her child being born with Down's syndrome.

Ms H said had she been made aware of the high risk she would have terminated the pregnancy.

She brought a damages claim in the Western Cape High Court on behalf of her child.

The centre raised a number of exceptions, most prominently that this type of claim, known as a claim for 'wrongful life', was not recognised in South African law. The high court dismissed the claim.

In the Constitutional Court, Ms H argued that the common law should be developed to recognise a claim for 'wrongful life', especially in light of the focus on children's rights enshrined in the Constitution and the Children's Act.

She contended her claim was aimed at recovering damages to support the life now being lived, one which involved total dependence and continuous care,

rather than a claim on the basis that the child should not have lived at all.

She further submitted the centre had a duty to inform her of the risks associated with the birth of her child and that this duty extended to her child.

The centre argued the claim should not succeed because it owed no legal duty to the unborn foetus.

The respondent further submitted the claim should not be recognised in South African law because to award damages in this instance entailed comparing the value of never being born (in the event of a termination of pregnancy) with the value of living with a disability.

The centre contended that for ethical, moral, philosophical, and legal reasons, no such comparison could be made by the law.

Source: http://www.news24.com/SouthAfrica/News/Mom-seeks-justice-in-wrongful-life-claim-20141211

15.4.2 The end of legal personality

A natural person's legal personality is terminated or ended by death.

In the past, it was accepted that a person died when heart and lung activity stopped. Recent developments in medical science have led to death becoming more protracted, rather than a sudden event. So it is no longer always obvious when the moment of death occurs. Does a person die when the heart and lungs stop working or when the brain stops working? Consider this question in light of the following case study.

Case study Dead or not?

In the case of *S v Williams* 1986 (4) SA 1188 (A), the deceased was shot by the accused in the neck. When she was taken to hospital, doctors placed her on an artificial respirator. The day after the shooting, doctors could not register any brainstem activity in the deceased. As her condition did not improve over time, the doctors took the decision to remove her from the respirator. As a result, her heart and lung activity stopped.

Medical evidence that was led in this case stated that medical science considered a person dead when there was brainstem death. The accused argued that he was not guilty of murder because the death of the deceased had been caused by the doctors switching off the respirator, which caused her heart and lung activity to stop, and not by his shooting her.

The Appellate Division held that the accused was guilty of murder and decided the matter in accordance with the traditional view that death occurred at the point at which the lungs and heart stopped functioning. The court found it was unnecessary to decide whether the view of medical science that death occurred when the brainstem stopped functioning should be adopted as the new standard of deciding the end of legal personality.

What happens if a person disappears and nobody hears from her again? The family does not know whether the person is alive or not. A person's disappearance can cause various problems for the remaining family members. For example, may the missing person's husband remarry without proof that the missing person is dead? What should the family do with the assets the person leaves behind?

A family in this situation may approach the High Court for an order to presume the death of the missing person. This is called the **presumption** of death order.

When you **presume** something, you suppose that it is the case, because it is probable.

The court will only grant such an order if it is convinced that the missing person is dead. The court will consider how long the person has been missing, the missing person's age and occupation, whether there was any reason for her to disappear without telling the family and how the person disappeared.

After the court has heard evidence, it sets a return date when the **applicants** must return to the court for a final order to be made.

The **applicants** are the people who are applying for the order.

Before then, the applicants have to give notice of the application for the presumption of death order to any interested party and must publish the notice in the ***Government Gazette*** and a local newspaper.

On the return date, if the missing person does not appear at court and the court is convinced that the missing person is dead, it will grant the presumption of death order.

The presumption of death order means that we presume that the person is dead, but if the missing person is later found alive, the court will set the order aside.

The ***Government Gazette*** is a government newspaper in which all new laws and other matters of legal importance appear.

Once the court grants the presumption of death order, the estate of the missing person can be dealt with as if she had died. The only difference is that the people who inherit the estate must provide security for their inheritance, in case the missing person returns. This means that they must leave a sum of money, or guarantee, with the court to make sure that the missing person can get back her possessions if she returns.

What about the spouse of the missing person?

Once a court grants a presumption of death order, the court may also make an order that the marriage between the spouse and the missing person be dissolved.

The spouse of the missing person will then be free to remarry. The remarriage will be valid, or accepted in law, even if the missing person comes back again.

15.5 Family law

Family law is the area of law that affects family relationships. It controls engagements, marriages, divorces and the relationship between a parent and a child.

In the past, marriage in South Africa was recognised only as a union between a male and a female. In December 2005, this was changed when the Constitutional Court ruled that the definition of marriage was unconstitutional in that it did not allow same-sex couples to marry and gave the government twelve months to change the definition of marriage to allow same-sex couples to get married. In response to this, the government passed the Civil Union Act 17 of 2006, which led to homosexual marriages now being recognised as legal marriages.

Only heterosexual civil marriages were recognised in the past. In a civil marriage, the two people getting married sign the marriage certificate in front of witnesses and a marriage officer. This certificate is then kept at the Department of Home Affairs.

In the past, Christian priests or ministers were recognised as marriage officers, but Hindu priests and Islamic imams were not. This led to the situation where customary or religious marriages, such as Hindu and Muslim (Islamic) marriages, were not recognised as valid.

Professor says — Hindu and Muslim marriages

Now Hindu priests and Islamic imams can apply for recognition as marriage officers. They will then be allowed to conduct the religious ceremony and complete the civil law marriage certificate, which is then registered at the Department of Home Affairs. However, not all Hindu priests and Muslim imams have applied to be marriage officers and so there may be problems if they conduct religious marriages and the spouses do not also have a civil marriage.

The Constitution emphasises the right to religious freedom. The courts now recognise a Muslim marriage as a valid marriage, but only in some situations. For example, when a wife wants to claim damages for her husband's death from the Road Accident Fund, the marriage will be recognised. However, Islamic marriages (where the marriage partners have not also undergone civil marriages) are not recognised as legal marriages for other purposes.

Professor says (continued) Hindu and Muslim marriages

The courts have also considered whether a Hindu marriage can be recognised as a valid marriage for the purposes of South African law. They have come to the conclusion that a Hindu marriage is not recognised as a legal marriage in South Africa. However, like Islamic marriages, a Hindu religious marriage will be recognised as a valid marriage in some situations. For example, a woman married by Hindu rites alone is now entitled to inherit intestate from the estate of her deceased husband and she may also claim maintenance from her husband.

15.5.1 The variable consequences of a civil marriage

People enter into a civil marriage in accordance with the laws of South Africa.

The law attaches certain legal consequences to a marriage. We can divide these into **variable** consequences and **invariable** consequences. The variable consequences of a civil marriage are consequences that can be changed by agreement between the spouses. The only consequences that spouses can in fact change are those that flow from their choice of **matrimonial system**.

There are three types of matrimonial system:

1. marriage in community of property
2. marriage out of community of property, excluding **accrual**
3. marriage out of community of property, including accrual.

Each matrimonial system has different consequences for the spouses. They must decide on a matrimonial system before the marriage.

Civil marriages now include same-sex marriages in terms of the Civil Union Act.

If something is **variable**, it can be changed. If it is **invariable**, it cannot be changed.

A **matrimonial system** is the type of property regime, or arrangement that applies to the marriage.

Accrual refers to the growth of the estate.

Marriage in community of property

This is the most common matrimonial system in South Africa. In any civil marriage, this is the automatic matrimonial system. If the spouses do not want to enter into a marriage in community of property, they must enter into an **ante**nuptial contract. An antenuptial contract is a contract that two people enter into before their marriage. It gives the details of the type of matrimonial system that they have chosen. This contract is registered at the deeds office.

The prefix **ante**- means before.

In a marriage in community of property, the estates of each spouse are merged or combined into one estate. This estate is a joint estate, as it is owned equally by both spouses. Just as their separate assets merge, their separate **liabilities** also merge on marriage and these liabilities become liabilities of the joint estate. The joint estate is only divided when the marriage is terminated through death or divorce.

Your **liabilities** include your debts and money that you owe.

In the past, when a woman married, she no longer had the legal capacity to enter into contracts or to **litigate** without the permission of her husband. This loss of a wife's legal capacity is called coming under the marital power of her husband. The only way a woman could have legal capacity after marriage was to enter into an antenuptial contract excluding the marital power.

To **litigate** is to bring a court case against someone or to take part in legal proceedings.

The General Law Fourth Amendment Act 132 of 1993 abolished the marital power for all marriages. So now, women have equal powers of administration of the joint estate with their husbands. This means that wives can also control the joint estate and incur debts on behalf of the joint estate. The spouses still need each other's consent to enter into certain types of contract.

If one of the spouses in a marriage in community of property becomes **insolvent**, the joint estate becomes insolvent.

If you are **insolvent**, you have spent more than you own and cannot pay your debts.

Marriage out of community of property

If the parties wish to enter into a marriage out of community of property, they need to enter into an antenuptial contract. An antenuptial contract is only valid if it is registered in the deeds office in accordance with s 87 of the Deeds Registries Act 47 of 1937. The contract must be signed by a **notary** and must be registered in the deeds office within three months of its execution.

A **notary** is an attorney with a further special qualification who is authorised to perform certain legal actions, such as drawing up or certifying specific types of contracts.

There are two types of marriage out of community of property. Since 1 November 1984, a marriage out of community of property (a marriage with an antenuptial contract) is automatically a marriage out of community of property 'with accrual'. If the parties do not wish the **accrual system** to apply to their marriage, they can state this in the antenuptial contract.

The **accrual system** does not apply to marriages concluded with an antenuptial contract before 1 November 1984.

There is a difference between marriages out of community of property excluding accrual and including accrual.

- In a marriage out of community of property excluding accrual, each spouse retains or keeps the separate estate they had before the marriage. Their estates remain separate upon marriage and do not merge. Neither spouse becomes liable for the debts of the other spouse. When the marriage is terminated by death or divorce, neither spouse has a **claim** on the other spouse's estate.
- In a marriage out of community of property including accrual, the spouses retain the separate estate they had before marriage and their estates do not become a joint estate. Each spouse remains liable for for his or her own liabilities. However, when the marriage is terminated by death or divorce, each spouse shares in the growth or the increase in the value of both estates. The estate is not a joint estate but the spouse has a claim on the other spouse's estate when the marriage ends.

They still may have a **claim** in terms of the support owed by each spouse or if a spouse claims part of the estate when the partner dies without a will.

Activity 15.1

John and Faye wish to marry. John is employed as a salesman at a furniture store, but he intends to leave this job and start a business manufacturing furniture. This will be his first business venture and he is not sure whether he will be successful. Faye has qualified as an architect but she decides that she will leave work and stay at home to be a wife and mother as soon as she and John have children, which she hopes will happen soon. They have heard that there are various forms of matrimonial systems and they approach you for advice about which system would be best for them.

Give them advice about the different systems.

15.5.2 The invariable consequences of a civil marriage

We have said that a civil marriage in any matrimonial system brings certain consequences. When these consequences are automatic and cannot be changed by the spouses, we call them the invariable consequences of marriage. We will look at some of these invariable consequences now.

The status of the spouses

A civil marriage affects the legal status of the spouses in the following ways:

- During the marriage, neither spouse may marry another person.
- Each spouse has the right to succeed to the other spouse's estate on that spouse's death.
- If the spouses are the biological parents of a child born before their marriage, the child becomes **legitimate** when his biological parents marry.
- The spouses become the guardians of any children born of the marriage.
- If a minor enters into a valid marriage, she automatically attains **majority** upon marriage.

A **legitimate** child is a child that is born of parents who are married to each other.

When you attain **majority**, you are legally considered to be an adult.

Consortium

When a person enters into a civil marriage, he acquires the right to *consortium* from the other spouse. This means the spouse has the right to the love and companionship of the other spouse.

Of course, you cannot ask a court to order your spouse to love you. However, a spouse can ask for a divorce if consortium is no longer present and there is no longer a normal marital relationship.

Activity 15.2

Thandi and Sbonelo have been married for ten years. They live in a huge house on the beach in Umhlanga. Sbonelo is a doctor. Thandi does not work, but looks after their two children, Ntokozo and Tapiwa. They live a lavish lifestyle and they often travel overseas.

Thandi discovers that Sbonelo has a girlfriend. She is scared that Sbonelo no longer loves her and has heard about her right to companionship, love and affection. So she wants to get a court order for Sbonelo to leave his girlfriend and love her only.

Give Thandi advice, based on your knowledge of the law.

Duty of support and household necessaries

During a marriage, each spouse owes the other spouse a duty of support or maintenance. This duty means that the spouses should provide food, clothing, housing and other necessaries for each other. Household necessaries are everyday items that you need, such as medical services, food and clothing. Where a spouse incurs a debt for a household necessity, the other spouse may also be held liable for this debt.

If a spouse does not fulfil this duty of support, the other spouse may ask the court to make a maintenance order to force the other spouse to provide the support. The court will only make this order if the spouse is able to pay the support and the spouse who is claiming the support needs it. This claim can be brought in either the High Court or the maintenance court.

The duty of support ends on the termination of the marriage through death or divorce. If the marriage is terminated through the death of one spouse, the surviving spouse has a right to claim maintenance from the **deceased's estate**. If the marriage is terminated by divorce, the court may order one spouse to pay the other spouse an amount for maintenance.

The **deceased's estate** is the money and property that the dead person leaves behind.

It is not always simple to claim maintenance, as the following article regarding child maintenance shows.

Battle for maintenance

By Zisanda Nkonkobe
January 28, 2017

Zandile* paints a harrowing picture as she speaks from outside the maintenance office in the East London Magistrate's Court, her hands restlessly playing with prayer beads.

Having parted ways with her physically abusive husband five years ago, she said she was forced to allow the court to grant temporary custody of their 10-year-old son to his father as she was unemployed at the time of the separation and could not afford to support him.

After a brief visit during the June school holidays last year, Zandile was left heartbroken when the time came for her son to return to his father's house and he tearfully told her he received daily beatings from his father.

She did not send him back, instead applying for an urgent interdict to have him remain with her while she resumed her fight for custody.

While her low-paying job will meet most of her child's basic needs, she said she would need money from the father to supplement her income.

Zandile said she hoped going via the courts would yield positive results, but after months of rejection and humiliation at the hands of court officials, she said she was close to giving up.

"You get here and, on asking where to go, you are told to go and visit that office. You get to that office, sit in a queue for hours and, when it's finally

your turn, you are told you're at the wrong office and you should be next door," a tearful Zandile said.

"Because you are desperate, you go to the next door and again sit outside for a long time, waiting your turn. The people who work here are not friendly and many do not even seem interested in hearing your story. We are told to fill in many forms, some of which we don't even understand.

"I've just been told to go visit social workers as I'm still in the process of getting legal custody of my son, but there are many women who have been coming here for a long time. It's already so hard to come here seeking help and this is made more humiliating when we are treated the way we are. But we come back every single day because we really have no choice."

Many mothers, fathers, step-parents and guardians report the difficulties they experience when visiting maintenance court in an effort to get errant ex-partners to contribute towards the upbringing of their children. This begs the question, are our maintenance courts failing the very subjects they exist to protect?

In an effort to gain a better understanding of the issues faced by many inside the court, East London attorney Tammy Coutts of Coutts Attorneys compiled a thesis on the topic in 2014.

Titled "A critical analysis of the implementation of the Maintenance Act 99 of 1998: Difficulties experienced by the unrepresented public in the Maintenance Court as a result of the poor implementation of the Act", the dissertation looks at a range of issues.

Coutts said she visited maintenance courts in Port Elizabeth, East London, Mthatha, King William's Town, Zwelitsha and Mdantsane. What she found were issues including court files getting lost, rude staff, lack of proper waiting rooms and no ablution facilities in some courts.

"Some courts are better equipped than other courts but each of them has their own problems," Coutts said.

"The system is designed that you don't need to have a lawyer but, because of the inefficiency of the courts, many resort to getting one. In most cases, these people cannot afford one and when a case is done, many end up worse off financially than when they began.

"Those who don't get a lawyer often struggle to fill in the complicated forms, they sit in waiting rooms waiting for their cases to be heard for up to eight hours and in many cases are told to come back the next day.

"Some of these women come from rural areas and may not have the taxi fare to come back or some have taken a day off from work and are losing out on a day's pay."

To speed up maintenance procedures, in 1998, "the Act introduced a number of new or revised concepts, including the introduction of the maintenance investigator (tracers), additions to the type of orders to be made (including the granting of default orders), a shift in the onus of proof from accused to prosecutor in a criminal matter, the extension of the application of the Act to a contractual duty outside of blood relation or marriage, and the automatic deduction of payments from wages through emoluments attachment orders.

"Despite the best intentions of the legislature, however, the maintenance system remains in disarray. It continues to be slow and ineffective and a fairly unproductive means of enforcing rights."

The Saturday Dispatch sent questions to the department of justice (DoJ) on Wednesday this week, hoping to provide clarity on some of the maintenance court procedures, but these have gone unanswered.

According to the DoJ website, for a parent to claim maintenance from another party, the parent needs to apply at the Magistrate's Court in the district they live in, where they will fill out an application form known as the J101.

Accompanying this form should be proof of monthly income and expenses such as receipts for food purchases, electricity and proof of rent payments.

The court will then set a date where the claimant and the respondent (the person from whom you wish to receive maintenance) must go to court. On this date a maintenance officer and an investigator will investigate the claim and look into the claimant's circumstances.

Should they find grounds, a summons will be issued to the respondent telling them when they have to appear in court, where they will be given the choice to either agree to pay the amount or to contest it in court.

If the respondent agrees to the amount claimed, the magistrate will review the relevant documentation and make a payment order. If the respondent contests the payment, he or she must appear in court where evidence from both parties will be heard. If found liable for payment, the court will determine the monthly payments to be made. This can either be made directly to the magistrate's office, from where the claimant can collect it each month; into the bank account of the person concerned, or directly to the claimant.

Jennifer*, a mother of two, who split from her husband when her youngest child was just a year old, said despite him initially contesting the maintenance order, the court had ordered her ex-husband to make monthly payments of just over R1 500 for both children.

Sixteen years later, Jennifer said she had yet to see a cent of this money and was now owed over R300 000.

The single parent currently holds down two jobs in order to support her children.

"I have e-mails from top officials promising to help me, to no avail. I have had enough of this maintenance department and have also lodged a complaint with the Hawks," she said.

"I have battled and struggled for 16 years with a sick son with huge medical bills and this department has failed me and I am sure many others. My ex lives in Johannesburg and has a warrant out for his arrest from January 2016, but it seems … he cannot be found and held accountable.

"I have given officials his home address, his business address and all his contact numbers, but they tell me he cannot be found. I find it strange."

Lecturer Steve* said he had been looking after his stepdaughter since she was in Grade 1 without any assistance from her biological father.

He said his wife had originally claimed R4 000 a month from the child's father, which he contested, saying he could only afford R700, which he was granted. These payments finally started last year but stopped after six months. His excuse for not paying in the years before this was that he did not have a job.

"That amount is ridiculous. It's not even enough to pay for her school transport, which is R750 a month, but the courts granted that order anyway. Now he's stopped paying and when we asked him why, he just said he can't afford it," he said, adding that as a 15-year-old, his stepdaughter needed school fees, cosmetics, clothes, food plus her medical expenses.

"She has grandparents who live in a very fancy house in the suburbs but they also refused to give any money towards raising her.

"And it's not that I mind paying for her. I just feel that as a father he has a duty to care for his child. He has full access whenever he wants to spend time with her but he clearly doesn't see the need to try and raise her."

Coutts said she had come across a number of fathers seeking compensation from mothers, but in many cases their pleas for help were not taken seriously.

"At the end of the day, a parent is a parent. Whether male or female, they have the right to seek what they need in order to raise their children."

* Zandile's name, and other names in this article have been changed to protect their identity and those of their children. – zisandan@dispatch.co.za

Source: http://www.dispatchlive.co.za/daily-life/2017/01/28/battle-for-maintenance/

The matrimonial home

While the marriage is in existence, each spouse has the right to live in the **matrimonial home** and to use the household furniture and appliances.

The **matrimonial home** is the home where the spouses live after they are married.

Guardianship

Both parents have equal guardianship over children born from a marriage. If you are a guardian of a child, you are legally responsible for the child, because she cannot take part in legal proceedings or manage her estate. If spouses divorce, a court may make an order giving guardianship of the child to one of the spouses or may allow both parents to remain guardians of the child.

15.5.3 Termination of a civil marriage

A civil marriage may be ended by death or divorce. We will explain more about the termination of marriages by divorce.

The Divorce Act 70 of 1979 provides for two **no-fault grounds** of divorce:

1. Irretrievable breakdown of the marriage means that there is no possibility that the marriage can continue.
2. Mental illness or continuous unconsciousness of one of the spouses will also require no further grounds to justify a divorce.

No-fault grounds mean that neither spouse has to show that the other spouse is the cause of the failure of the marriage.

For a court to find that there has been an irretrievable breakdown of a marriage, the court must be satisfied that the marriage has broken down so that it is not likely that a normal marital relationship can ever be restored. The Act lists the following three guidelines to decide whether the marriage has broken down **irretrievably**:

Irretrievably means that it cannot possibly be mended again.

1. The parties have not lived together as man and wife for a continuous period of at least one year before the date of the divorce action. Here the spouses have to show that there has been no consortium for the year.
2. The **defendant** to the divorce has committed adultery and the **plaintiff** finds it irreconcilable with a continued marriage relationship.
3. A court has declared the defendant a habitual criminal and the defendant is serving a sentence in prison.

The **defendant** is the person who is sued in court by another party, the **plaintiff**.

These three grounds are not the only grounds. Parties may bring other factors before the court to show that the marriage has irretrievably broken down. Here are some examples:

- One spouse suffers from a mental illness and there is no reasonable prospect of a cure.
- One spouse has been in a state of continuous unconsciousness for a period of at least six months before the date of divorce and there is no reasonable prospect that he will regain consciousness.

A defendant may choose to defend a divorce action and prove that the marriage has not irretrievably broken down.

Generally, the court will not grant a divorce until the parties have made arrangements for the minor children of the couple. This includes visiting rights and maintenance of the children.

15.5.4 Customary marriages

In the past, customary marriages were not generally recognised because they allowed **polygany** – that is, the husband is allowed to have more than one wife. A polyganous arrangement conflicts with the usual definition of marriage in South African law which refers to one man and one woman or two people of the same gender.

Polygany is a type of polygamy. Polygamy means having more than one husband or wife.

The Recognition of Customary Marriages Act 120 of 1998 now provides legal recognition of any customary marriage entered into before or after the Act. The number of wives a husband has is irrelevant in terms of the Act.

15.5.5 Muslim marriages

In the past, Muslim marriages were also not recognised because they allow for polygany. However, South African case law now recognises Muslim marriages under certain circumstances.

In the case of *Daniels v Campbell* [2004] 7 BCLR 735 (CC), the Constitutional Court allowed a surviving spouse in a monogamous Muslim marriage to be recognised as a spouse and survivor for purposes of the Intestate Succession Act 81 of 1987 and for the Maintenance of Surviving Spouses Act 27 of 1990. A monogamous marriage is a marriage in which each party only has one spouse.

In the case of *Amod v Multilateral Motor Vehicle Accidents Fund* 1999 (4) SA 1319 (SCA), the court held that in the light of South Africa's new culture of religious freedom and its culture of legal pluralism, the contractual duty of support that flowed from a Muslim marriage must be recognised and enforced in terms of the common law. However, Amod's case also involved a monogamous Muslim marriage and the court left open the question of what would happen had a polyganous Muslim marriage been involved.

In the case of *Hassam v Jacobs NO and Others (Muslim Youth Movement of South Africa and Women's Legal Trust as* Amici Curiae) 2009 (5) SA 572 (CC) the Constitutional Court allowed a Muslim woman married by Islamic rights to be recognised as a spouse for the purposes of intestate succession from her husband's estate despite the fact that she was a spouse in a polyganous marriage (i.e. her husband had more than wife to whom he was married in terms of Islamic rites). This shows us that the courts are now willing to also afford protection to women in polyganous Islamic marriages.

In the case of ***Moosa NO et al v Harnaker et al*** recently heard in the Western Cape High Court, the court also allowed a Muslim spouse in a polygamous marriage to inherit in terms of **Section 2C(1)** of the Wills Act. The deceased had left behind two spouses. He was married to both of them by Muslim rites and had remarried his first wife by civil rites at a later date in order to obtain a home loan from the bank. On his death he left his estate in equal shares to both his wives but the registrar of deeds refused to transfer half of the property to the second wife (to whom he had only been married by Islamic rites), stating that she could not be recognised as a surviving spouse for purposes of section 2C(1) of the Wills Act. The court held that the provisions of the Act discriminated against the second spouse on grounds of her religion and marital status and was thus unconstitutional. The second wife was thus entitled to inherit equally in terms of section 2C(1) of the Wills Act.

The South African Law Commission has prepared a draft Muslim Marriages Bill. If this is accepted, Muslim marriages will be recognised as valid marriages in South African law.

Moosa NO et al v Harnaker et al was an unreported judgment handed down in September 2017.

Section 2C(1) deals with inheritance by a spouse of a deceased if a shared inheritance is refused by the descendants of the deceased.

Legality of Muslim marriage a religious, human rights issue – divorcee

2017-03-24 06:42

Tammy Petersen, News24

Cape Town – For 20 years, Nasrin Hoosain* was a supportive wife and mother. She left her studies and job opportunities to build her family, raise their children and support her husband as he climbed the career ladder.

When, after years of abuse and infidelity, he asked for a divorce, she was the one who faced an uncertain future, without financial stability and the risk of homelessness.

Muslim marriage – known as a nikah – is not legally recognised in South Africa, meaning Hoosain, like other muslim women, is not entitled by law to the assets accrued with her husband in the two decades of their union.

She joined dozens of women who lined up outside the Western Cape High Court this week, calling for nikahs to be declared legally valid. This would allow recourse for wives who can be left penniless when the marriage dissolves.

The class action is expected to be heard on August 28, three years after the Women's Legal Centre first brought its case.

It argues that once customary marriages were given full legal recognition, the historical basis for not recognising polygynous marriages fell away.

Legislation is therefore needed to recognise Muslim marriages, the WLC says.

Muslim marriages allow for up to four wives, but come with the responsibility of providing equally to each spouse. It is not commonly practiced because of the difficulty in maintaining this, research has found.

The non-profit legal centre contends that legal protection has been denied to Muslim women 16 years after the Constitution came into force. This had resulted in widespread oppression and gender discrimination in areas such as divorce, the duties of support, parental rights and responsibilities, and inheritance.

For Hoosain, the end of her marriage meant starting over after years of living a financially comfortable life.

'Soul destroying'

She had been a student when she tied the knot, and dropped out of university to see to their home after having their first born.

"I was a full time mom – a cook, a doctor, a nurse and a taxi driver, all in one," she said.

Hoosain put her own prospects on hold to "build a successful family", despite facing ill-treatment from her husband at home.

When he asked her for a Talaq – which in Islamic terms is a divorce prompted by the man as a formal repudiation of his wife – she didn't put up a fight.

For three months, her husband was forced to maintain her, but once the process was finalised, she was without an income.

"As a wife, I gave such a lot of myself to him over the years. All I got in return was a 'thank you, ma'am, for your services rendered; off you go," Hoosain recalls.

As they did not have a civil union, her husband was not recognised as such in the eyes of the law.

He therefore did not legally have to split their assets accrued over the 20 years, or give her spousal support. She however refused to do the "normal thing" and move out of the house she helped him build.

"I had done my research, so I knew he couldn't force me to leave. Both of us had worked ourselves up, both of us had made sacrifices for what we had. I put my foot down and told my children that we couldn't be put out, showing them what our country's laws state and referring to passages in the Quran. Eventually he left, but not without a fight."

Hoosain has an English version of the religious text of Islam, marked with pink sticky notes, as well as South African law documents which she refers to, to substantiate her arguments.

Life has been difficult since her marriage dissolved, Hoosain admits, as she relies on her ex-husband for money to support their minor children.

She doesn't want to approach the courts for child maintenance, describing the process as "soul destroying".

Legal proceedings

"So I am at his mercy. Whatever he decides to give is what I just have to take," she explains, resigned.

Her career prospects are limited as she does not have work experience, and her age, 40, also puts her at a disadvantage.

But unlike some of her Muslim friends who were forced to "take what their husbands offered to placate them, which is usually next to nothing", Hoosain has instituted legal proceedings to force him to cough up.

She declined to disclose the details of her case as it is still before the courts.

Fair religion

Had her marriage been legally recognised, the traumatising reality of divorce would have been somewhat easier, Hoosain insists. The non-recognition of the union is against her human rights.

"It is unfair, discriminatory and prejudicial. We live in a secular country in which we are legally protected from any form of discrimination. Why are Muslim marriages excluded from that?"

The devout Muslim says her issue is not with the teachings of Islam, but with the cultural interpretation which is "not in line" with the Quran.

"Islam is a fair religion, which promotes equality. It even says in the Quran that in case of divorce, separate on equitable terms. This means it must be fair, just and equal.

"Why should a woman have to give up her lifestyle in the event of a divorce? Building what you have takes two people; why does only one get everything?"

Had she known what awaited her later, she would have insisted on a civil union, Hoosain admits.

'This is our fight'

"You, as a woman, are not protected otherwise. This is both a religious and human rights issue. Islam teaches you to stand firm in what you believe is the truth; to fight oppression, injustice and tyranny. We can't just sit and take it.

"Women need to be respected. When men refuse to give you your fair share, it's a sign of disrespect. You give the best years of your life to your marriage and building a family [but have no recourse if the marriage dissolves]. It's unfair."

The recognition of customary marriages, which allows for more than one wife, should also extend to Muslims, she argues.

Polygamy is not common in Islam, Hoosain says, as the Quran teaches that you have to treat both equally, from physical assets to emotional support.

"It's allowed, but virtually impossible to maintain multiple wives equally," she says.

The class action is an important step toward protecting the rights of Muslim women, Hoosain believes.

"Our voices need to be heard; we are part of South African society. This is our fight so that our daughters can have a better life and not be left destitute in the event of divorce," she says.

Judges Siraj Desai, Gayaat Salie-Hlophe and Nolwazi Boqwana are expected to preside over the matter.

*Not her real name

Source: http://www.news24.com/SouthAfrica/News/legality-of-muslim-marriage-a-religious-human-rights-issue-divorcee-20170324

15.5.6 Same-sex life partnerships

In South Africa, same-sex marriages are now recognised as legal marriages. In 2006, the Civil Union Act 17 of 2006 was passed. This Act allows two people who are over the age of 18 to enter into a civil marriage. The two spouses do not need to be of different genders. So, homosexual marriages are now legal in South Africa.

Home affairs minister rejects call to amend discriminatory same-sex law

Carl Collison
19 Jul 2017

Home Affairs Minister Hlengiwe Mkhize is accused of "hiding behind questionable provisions of the law" in refusing to call for the amendment of a section of the same-sex marriage Act that allows officials to refuse to marry same-sex couples on the grounds of religious or cultural beliefs.

In a parliamentary question to the minister in May, Congress of the People MP Deidre Carter asked whether, "given our constitutional order", Mkhize supported the exemption given to marriage officers and, "if not, would she introduce amending legislation to repeal section 6" of the Civil Union Act.

Mkhize said 421 of the department's 1 130 marriage officers were exempt from performing same-sex unions after having "objected on the grounds of conscience, religion or belief".

"This is not a ministerial prerogative, but a provision of the law," she said. "The Act is clear in that marriage officers will not be compelled to solemnise such unions."

Matthew Clayton, from the lesbian, gay, bisexual, transgender, intersex, queer or questioning, asexual and other sexual and gender identities (LGBTIQA+) organisation Triangle Project, countered: "Changing the law is clearly the prerogative of the minister. Her response is a disappointing one, which shows a continued lack of willingness to deal with human rights abuses in the department."

Mkhize said: "As can be imagined, we have a duty to protect the rights of all, including legal rights of workers, in this case, marriage officers." Sanja Bornman from Lawyers for Human Rights believed the exemption was absurd. "They are public servants of a secular state and personal politics and squeamishness must be left at the door when they enter the workplace. The 'conscientious objector' clause in the Act is clearly being abused at the expense of the human rights to dignity and equality the Act was intended to protect."

Mkhize said that the department's marriage process was redesigned after a joint task team was set up last year, made up of representatives of the department and various LGBTIQA+ organisations. The idea was to create a more streamlined and clear process, and to increase transparency and "clear accountability assigned in each step of the process". It was meant to "promote responsibility of each marriage officer or official handling the marriage register, and the continuous promotion of responsible behaviour by the involved official".

The department was improving on the enforcement of its anti-discrimination and diversity management policy, said the minister, adding that one of the skills development programmes officials took was "improving sensitivity on LGBTIQ rights".

She said the department trained 407 officials in 2015–2016, an increase from 355 officials in 2014–2015.

The department has long been accused of discriminatory practices when it comes to the rights of LGBTIQA+ people.

In an attempt to redress this, the department under then home affairs minister Malusi Gigaba, introduced sensitisation workshops for its employees.

In a September 2016 interview with the *Mail & Guardian*, Gigaba said: "Home affairs is a department that used to classify people in order to discriminate. So a lot of those tendencies haven't really left the department. [Through these sensitisation workshops] we hope, with time, to make people more open-minded, more sensitive, more willing to conduct same-sex marriages."

But Igor Scheurkogel, a concerned citizen, has initiated an online petition to amend section 6.

"Sensitisation workshops are not a guarantee of acceptance, especially if it is written in the Act that they do not have to marry certain people. But we all pay taxes and should be able to access these services," said Scheurkogel.

Gigaba had said reviewing some of the legislation was one of the topics the task team was dealing with.

In a statement released following Mkhize's response, Carter said it was time to amend the Act "instead of hiding behind the current and questionable provisions of the law".

Mkhize said: "A legislative amendment is not required in respect of the Civil Union Act. In discussions with the department, what the LGBTIQ leaders had requested was clarity on the offices where marriages may be solemnised with dignity. This was to assist the LGBTIQ community to select appropriate offices. What this does mean is that we get to know in advance which objections from marriage officers were approved, on their merit, in advance, to plan better."

Mkhize said the department was "committed to strengthening and sustaining our partnership with LGBTIQ stakeholders".

"The assumption that government will, on its own, transform society is at best misleading," said Mkhize.

"We invite all role players to come forward, sans antagonism, to engage with us on these matters of importance. Questions of identity, nation-building and imperatives to promote unity in diversity are never resolved overnight," she said.

Clayton said:

"For her to suggest that those who are campaigning for equal rights should do so 'sans antagonism' and not think change will come 'overnight' is insensitive and ahistorical."

Lerato Phalakatshela of *OUT Well-being* and a member of the national joint task team, said the minister's response was "a bit biased, as she appears to be protecting people who should be providing services to everybody in South Africa. As much as she wants to protect the rights of people working at home affairs, she is, in doing that, doing an injustice to others. Civil servants should put their jobs first when serving the country's citizens."

Scheurkogel added: "Our call is not an attack on anyone's religion. All we are saying is that, if you are a state employee, you have to serve everyone regardless of their sexual orientation or identity."

Source: https://mg.co.za/article/2017-07-18-home-affairs-minister-rejects-call-to-amend-discriminatory-same-sex-law

15.6 Law of succession

The law of succession deals with the division of the assets of a person's estate after her death.

If a person dies and leaves behind a will, we say that he died testate.

We then apply the law of testate succession. If a person dies and does not leave behind a will, we say that he died intestate. Then we apply the law of intestate succession. We will explain this first.

15.6.1 The law of intestate succession

The law of intestate succession is governed by the Intestate Succession Act 81 of 1987. This Act sets out which people are allowed to inherit from a person who has died without leaving a will. A person's spouse and children inherit first. Other family members, such as the deceased's parents or siblings, only inherit if the deceased dies without leaving behind a spouse or children.

15.6.2 The law of testate succession

Testate succession deals with the division of a deceased person's estate in accordance with a will left by the deceased. A person must be over the age of 16 years in order to draft a valid will. The person who dies leaving behind a will is called a testator.

We will look first at the law's requirements for a will to be valid, before looking at how a deceased's assets are distributed in terms of the will.

Requirements for wills

Certain **requirements** need to be met for a will to be regarded as valid.

The **requirements** are set out in section 2(1)(a) of the Wills Act 7 of 1953, as amended by the Law of Succession Amendment Act 43 of 1992.

- Wills must always be in writing. South African law does not allow for oral wills or wills made on a videotape. A will can be handwritten, typed or printed.
- The testator must sign the will at the end of the will. The end of the will is not the bottom of the page but where the writing ends on the last page of the will. When the will has more than one page, the testator must sign anywhere on each page and at the end of the will on the last page.
- The testator must sign the will in the presence of two competent witnesses. A competent witness is anyone over the age of 14 who is competent to give evidence in a court of law.
- The witnesses must sign the will in the presence of the testator and each other.
- The witnesses need only sign the last page of the will but, in legal practice, they sign each page of the will.

Professor says — What if the testator cannot sign?

We know that it is important for a testator to sign his will so that it is valid. But what happens when a testator cannot sign his will?

Let's consider the following situation. Jabu is 45 years old. He wants to draft a will in order to distribute his estate fairly to his children. Unfortunately, he lost both his hands in a mining accident ten years ago. He does not think that he can physically sign the will his lawyer drafted.

In a situation like this, the Wills Act allows for another person called an ***amanuensis*** to sign the will on behalf of the testator. Such a will must then be certified by a commissioner of oaths. The reason for this is to prevent fraud.

Have a look at the following will. Sid Singh is the testator.

An ***amanuensis*** is a person who signs a will on behalf of the testator.

Last Will and Testament of Sid Singh
I, Sid Singh, presently domiciled and resident at 75 Sparrow Road, Pietermaritzburg, Province of KwaZulu-Natal, declare this to be my last will and testament.

1. Revocation
I hereby revoke all previous wills, codicils and other testamentary acts made by me, either singly or jointly.

Nomination of Executor and Trustee
I hereby nominate Sipho Mdlala of the law firm Mdlala and Associates to be the executor of my estate.
The Master of the High Court is directed to dispense with the necessity of my executor furnishing security for the administration of my estate.

Bequest of estate
I leave my Mercedes-Benz having Engine Number PRS 655-556 to my father, Rakesh Singh.
I leave my golf clubs to Yashen Thomas.
I leave the rest of my estate to my wife, Anne Singh, and to my son, Zydan Singh.

Signed at Pietermaritzburg on this the 7th day of May 2017 in the presence of the undersigned witnessed, all being present at the same time and signing in the presence of each other

AS WITNESSES **TESTATOR**

1. _____

2. _____

Distribution and administration of deceased estates

What do we mean by a will, and how is the property of the deceased divided up in accordance with the will? We will answer these questions in this section.

In a will, a testator usually leaves his assets to certain people who are named. People who inherit a particular asset in a will are called legatees. The assets left to legatees in a will are called legacies. In the

will we have just looked at, Sid Singh's legatees are Rakesh Singh and Yashen Thomas. Their legacies are the Mercedes-Benz and the golf clubs.

People who receive the whole inheritance or a part of the residue are called heirs. The residue of the estate is the amount of the estate available after all expenses and administration costs have been paid. In the will of Sid Singh, Anne Singh and Zydan Singh are the heirs of his estate. They each inherit an equal share of the residue of the estate.

If a testator leaves behind a will, she usually **nominates** a person to be the executor of the estate.

To **nominate** is to appoint or name someone for a job or position.

The executor is responsible for making sure that the testator's wishes as expressed in the will are carried out. The executor is usually an attorney, but does not have to be one. In the will of Sid Singh, Sipho Mdlala is the executor. The executor may collect a fee for administering the estate.

When the testator dies, the executor is responsible for reporting the testator's estate to the **Master of the High Court**. This means that the executor informs the Master of the High Court that the testator has died leaving behind a will.

The **Master of the High Court** is a government official who supervises the administration of deceased estates.

The executor then **lodges the will** and an inventory of the testator's estate with the Master. The inventory lists the details of all the property in the estate.

To protect the heirs and legatees of the estate, the Master may ask the executor to provide security. If the Master does require security, the executor must leave a sum of money that he will get back when the will has been administered in an honest way. If the executor steals money from the estate, the Master can then claim the security. In the will, the testator can state that the executor does not need to provide security.

To **lodge a will** is to present it formally to the proper authority.

The executor must collect all the assets that the testator owned. This includes any debts that are owed to the testator.

The executor is also responsible for paying all the liabilities owed by the testator. This includes debts the testator incurred before death, such as amounts owed on mortgage bonds, credit cards or on accounts at retail stores, and debts the estate has incurred after the testator's death, such as funeral expenses and **administration expenses**.

Administration expenses include executor's fees, Master's fees and estate duty, which is a tax owed to the government if the testator's estate is worth more than R1,5 million.

After all the expenses have been paid, the executor distributes the legacies to the legatees. Then the heir or heirs inherit the residue of the estate. The executor also gives the Master of the High Court the accounts of the estate in order to show that nothing was stolen from the estate and that the people named in the will have all received their inheritances.

The principle of freedom of testation allows the testator to leave her estate to any person or organisation she wishes to.

So a testator may *disinherit* her family and leave them nothing in the will. If this happens, the spouse of the testator can claim for maintenance against the estate in terms of the Maintenance of Surviving Spouses Act 27 of 1990. The testator's children will also have a claim for maintenance against the estate. If their claims are successful, the maintenance amounts are deducted by the executor before he pays the residue to the heir named in the will.

What do you think?

Think about the following questions. If a will says that my estate must be divided in equal parts among my children, should it include only legitimate children of the testator? If a will determines that the estate is to be divided among all my children, should it include the children of a child who has already died?

Now that we have explored some different branches of private law, do you think that you can answer the questions in the 'Before you start' section at the beginning of the chapter? Private law affects so many areas of your life – it covers the rights you enjoy from the time of your birth to the date of your death. Did you know anything about private law before you read this chapter? Do you now know more about the various private law rights you enjoy, as well as the duties you may owe to other people?

Chapter summary

In this chapter, we learned the following about the law of persons, family law and the law of succession:

- Private law deals with the status of persons and with their relationship with each other and with legal objects.
  - Legal subjects include natural and juristic persons. Natural persons are human beings and juristic beings are non-human entities to which the law has given legal personality.
  - A legal subject enjoys legal rights and owes legal duties to other legal subjects.
  - A legal subject also enjoys legal rights over legal objects.
  - There are four types of legal object: things, intellectual property, performances and personality.
  - Legal capacity is the ability of legal subjects to enjoy rights and owe duties. Legal capacity also refers to the ability of a legal subject to take part in the legal process.
  - Children under the age of 7 and mentally ill people have no legal capacity. Children between the age of 7 and 18 have limited legal capacity. People over the age of 18 generally have full legal capacity.
- Mentally ill people do not have legal capacity while they are mentally ill. If the insanity is temporary, their legal capacity can be restored.
  - The law of persons deals with the status of legal subjects.
  - A natural person acquires legal personality at birth.
  - A foetus acquires personality in certain limited circumstances that is only when it is to the advantage of the foetus to be considered alive and if the foetus is later born alive.
  - This is known as the *nasciturus* fiction.
  - A natural person's legal personality is terminated by death.
  - If a person disappears and is not heard from again his family can apply to the High Court for a presumption of death order.
  - The court will grant the order if it is convinced that the missing person is dead.
  - Once the order is granted, the missing person's estate is dealt with as if he had died.
  - The court may also make an order that the marriage between the missing person and his spouse is dissolved. This will allow the spouse of the missing person to remarry.
- Family law is concerned with engagements, marriages, divorces and the relationship between parent and child.
  - There are three types of matrimonial system in South Africa: marriage in community of property, marriage out of community of property with accrual, and marriage out of community of property excluding accrual.
  - In a marriage in community of property, both spouses are owners of the joint estate in equal shares. The joint estate is only divided on termination of the marriage through death or divorce.
  - Spouses can only enter a marriage out of community of property if they sign an antenuptial contract.
  - In a marriage out of community of property excluding accrual, each spouse retains their own individual estate and the estates do not merge. On termination of the marriage, neither spouse has a claim on the estate of the other spouse.
  - In a marriage out of community of property with accrual, each spouse retains his or her own individual estate. On termination of the marriage, each spouse shares in the growth of both estates.
  - Entering into any of the three forms of marriage leads to certain invariable consequences and obligations for the spouses and for third parties who deal with the spouses. These come into operation automatically upon marriage and cannot be excluded by agreement between the spouses.

- The status of the spouses is affected by marriage. As long as the marriage is in existence, neither spouse may marry another person.
- Upon marriage, each spouse acquires the right of consortium (which includes the right of companionship and love) from the other spouse.
- During the marriage, each spouse owes the other spouse a duty of maintenance or support, which means that the spouses should provide food, clothing, housing and other necessaries for each other. If a spouse purchases household necessaries from a third party, the other spouse may also be held liable for this debt.
- Where the marriage is terminated through the death of one of the spouses, the surviving spouse may claim maintenance from the deceased estate.
- Where one spouse refuses to maintain the other spouse, the court may make a maintenance order.
- While the marriage is in existence, each spouse has the right to live in the matrimonial home and to use the household furniture and appliances
- Both parents have equal guardianship over children born of the marriage.
- There are two no-fault grounds for a divorce in South Africa. These are irretrievable breakdown of the marriage and mental illness or continuous unconsciousness of one of the spouses.
- Customary marriages are now regarded as valid marriages by the Recognition of Customary Marriages Act 120 of 1998.
- The South African Law Commission has prepared a draft Muslim Marriages Bill to allow Muslim marriages to be recognised as valid marriages in South Africa.
- In 2006, the Civil Union Act 17 of 2006 was passed allowing for same-sex marriages to be legally concluded.
- Hindu marriages are currently not recognised as valid civil marriages in our law.
- However the court will recognise the marriage in certain very limited circumstances.

- The law of succession deals with the distribution of a person's estate after his death.
  - If a person dies and leaves behind a valid will, we apply the law of testate succession.
  - A will must comply with the formalities of the Wills Act 7 of 1953 as amended by the Law of Succession Amendment Act 43 of 1992 in order to be valid.
  - Only a person over the age of 16 years may draft a will.
  - The testator must sign the will at the end of the will and on each page of the will in the presence of two witnesses. The witnesses only need to sign the last page of the will.
  - Where a testator is unable to sign a will, an amanuensis may sign the will on behalf of the testator. This will must be certified by a commissioner of oaths.
  - The executor of the estate has the responsibility of reporting the estate to the Master and distributing the assets of the estate to the heirs.
  - The Master may ask the executor to lodge security for dealing with the estate.

Review your understanding

1. You have seen that legal subjects have legal rights over legal objects. Now discuss these rights with a friend or in a group. Make notes about:
   a) legal subjects
   b) legal objects
   c) the rights that legal subjects have over legal objects.
2. In South Africa, many people do not know the law about marriage and divorce. Do a survey among your family and friends to find out:
   - whether they have entered into a civil marriage, a customary or religious marriage
   - what type of matrimonial system they chose whether they understand the consequences of their marriage.
3. Write a short report on your findings. Include an explanation of the consequences of all the different types of marriage that can be identified in South Africa.
4. Fadzai is seven months' pregnant when she is involved in a car accident. The accident causes her to go into premature or early labour. She is rushed to hospital and after a difficult labour, due to her injuries in the car accident, she gives birth to Marala. The doctors inform her that Marala has suffered brain injuries while she was in the womb and will suffer from mental retardation. Fadzai wants to sue the driver of the other vehicle on behalf of Marala, claiming that the car accident caused Marala's retardation. Advise Fadzai as to whether she can launch an action for the damages that Marala sustained while in the womb.
5. What does an executor do?
6. How can a person who has had both his hands amputated execute a will?
7. Read the questions posed in the 'Before you start' section of this chapter again and answer each of the questions you find there.

Further reading

Barratt, A. et al. 2016. *Law of persons and the family,* 2nd edn. Cape Town: Pearson South Africa

De Waal, M.J. and Schoeman-Malan, M.C. 2015. *Introduction to the law of succession,* 5th edn. Cape Town: Juta and Co. (Pty) Ltd
(You will find more information about the law of succession in this book.)

Law of property and law of intellectual property

Chapter 16

The main ideas

- Law of property
- Law of intellectual property

The main skills

- Distinguish between types of acquisition.
- Apply your knowledge of the law of property to problems.
- Distinguish between patents, copyrights and trade marks.

Apply your mind

This chapter is about property. It looks at both tangible and intangible property. People are justifiably possessive in regard to property that belongs to them and this chapter will explore how property can be legally transferred. It will also show the different forms that property can take. Please take a minute and think about what property you own. Make a list and try to categorise what type of property each item on your list is.

In Chapter 15 we explained private law in general and then explored family law, the law of persons and the law of succession in a little more detail. In this chapter, we will focus on other branches of private law: property law and intellectual property law.

We will see how a person can obtain ownership of property. We will then see how a person can protect what she creates when writing or inventing.

Before you start

After you graduate from university, you begin a new job at a law firm. You now want to buy things such as a house, a car or even shares on the stock exchange. Your lecturer taught you about the different ways of acquiring ownership in South Africa, but you cannot remember them all.

At the weekends, you like to spend your time composing music and one day you compose a song that you are sure will be a big hit. But you are scared that someone will steal the song from you. How do you protect it?

A friend is thinking of starting up a small computer business. What can you advise him about trade marks?

You should have a better idea of the answers to these questions by the end of this chapter.

16.1 Law of property

Property refers to all the assets that belong to a person. It includes immovable property, such as a house, as well as movable property, such as a car. If property is intangible or incorporeal, you cannot touch it – for example, you cannot touch the shares you own in a company. *Corporeal* property is property that you can touch and feel, such as furniture, a CD player or a bicycle.

The law of property includes laws about ownership of property and the **acquisition** of ownership. There are two main ways of acquiring ownership in South Africa:

1. original acquisition, which means that you own your property legally, even if your **predecessor** did not legally own the property or agree to transfer the property, and

Property is not just a building and the land around it. Your property is everything you own.

Acquisition refers to how you acquire or come to own property.

A **predecessor** is someone who owned your property before you acquired the property.

2. derivative acquisition, which means that you may only own your property legally if your predecessor owned the property legally.

Ownership of immovable property, such as houses and land, may only be transferred by registration in the deeds office.

We will now look in more detail at the two types of acquisition of property.

16.1.1 Original acquisition

There are many forms of original acquisition of property. Some of these are now discussed under separate headings.

Occupatio

If you gain original acquisition of property by *occupatio*, you take control over property that is not owned by anyone. Your intention is to become the owner of the property. You must have physical control over the property. For example, wild animals and fish do not have owners if they are in their **natural state**. If you catch a fish in the sea (and your fishing is not against any law to protect the environment) and you exercise physical control over the fish by placing it in a basket, you become the owner of the fish.

Wild animals are in their **natural state** if they are still in the wild.

If a previous owner has **abandoned** his property, then that property no longer has an owner. If you then take control over it, you acquire the property by original acquisition.

There is a difference between losing property and **abandoning** property. The owner must actually abandon or permanently leave the property, not simply lose it.

Accessio

When you acquire property through *accessio*, two corporeal things are combined so that the accessory corporeal property no longer stands on its own but becomes part of the main or principal corporeal property**.** Principal corporeal property can be thought of as the property that does not lose its identity or its independence when combined with the *accessory corporeal property*, whereas the accessory corporeal property once combined with the principal corporeal property loses its individual identity and independence. The owner of the principal corporeal property then becomes owner of the accessory corporeal property.

There are three different types of *accessio*, which we will now discuss.

1. Accession of **immovables** to immovables: This usually happens in nature when soil moves from one property to another in flooding, for example.
2. Accession of movables to immovables: This happens when a movable is attached to an immovable by means of human action. The owner of the immovable property then becomes owner of the movable property. For example, Thabo lets his house to Jake – and Jake, although he is only a tenant, decides to plant an apple tree (movable property) in the garden. When Jake later moves to another town, he cannot take the apple tree with him, as it has become joined to the soil (immovable property). Thabo has therefore acquired ownership of the tree.
3. Accession of movables to movables: Where two movables are attached to each other to make one object, the owner of the principal movable property becomes owner of the new property. For example, if Patrick uses Maria's piece of canvas to paint a picture, then Patrick becomes the owner (or **acquires ownership**) of the piece of canvas. But he must give Maria some money for the canvas he has used. Here we can see that the canvas is the accessory corporeal property since it loses its identity and its independence when Patrick paints on it – people will no longer look at the canvas or consider the canvas, but will rather see the painting that has been painted onto the canvas.

Soil is part of land, which is **immovable** property.

He will only **acquire ownership** if the painting is more valuable than the canvas.

Manufacture

In this form of original acquisition, you use someone else's material without her permission to manufacture a completely new thing. The new item cannot return to its original form. For example, you

use someone else's grapes to manufacture wine. You cannot change the wine back to grapes. But the owner of the grapes can claim **compensation** from the new owner.

The owner of the grapes can ask to be **compensated** or paid in money for the grapes.

Mixing and fusing (commixtio et confusio)

Mixing is when solids belonging to two different owners are mixed. For example, if wheat belonging to Jabu is mixed together with wheat belonging to Vusi, it will be impossible to state which individual wheat sheaf belongs to Jabu and which to Vusi. Fusing is when a liquid and a solid or a liquid belonging to two different owners are combined. Both mixing and fusing must be done without the permission of the original owners to qualify as this form of original acquisition. An example of this would be where my mineral water is mixed with your flour. The two original owners become **joint owners** of the new item. The elements in the new item must not be able to be separated again.

Joint owners share the ownership of the property.

Expropriation

According to the Constitution of South Africa, the government may expropriate or take a person's property for public use or benefit. The state must compensate the owner of the property for his loss. The owner of the property, usually land, does not have to **consent** to the expropriation and the state may expropriate the property even if the owner does not agree to the expropriation.

To **consent** to something is to agree or to give permission.

Professor says — Unwilling expropriation

The topic of expropriation of land, especially farming land, has become a very controversial topic in South Africa. Read the article below and discuss with your class mate how you believe equitable land re-distribution can be achieved in South Africa.

Constitution not impediment to land reform – Cronin

2017-06-13 21:12

Jan Gerber, News24

Cape Town – The Constitution is a clarion call for land reform, not an impediment to it, says Deputy Minister of Public Works Jeremy Cronin.

He was speaking in a debate on land reform in the National Assembly. The debate was called for by the National Freedom Party's Sibusiso Mncwabe, under the topic: "Speeding up land reform by using the limitation clause in the Constitution to bypass the failed 'willing seller, willing buyer policy'".

Cronin welcomed Mncwabe's commitment to speeding up land reform within the bounds of the Constitution, but said their idea of using the Constitution's limitation clause is misguided.

He, and several other speakers, pointed out that there is no mention of the "willing seller, willing buyer" principle in the Constitution.

Cronin said land reform must be about productive lives and sustainable livelihoods, rather than meeting quotas. He also said well-located state land must be released for land reform and that compensation was a hurdle in land reform.

"Compensation could in certain cases be merely a token," he said.

He also referred to a recent court ruling which stated that a just and equitable price was not the same as market price and that market price must not be given more weight than the other things that the Constitution stipulates have to be taken into account when determining the compensation for expropriated property.

These are the current use of the property, the history of the acquisition and use of the property, the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property and the purpose of the expropriation.

Compensation

The Economic Freedom Fighters' Sipho Mbatha repeated the EFF's oft-expressed call for land expropriation without compensation. He said since the EFF came to Parliament, they have offered their 6% to the ANC to change the Constitution to make expropriation without compensation possible, but the ANC lacks the

political will and understanding of people's needs.

"Today our people are left with the Constitution. They cannot eat the Constitution. They cannot settle in the Constitution."

Cronin responded to this. "The EFF's position on this topic is a remarkable achievement. It manages to be both consistent and incoherent."

He said while they offered their vote to the ANC, they give their votes in municipalities to the DA, who is against no compensation.

The DA speakers said it is not the "willing buyer, willing seller" principle which impedes land reform, but the government's poor performance.

DA MP Thandeka Mbabama, in her maiden speech, said President Jacob Zuma contradicted his own party on land reform while going the populist route.

"The DA does not believe in expropriation without compensation," she said.

Freedom Front Plus leader Dr Pieter Groenewald warned that expropriation without compensation could lead to a civil war. He was chided by the EFF, Cronin, Mncwabe and the DA's Thomas Walters for his war talk.

Source: http://www.news24.com/SouthAfrica/News/constitution-not-impediment-to-land-reform-cronin-20170613 accessed on 29/06/2017

Prescription

You can acquire ownership of immovable and movable property if you hold that property in open and undisturbed possession for an uninterrupted period of thirty years. Open possession means that your possession of the property is not done secretly or with the consent of the original owner. Undisturbed possession means that the original owner does not try and exercise his right of ownership during that period of thirty years.

The new owner will acquire ownership even if she knows that the property belongs to another person. The reasons for allowing ownership through prescription are the following:

- You have held the property for a long period of time, so ownership should be made legal.
- The original owner has neglected his property by not exercising his rights of ownership over the property.

16.1.2 Derivative acquisition of ownership

You can only acquire ownership of property through derivative acquisition if the original owner of the property collaborates with you. The new owner of the property does not acquire more rights in the property than the original owner possessed. For example, if Nontembeko buys a house from Phumzile and the property has a **panhandle driveway** through it, she does not acquire more rights in the property than Phumzile. In other words, Nontembeko will not be able to stop other people from driving on the panhandle driveway because Phumzile did not have that right either.

A **panhandle driveway** usually goes from a public road across or through someone's property to someone else's property. People from the other property are allowed to use the driveway to get to the road.

Where movable property is sold in a cash sale, ownership in the property is only transferred once the purchase price has been paid in full. Where movable property is sold on credit, ownership usually passes immediately. However, the parties (buyer and seller) may agree that ownership will only pass to the buyer when the last instalment has been paid.

Ownership of immovable property is only acquired when transfer of ownership is registered in the deeds office. Ownership of movable property is gained when there is agreement that the original owner is transferring ownership of the property to the new owner. In addition, it is essential that the original owner (the transferor) delivers the movable property to the new owner (the transferee). There are several methods of delivery, which is the formal handover of the property from the seller to the buyer. We will look at two methods.

Actual delivery

If the transferor delivers the property to the transferee or his representative, this is known as actual delivery. For example, Oreditse sells a gold ring to Nokubonga. Actual delivery is when he places the ring in her hand.

Constructive delivery

In constructive delivery, the object is not physically handed over because of its size or type. The **transferor** cannot actually hand over the object to the **transferee**, so delivery must take place in one of the following ways:

- *clavium traditio*
- *traditio longa manu* (delivery with the long hand)
- *traditio brevi manu* (delivery with the short hand)
- *constitutum possessorium*
- *attornment*.

The **transferor** is the original owner and the **transferee** is the new owner.

Clavium traditio

Where the transferor hands over something that allows the transferee to gain physical control over the property, this is *clavium traditio*. For example, when Sally sells Linda her car, she cannot physically lift up her car and give it to Linda. Delivery takes place when she gives Linda the keys to the car, because the keys will allow Linda to exercise physical control over the car.

Traditio longa manu (delivery with the long hand)

If the transferor points out the property to the transferee so that the transferee can take physical control of the property, this is *traditio longa manu*. For example, if Waheeda buys two horses from Ismail and Ismail points out the two horses to Waheeda, she can then take physical control over the horses.

Traditio brevi manu (delivery with the short hand)

If the transferee already has physical control of the object, but does not (yet) intend to control it as if he were the owner of the object, then delivery has not taken place. *Traditio brevi manu*, also known as delivery with the short hand, occurs when the transferee comes to hold the property with the intention of physically controlling it as the owner.

For example, when Gugu leased a car from Nandipha, she was in physical control of the car, but she did not control the car with the intention to own it, as she was only leasing the car. If Gugu now buys the car, Nandipha does not need to deliver the property to Gugu, because Gugu already has physical control of the car. When Gugu starts physically controlling it with the intention of an owner, delivery has taken place.

Constitutum possessorium

The opposite of *traditio brevi manu* is *constitutum possessorium*. Here, the transferor is in physical control of the object and will remain in physical control of the property. Delivery to the transferee takes place when the transferor stops holding the property with the intention of owning it, and instead, holds it on behalf of the transferee.

For example, Nandipha owns a Volkswagen Jetta. She is in physical control of the car and holds it with the intention of an owner. She then sells the car to Gugu, but they agree that Nandipha will continue to use the car after the sale. She will pay Gugu for this use. Delivery takes place when Nandipha stops physically controlling the car with the intention of an owner and starts controlling it with the intention of a **lessee**.

The **lessee** rents the property from the lessor who owns the property and leases it.

Attornment

Where delivery takes place by attornment, possession of the property is in the hands of a third party who has physical control of the property on behalf of the owner. Delivery takes place when the third party agrees to exercise physical control on behalf of the new owner.

Let's say that Nandipha owns a Volkswagen Jetta. She does not drive the car but leases it out to Manto, who has physical control over the car. Nandipha then sells the car to Gugu. Delivery takes place when Manto agrees that she will now exercise physical control over the car on behalf of Gugu and no longer on behalf of Nandipha. All three parties must have the same intention for delivery to take place.

16.2 Law of intellectual property

Intellectual property is intangible property that is the result of mental or creative work – for example, inventions and books are intellectual property. The law of intellectual property guards your book so that nobody else can copy it and sell it under another name. The book you are reading now cannot be copied and sold by someone else because it is the intellectual property of Pearson South Africa (Pty) Ltd.

Look on the imprint page (the page after the title page) for the name of the copyright holder. Can you find the symbol © for copyright?

Intellectual property deals with the following areas of law:

- patents
- copyrights
- trade marks
- counterfeit goods
- law of designs.

We will now explore these areas.

16.2.1 Patents

When people invent something new, they want to protect their invention so that other people do not make money from it. A **patent** is a licence that gives the inventor the right to make, use or sell the invention, usually for a set period of time. The patent document includes all the technical information about the invention. The law governing patents in South Africa is the Patents Act 57 of 1978.

If the invention is **patented**, nobody else is allowed to make or sell it without the permission of the patent holder.

16.2.2 Copyright

Copyright is the legal right to publish, perform, film or record **material**. You saw that this book is subject to copyright that belongs to the publishers of this book, Pearson South Africa (Pty) Ltd. This means that you may not photocopy this book without the permission of the copyright holder. Copyright protects literary works, musical works, artistic works, films, sound recordings and computer programs. Copyright usually lasts for a period of fifty years.

This **material** can be literature, art or music. You cannot record your favourite pop star's latest song because she has copyright to it.

16.2.3 Trade marks

Perhaps you are wearing a T-shirt, takkies or sunglasses that show the name or **logo** of the company that made them. This is a **trade mark**, which is a design or symbol in words or pictures that reminds the customer of the product. For example, you are probably familiar with the trade marks for Coca-Cola and KFC.

A **logo** is a sign or symbol that represents the company. For example, a tick ✔ is Nike's logo.

A trade mark will last for a period of ten years, but this period can be renewed for another ten years. Consider the following internet article about a dentist's trade mark.

Dentists in fight to be the real Dr Smile

Weekend Argus (Saturday Edition)
Zelda Venter
27 May 2017

WHO is the real Dr Smile? This is the question before the high court in Pretoria, with two Joburg dentists both claiming they are Dr Smile.

Zeyn Khan said he had been known for years as Dr Smile.

He even wrote for international journals under the name Dr Smile, about his quest to ensure his patients had beautiful smiles. There was a signboard in front of his Hyde Park practice with the name, Dr Smile, Khan said.

He said that fellow dentist, Dr Rawahani Faizi, whose practice was in Sandton, claimed he, too, was Dr Smile. But Faizi had registered the Dr Smile trade mark with the

Registrar of Trade marks, while Khan had not.

Khan asked the court to order the Registrar of Trade marks to expunge the Dr Smile trade mark, as registered by his opposition. He also wanted the court to interdict Faizi from using the Dr Smile name.

Khan said in court papers he opened his practice in 2006 and soon after started calling his practice Dr Smile. His telephone number, converted into letters, even read Dr Smile.

He was shocked when he got a call from Faizi, who told him to remove the name Dr Smile from his billboard and advertisements, Khan said. He said he was the registered owner of Dr Smile.

Khan's lawyers told Faizi to remove his name from the trade mark register, but this request was met with silence.

Khan said he wrote to the registrar to ask it to transfer the mark Dr Smile to him, to no avail. The court added the Registrar of Trade marks as a respondent.

Source: https://www.pressreader.com/south-africa/weekend-argus-saturday-edition/20170527/281496456233796 accessed on 29/06/17

16.2.4 Counterfeit goods

At street markets in South Africa, you may find traders selling clothes or shoes with the Nike, but you know they are not genuine Nike products. We say they are **counterfeit**. Counterfeit clothing, sunglasses, shoes or DVDs are sold at a much lower price than the real products. The law that deals with counterfeit goods is the Counterfeit Goods Act 37 of 1997. According to this Act, it is illegal to own, make or sell counterfeit goods.

Counterfeit goods are made to look exactly like the genuine product in order to deceive people.

16.2.5 Law of designs

The law of designs is governed by the Designs Act 195 of 1993. This Act seeks to protect industrial designs. Industrial designs are the designs of manufactured articles such as perfume bottles or kettles. Once a design is registered at the designs office, the owner of the design has the sole right to manufacture the design and to use it.

What do you think?

Now that we have explored the law of property and intellectual property please refer back to the list of property you own, which you compiled at the beginning of this chapter. Do you think the law adequately protects your right to property?

Chapter summary

In this chapter, we have learned about the following branches of private law: the law of property and the law of intellectual property:

- Property refers to all the assets that belong to a person. Property consists of movable and immovable property and can be corporeal or incorporeal property.
- There are two main ways in which ownership of property can be acquired in South Africa, namely original acquisition and derivative acquisition.
- Original acquisition allows you to own property legally even if your predecessor did not legally own the property.

- Original acquisition includes *occupatio*, *accessio*, manufacture, mixing and fusing (*commixtio et confusio*), expropriation and prescription.
- In derivative acquisition, you may only acquire legal ownership of the property with the help of the legal owner of that property. The new owner of the property cannot acquire more rights in the property than the original owner.
- There are two types of derivative acquisition, namely actual delivery and constructive delivery.
- With actual delivery, the transferor delivers the property to the transferee.
- In constructive delivery, the property cannot actually be handed over to the transferee because of its size or type, so the transferor hands over something that will allow the transferee to gain physical control over the property.
  - Constructive delivery includes *clavium traditio*, *traditio longa manu*, *traditio brevi manu*, *constitutum possessorium* and *attornment*.
- Intellectual property is intangible property that is the result of mental or creative work.
  - A patent is a licence that gives the inventor the right to make, use or sell the invention, usually for a set period of time.
  - Copyright is the legal right to publish, perform, film or record material.
  - A trade mark is a design or symbol in words or pictures that reminds the customer of a product.
  - It is illegal to own, make or sell counterfeit goods.
  - The Designs Act protects the design of an object.

Review your understanding

1. What is meant by actual delivery and constructive delivery? Give some examples of each method of delivery.
2. What is protected by:
   a) a patent?
   b) copyright?
   c) a trade mark?
3. What category of intellectual property would be relevant in the following situations?
   a) You compose a song.
   b) You invent a gadget to convert leaves into fuels for motor vehicles.
   c) You are shopping at a flea market and you come across a stallholder selling replica Versace handbags at a fraction of the cost of the genuine product. He does not have a licence to produce or sell these handbags from the original manufacturer.

Further reading

Ramsden, P. 2011. *A Guide to Intellectual Property Law.* Cape Town: Juta and Co. (Pty) Ltd

Van der Walt, A.J. and Pienaar, G.J. 2016. *Introduction to the Law of Property,* 7th edn. Cape Town: Juta and Co. (Pty) Ltd

Law of obligations

Chapter 17

The main ideas

- Law of contract
- Law of delict

The main skills

- Distinguish between the law of contract and the law of delict.
- Apply your knowledge of the law of contract to problems.
- Apply your knowledge of the law of delict to problems.

Apply your mind

You are involved in a car accident in which you sustain serious damage to your vehicle. Do you know what area of law governs any potential claim you may have against the person who caused your damages and what you have to prove to sustain a claim? You then take your car to the panel beater who keeps it for months without repairing it. What area of law governs a potential claim against the panel beater?

In this chapter we will look at the law of obligations. The law of obligations regulates the relationship between two parties or people where the one party has a right to performance and the other party has a duty to perform. The law of obligations covers two separate branches:

- the law of contract
- the law of delict.

Before you start

In order to ensure that people meet their obligations and that transactions function smoothly, it is generally understood that agreements, such as contracts, which are entered into freely and willingly should be enforced. However, any law or conduct that is not in line with the Constitution is invalid. What do you think this means in the case of contracts that are not in keeping with our constitutional values?

17.1 Law of contract

A contract is an agreement between two or more persons where each person agrees to do something in terms of an agreement. It could be an agreement to do something, not to do something, or to deliver an object. It is not only business people who make contracts; ordinary people do this as well. There are many types of contracts, from contracts of lease to **contracts of sale**.

A member of your family may have signed a **contract of sale** when she bought a car or a house.

Many people believe that contracts have to be in written form and signed by the parties. This is not so. Contracts can be concluded **orally** and even **tacitly**. For example, you might select a loaf of bread in the supermarket, go to the cashier and, without saying a word, give her the payment. She takes it, and the bread is yours. You have tacitly concluded a contract of sale, even though you have not signed a written contract or even said a word. What do you think the function of the payment is in this tacit agreement?

Orally means by speech or discussion.

Tacit means that something is understood or implied without actually being said.

Contracts can also be concluded by means of verbal agreement. For example, you could verbally agree to sell your television set to a friend.

There are six requirements for a valid contract:

1. The parties to the contract must have contractual capacity.
2. There must be agreement between the parties.
3. Formalities specified in terms of the law or the contract must be adhered to.
4. There must be certainty in the contract.
5. There must be possibility of performance.
6. The contract must be legal.

While some of the terminology used here may sound unfamiliar to you, we will explore the content of each requirement in detail below. After that you will be able to return to this list and know what everything means.

17.1.1 Contractual capacity

In order to enter into a valid **contract**, the parties must possess contractual capacity. Contractual capacity means that someone is allowed by law to enter into a contract. Generally, everyone possesses contractual capacity, but the following persons have limited capacity:

A **contract** is valid if it has been carried out by means of the right process and is legally acceptable.

- minors
- married persons
- insolvents.

Contractual capacity of minors

Minors are natural persons under the age of 18. After turning 18, they are known as **majors**. Someone under the age of 18 can be regarded as a major only in two instances. First, if a minor gets married (even if it is to another minor), he attains majority. He does not lose this majority, even if his wife dies or if he gets divorced before he turns 18.

The minor will be treated legally as if he was a **major**.

Secondly, a minor can attain majority by way of a **court order**. This court order is known as an order of emancipation. If a minor wishes to obtain an order of emancipation, she must approach the High Court for an order declaring her to be a major. The court will grant this order only if it is satisfied that it is in the best interests of the minor that she be declared a major prior to attaining the age of 18.

Here, a **court order** will be an official statement of authorisation by a judge.

A minor under the age of 7 has no contractual capacity. She can therefore never validly enter into a contract herself. Any contract must be entered into on her behalf by her parents or guardians. The reason for this is that a child under the age of 7 does not possess the good judgment to understand the consequences of entering into a contract.

A minor between the ages of 7 and 18 has limited contractual capacity. He may enter into a contract only with the assistance of his parents or guardian. A guardian is someone who officially cares for a minor if he has no parents or if they are unable to look after him.

Assistance refers to the consent of a minor's parents or guardian. They may give this consent before the contract is entered into, at the conclusion of the contract or even after the contract has been entered into by the minor without his parents' or guardian's consent. If the minor's parents or guardian give consent to the contract after the minor has already entered into the contract, this is known as ratification. A minor may also, on attaining majority, ratify any contracts he has entered into while he was still a minor. Once he has ratified these contracts, they become binding on him.

A parent's or guardian's consent to a minor entering into a contract may either be:

- express
- implied.

Express consent refers to a situation in which the parents or guardians are aware of the contract and give their written or verbal consent to the minor entering into the contract.

Implied consent is expressed or shown by the parents' or guardian's behaviour. For example, Michelle and Luke have a 14-year-old son, Tom. One day Tom returns home with an expensive mountain bike, telling his parents that he has bought it. If Michelle and Luke do not insist that Tom return the mountain bike, they will have given implied consent to the purchase of the bicycle. If Michelle and Luke had gone with Tom to the bicycle shop and signed the sale agreement on his behalf, they would have given express consent.

Although it is the parent or guardian who assists the minor entering into the contract, the minor is the one who is bound to the terms of the contract.

If a minor has entered into a contract without the assistance of, or ratification by, his parents or guardians, the contract is called a limping contract. The minor is not bound to the terms of a limping contract, and he may ask for the return of any money or property he has handed over in terms of the contract. However, the other party to the contract is bound to it.

Case study *The Employment Contract Van Dyk v SAR&H* 1956 (4) SA 410 (W)

In this case V, a minor, entered into a contract of employment as a railway police officer with SAR&H. His father provided written consent to V entering into this contract. The contract provided that V could not resign from his post for a period of three years after commencing employment. V wished to resign prior to this date and claimed that the employment contract was invalid, as he did not have the assistance of his father when signing the contract as his father had not been physically present, but had merely provided a written consent. In addition, he claimed that the 3-year period was not binding as it had not been brought to the special attention of either himself or his father and had been merely included in the contract as a usual contractual term. The court held that V was bound by the contract as his father, when assisting him to enter the contract, did not have to have knowledge of all the specific terms of the contract. His consent for the minor to contract would have been sufficient if he was aware of the type of contract that the minor wished to enter into and he provided consent to this type of contract.

You should note, however, that a limping contract does not allow the minor to enter freely into contracts and to hold the other party bound without any consequences. He still incurs some legal liability. If a minor wishes to hold the contract invalid on the grounds that he entered into it without the assistance of his parents or guardians, he must return all property he has received in terms of the contract. This is based on the principle of unjust enrichment, which means that no person, in the absence of a legally recognised **ground**, may be enriched at the expense of another person.

In this context, **ground** means a basis for agreement, a firm reason.

Professor says Contractual capacity of a minor

Let's assume that Ashraf, a 15-year-old boy, and Thandolwenkosi, a major, have agreed that Ashraf will sell his iPod to Thandolwenkosi for R800. Thandolwenkosi gives Ashraf the R800, but Ashraf refuses to give Thandolwenkosi the iPod or to return his money. His reason is that the contract of sale entered into between him and Thandolwenkosi is invalid, because he is a minor and was not assisted by his parents or guardians when he entered into the contract. It would be unfair to allow Ashraf to keep both the money and the iPod, because he would be enriched by the sum of R800, in the absence of any legal reason at all. Ashraf would not be bound to the contract and he would not have to give the iPod to Thandolwenkosi. However, he would have to return the money given to him.

Where the parents or guardians of the minor subsequently ratify the agreement, or the minor himself ratifies the agreement on attaining majority, he will be bound by the terms of the agreement.

Contractual capacity of married persons

A person can marry in community of property or out of community of property, either with accrual or without. Accrual assumes that a couple gathers property over the years of their marriage, so that their possessions are nearly always more than when they started the marriage. There are different consequences regarding contractual capacity depending on which form of **matrimonial** property system a person chooses. We are going to discuss these terms below.

Matrimonial refers to matters to do with marriage.

Marriage in community of property

When a person enters into a marriage in community of property, then both spouses have equal contractual capacity regarding their **joint estate**, that is, what they own. However, the Matrimonial Property Act 88 of 1984 limits the spouse's contractual capacity to a certain extent, meaning that the spouses do not have an entirely free hand.

In a **joint estate**, the property belongs to both spouses together.

According to the Act, various levels of consent are required for certain contracts before they will be valid.

1. Written consent of the spouse and two witnesses: If a spouse married in community of property wishes to enter into the contracts outlined below, he or she must write a statement giving agreement to the contract. Any two witnesses can be there while this is taking place. The contracts requiring the written consent of both the spouses and two witnesses are:
   - contracts for the sale or mortgage of immovable property
   - contracts in terms of which one spouse receives **credit**
   - contracts in terms of which one spouse agrees to act as **surety**.
2. Written consent of the spouse: The written consent of the other spouse is required before a spouse:
   - sells incorporeal movable assets held as investments, such as shares or fixed deposits
   - sells corporeal movable assets held as investments, such as jewellery, coins, stamps or paintings
   - withdraws money held in the name of the other spouse held in any bank account.
3. Informal consent of the spouse: Other less important contracts require only the informal consent of the other spouse. This informal consent can take the form of written or oral consent, express or implied. Examples of such contracts are the sale of household furniture and giving small donations.

If one spouse opens an account at Edgars, the store will place a limit on the amount that can be spent each month. That sum is the **credit** allowed.

Standing **surety** means that you agree to pay the debt of another person if she cannot do so.

Marriage out of community of property

Where a person enters into a marriage out of community of property, whether it is with or without accrual, he or she retains full contractual capacity and may freely enter into contracts with the other spouse, or with third parties, without the consent of the other spouse.

Contractual capacity of insolvents

As explained, a person may be declared insolvent when his liabilities or debts are greater than his assets. Once a person has been declared insolvent, his contractual capacity is limited in three areas, which are specified in the Insolvency Act 24 of 1936:

1. contracts to **dispose** of assets that form part of the insolvent estate – for example, selling a house that forms part of the insolvent estate
2. contracts that will prejudice, or disadvantage, the insolvent estate – for instance, deciding to buy a holiday home in Mauritius would increase the debt owed by the insolvent estate
3. carrying on business as a general dealer or manufacturer.

Dispose means to sell or give away.

If he wishes to enter into any of the contracts outlined above, then the insolvent requires the written consent of the **trustee** of his estate. As far as any other contract goes, he enjoys full contractual capacity. For example, an insolvent may enter into an ante-nuptial contract with his future spouse in which he agrees to get married out of community of property, excluding accrual – he does not need the consent of the trustee of his insolvent estate for this contract.

A **trustee** of an insolvent person is an attorney or other person appointed by the court to administer the insolvent estate.

17.1.2 Agreement between the parties

The second requirement for a valid contract is that there must be a valid offer and acceptance between the parties.

The offer

One of the parties, the offeror, or the one who makes the offer, must have made an offer to the other party, the offeree. This offer does not have to be in writing – it can also be made orally.

For the offer to be regarded as valid, the following five requirements must be met:

1. The offer must be complete in that the offeror must, for example, state what she wants to sell and how much she wants to sell it for.
2. The offer must be clear. This means that, after the offer has been made, the offeree must understand the terms of the contract. There must be no confusion as to whether a contract has been entered into or not.
3. The offer must be made with the offeror intending that a contract will be created and that she will be bound. The offeror must not be joking. For example, if a person said, "I am craving a chocolate doughnut so much right now that I would give up my brand new Porsche for one," she is not being serious and does not intend to be bound by the offer.
4. The offer must be communicated to the offeree. The offeree cannot accept the offer unless he is aware that an offer has actually been made. Look at the case study below for an example.
5. The offer must not have lapsed, been rejected or revoked.

Case study The Jewel Heist: *Bloom v American Swiss Watch Co* 1915 AD 100

A robbery occurred at the offices of the defendant (ASW). ASW placed an advertisement in the newspapers offering a reward for information that would lead to the arrest of the thieves and the recovery of the stolen jewellery. Bloom gave the police information that led to the arrest of the thieves and the recovery of the jewellery. When he did this, he did not know that ASW had offered a reward for the information. Once he had learned of the offer he attempted to claim the reward. The court held that there was no agreement to pay the reward to Bloom, because at the time he gave the information, he was unaware of the offer and as such had not accepted the offer. He could therefore not claim the reward.

When does an offer lapse?

Usually an offer is open for acceptance only for a specified time or for a reasonable time. If the offer is not accepted within this time, it lapses and is no longer open for acceptance.

When is an offer rejected?

There are two ways of rejecting an offer. First, the offeree may reject the offer outright. For example, if Juanita offers to sell Sukhinya a cell phone for the sum of R1 000 and Sukhinya refuses to buy it, she has rejected the offer outright. Secondly, an offer can be rejected when a counter-offer is made. For example, if Sukhinya tells Juanita that she feels the cell phone is overpriced and offers to pay the sum of R800 instead, she has rejected the initial offer and substituted it with a counter-offer. Juanita may now accept Sukhinya's offer or she may reject it.

When is an offer revoked?

The general rule is that an offeror may revoke the offer at any time before it is accepted. By revoked, we mean that the offeror may withdraw or cancel the offer. However, if the offer has already been accepted by the offeree, it may not be cancelled.

The acceptance

Once an offer has been made, a contract is concluded only when the offer is accepted. In order for an acceptance to be valid, it must meet the following six requirements:

1. The acceptance must come from the offeree. If an offer is made to a specific person, only that person may accept the offer. If an offer is made to the world at large, then any member of the public may accept it.
2. The offeree must know about the offer. Look again at the example of the reward offered in the case study on the opposite page. An offeree may not accept an offer unless he is actually aware that an offer has been made.
3. The acceptance must be clear and unmistakable. When the offeree accepts the offer, he must do so in a clear, precise and unambiguous manner. This means that there must be no doubt in the mind of a reasonable person that the offer has been accepted. Where there is reasonable doubt as to whether an offer has been accepted or not, then no valid acceptance has occurred.
4. The acceptance must comply with the terms of the offer, so the offeree must accept the specific offer made. If he makes a counter-offer, strictly this means that he has rejected the first offer and created a new one.
5. To be valid, the acceptance must be made within the time stated for the offer. If there is no time limit on the offer, the offeree must accept within a reasonable time.
6. For the acceptance to be valid, it must be in the form agreed by the parties. For example, Nomkhosi offers to sell his car to Skhumbuzo for the sum of R50 000, but specifies that Skhumbuzo must send his acceptance in writing. This means that Skhumbuzo may not phone Nomkhosi and try to accept the offer orally. The acceptance is complete only when it has been communicated to the offeror. If no specific form of acceptance has been stated, it can be in written or oral form.

Postal acceptance

When acceptance by post is specified, the contract is concluded at the time and place where the acceptance is posted. For example X, who lives in Durban, offers to sell his car to B, who lives in Polokwane, for the sum of R250 000. He tells B to accept the offer by post. This offer is open for acceptance only until 10 July 2017. If B posts his acceptance in Polokwane on 9 July 2017 and it reaches Durban on 15 July 2017, the contract is concluded at Polokwane on 9 July 2017. X cannot claim that the acceptance is not valid with the excuse that it reached him only on 15 July 2017. This rule that a contract is concluded when the letter of acceptance is posted is known as the expedition theory.

Telephonic acceptance

If an offer is accepted by telephone, the contract is concluded when and where the offeror hears the offeree's acceptance. These are rules related to fax and email but you do not need to know the details.

17.1.3 Formalities

The general rule is that no formalities are necessary for a binding contract to come about. Formalities are specified procedures. In other words, contracts do not usually have to be written or to follow other set procedures. However, sometimes the law requires formalities to validate and conclude a contract. There are also times when the parties themselves agree that they would like certain formalities for their contract to be valid.

In terms of certain legislation, some contracts require formalities specified in the piece of legislation to be followed.

For example, the Alienation of Land Act 68 of 1981 requires a contract for the sale of land to be written and then signed by both parties, or by their agents. This means that you cannot conclude a sale of land orally or tacitly.

Another example is the ante-nuptial contract, which you studied under family law in Chapter 15. For this contract to be valid, it must be signed in the presence of a **notary public**.

The parties themselves can also agree that no contract will come into existence between them unless certain formalities are followed. Thus Kabelo and Rick can agree that a contract for Rick to buy Kabelo's car will come into existence only when Rick's **acceptance is written**.

A **notary public** can administer oaths, act as a witness, authenticate documents and perform various other related tasks.

There are other ways of presenting an acceptance, but Kabelo has selected a **written acceptance**, and will take nothing else.

17.1.4 Certainty

To be valid, a contract must be certain. If it is so vague that the parties do not know what they have to do to carry out their side of the contract, it will be void and therefore invalid.

The contract must also bind both parties so that they clearly have rights and owe duties to each other. For example, if Chris and Brad agree that Chris will supply Brad's florist shop with roses whenever it is convenient for him to do so and in any quantities that he chooses, then the contract might be void because of uncertainty. Brad has no idea whether or not Chris will choose to perform in terms of the contract. However, before a court could declare this contract void, it would try to uphold the agreement, if at all possible. Only if the duties of the respective parties could not be reduced to some measure of certainty will the court declare the contract void.

17.1 5 Possibility of performance

For a contract to be valid, it must be physically possible to carry it out. For such a contract to be declared void on the grounds of physical impossibility, it must be objectively impossible, not just subjectively impossible. The term objectively impossible means that it is physically impossible for anyone to perform the terms of the contract. Subjectively impossible means that only the party in question is unable to perform, owing to his personal situation or because he thinks he cannot do this. Let's look at two examples to make these terms clear.

Buyi and Krish agree that Buyi will sell his Mercedes-Benz to Krish for the sum of R300 000. On the date that Krish is due to pay Buyi, he claims that this is impossible because his accountant has vanished with all Krish's money. Krish's ability to pay the sum is subjectively impossible because he cannot afford it. However, another person could afford to pay Buyi on Krish's behalf. The contract is therefore not void and Buyi can sue Krish for his failure to perform in terms of the contract.

However, if Buyi and Krish agree that Buyi will pay Krish R1 000 if Krish brings his dead dog Scampy back to life, the contract is void on the grounds of impossibility of performance because it is objectively impossible for any person to bring dead animals back to life.

17.1.6 Legality of the contract

For a contract to be valid, it must be allowed by the law. Courts will enforce only a legal contract. A contract will be recognised as illegal if it is prohibited by statute (statutory illegality) or if the contract is against the interests of the community or public policy (common law illegality).

Statutory illegality

Legislation sometimes renders certain contracts illegal. For example, s 60(4) of the National Health Act 61 of 2003 makes it an offence to sell body parts or organs. A contract between two people for the sale of a kidney or any other body part is therefore an illegal contract.

Usually the piece of legislation will carry a penalty to punish the parties if they enter into the illegal contract. This penalty may take the form of a fine or imprisonment. In addition, the court may declare the contract to be void.

Common law illegality

Our courts also refuse to recognise contracts that are against good morals or public policy. If a contract encourages behaviour that society finds unacceptable, it will not be recognised as a valid contract. For example, a contract between two parties for the performance of a crime or a delict would be against both good morals and public policy. You would not be able to hire hit men to kill or beat up your law lecturer because you failed your exams. Such a contract is illegal and the courts will not enforce it.

Professor says — Electronic contracts

The prevalence of the use of the internet has also affected the law of contract. Many people regularly buy and sell products online. In order to purchase and buy online buyers and sellers contract online and no physical or telephonic communication is needed. These online contracts are regarded as valid in our law and are subject to the same contractual principles as discussed above. Parties do not need to physically sign the contract and can do so by using digital signatures or clicking on boxes agreeing to the conclusion of the contract. Electronic contracts are usually used for the sale of moveable property. They cannot be used for the sale of immoveable property in South Africa, nor can they be used if the parties have expressly excluded the use of digital contracts in their contractual negotiations. In addition to complying with the requirements above electronic contracts also have to comply with the provisions of the Electronic Communications and Transactions Act 25 of 2002. In the case of *Jafta v Ezemvelo KZN Wildlife* (2009) 30 ILJ 131 (LC) it was held that it was possible to accept an offer and thus conclude a valid contract by use of email and SMS.

17.2 Law of delict

The law of delict deals with situations where a wronged party can claim damages for any loss caused by the wrongdoer. Damages are losses suffered by the wronged party. Damages can be damages to property, such as your house or your car, or a loss linked to an interest of your personality, such as your good name or reputation, dignity and privacy. For example, if you are involved in a car accident that you caused, then you are the wrongdoer and the person whose car you damaged is the *wronged party*. He can then sue you in delict for any loss that you caused when you damaged his car.

We have said that a delict can also take the form of a loss to an interest of your personality. For example, if someone calls you a '**slut**' in class, you do not suffer any financial loss, but you suffer a loss of reputation. So you can sue that person in delict for the harm that you suffered.

It is rude to call someone a **slut**, as it means a bad woman who sleeps around.

In South African law, there are two main delictual actions:

1. the Acquilian action, dealing with damages to property interests, and
2. the ***actio iniuriarum***, dealing with damages to personality interests, such as reputation, dignity and privacy.

We still use the Latin names because South African law comes from ancient Roman law. So, note that we talk about the ***actio iniuriarum***, not the 'action' *iniuriarum*.

17.2.1 Acquilian action

The Acquilian action covers damage or harm to a wide range of interests, including damage to tangible and intangible property. Tangible damage is damage that can be seen with the human eye, as when someone hits your car or drives a car into your house. Intangible damages are damages suffered by a wronged party, and which cannot be seen. For example, a loss of goodwill in a business or a loss of profits is intangible damage. Other damages include losses resulting from bodily injury, such as medical expenses, pain and suffering, loss of income and loss of support.

You must prove each of the following four elements in every situation where you want to sue a wrongdoer in delict for the loss or damage you suffered:

1. conduct
2. fault

3. causation
4. damages.

Conduct

The way you behave is your conduct. In law, conduct can be an act or an omission. An omission is something you should have done, but did not do. An act is any action by the wrongdoer – for example, you punch someone or drive your car into the back of another car.

An omission is a failure to act when you should have acted.

You can cause damage or loss by your failure to act. Examples of omission are on the next page.

- your neighbour's house is on fire, but you do not call the fire department, or
- you see a child drowning in a shallow pool, but you do not try to rescue him.

In general, there is no duty on a person to act to prevent harm to another person and therefore a person will only be delictually liable for his omission if there was a legal duty upon him to act.

If you sue in delict, the act or omission that you complain of must always be that of a human being.

Professor says — The conduct element

What happens if John sets his dog, Prince, on James and James suffers injuries as a result of the dog bites?

In this situation, James suffered bodily injury (or damages) because the dog bit him. But James cannot sue the dog. In this situation, the conduct element is John's behaviour. He encouraged his dog to bite James, so his actions are positive conduct. So James can sue John in order to recover losses caused by his bodily injuries, such as medical expenses and pain and suffering.

The conduct must be voluntary conduct. In other words, you must be able to control your conduct and make the choice to act. Sometimes this may not be obvious. Imagine that Prajay drives his car while drunk, hits another car and kills the driver of the other car. He does not intend to kill the other driver, but the death is caused by Prajay's **negligent** driving.

When you are **negligent**, you do not take proper care of what you are doing.

This negligent driving is voluntary conduct since Prajay knew the dangers of driving while drunk and voluntarily chose to drive the vehicle while drunk.

A person does not act voluntarily where he is unable to control his conduct. For example, you have an epileptic fit and hit the nurse in the eye. She gets a black eye and needs medical attention. You are not liable for this loss – you did not act voluntarily because you could not control your body's actions. Other examples of involuntary actions are actions performed while you are sleepwalking or having a heart attack.

To be sued in delict, your conduct also needs to be legally wrongful or against the legal convictions of the community. This refers to conduct that the community feels is legally wrong and should be punished. It is not what the community feels is ethically or morally wrong.

Professor says — Legally wrongful conduct

In order to sue someone in the law of delict their conduct needs to be legally wrongful. Sometimes conduct may be criminally wrongful but may not lead to an action for damages in delict. For example, if you go through a red robot you have committed a criminal offence. This does not however translate into a delictual action since no one has suffered harm due to your criminally wrongful conduct. So while your conduct may be criminally wrongful it is not legally wrongful for the purposes of delict. In addition, what society considers legally wrongful changes

as time passes. For example, many people think that adultery is morally wrong, and initially if you committed adultery you could be sued for damages in delict. However, as time passed the community ceased to see adultery as something that is legally wrong. The Constitutional Court in the case of *DE v RH* 2015 (5) SA 83 (CC) held that a wrongful party may no longer sue for damages caused by adultery as this action was no longer a part of the South African law.

Fault

The wrongdoer will only meet the fault element if she has capacity. This means that she must be able to understand the difference between right and wrong and act accordingly.

A child under the age of 7 does not have capacity. This is an **irrebuttable** presumption. It is a rebuttable presumption that a child over the age of 7 and under the age of 14 lacks capacity. People over the age of 14 have capacity.

If it is **irrebuttable**, it cannot be proved to be false. If it is rebuttable, it can be proved to be false.

If a person cannot distinguish between right and wrong and act accordingly because he has a mental illness or disease, then he **lacks capacity**.

A person who is under the influence of drugs or alcohol may also **lack capacity**.

Fault means that the wrongdoer is legally liable for his actions. Fault can be present in the form of intention or negligence. So when we know that a person has capacity and is responsible for her actions, we then want to know whether she acted intentionally or negligently. You act intentionally when you want the wrongful consequence of your actions to happen.

To find out whether the wrongdoer was negligent, we use the reasonable person test. In this test, we compare the wrongdoer's conduct to the conduct of a fictional reasonable person in the same situation. This **fictional** reasonable person is an ordinary person of average intelligence, strength and bravery and is the so-called average person in any society.

A **fictional** person is imaginary, not real.

As in criminal law, the reasonable person test in the law of delict asks three questions:

1. Would a reasonable person in the position of the **wrongdoer** have foreseen the possibility of his conduct causing harm?
2. Would a reasonable person have taken steps to prevent the harm from happening?
3. Did the wrongdoer in fact take these steps?

Just because we call the person a **wrongdoer** does not mean that he is guilty of the delict.

If a reasonable person would have foreseen the possibility of harm arising and would have taken steps to prevent the harm from arising and the wrongdoer did not take these steps, then the wrongdoer is negligent.

Causation

The wrongdoer's actions must be the cause of the loss. Causation must include both:

- factual causation
- legal causation.

Factual causation

The wrongdoer's conduct must actually cause the damages to the wronged party or his property. To find out whether the wrongdoer is the factual cause of the damages, we use the '**but for**' test. So we can ask, 'but for the wrongdoer's conduct, would the wronged party still have suffered damages?' If the answer is no, the wrongdoer's conduct is the factual cause of the damages.

The Latin name for the '**but for**' test is the *conditio sine qua non* test.

If the wronged party would still have suffered the damages without the wrongdoer's conduct, then the wrongdoer is not the factual cause of the wronged party's loss. If the wronged party does suffer loss as a result of the wrongdoer's conduct, then the wrongdoer is the factual cause of the damages.

Let us look at an example. Andile is driving fast to a party one night and does not stop at a red traffic light. He does not see Fran, a pedestrian crossing the road, and knocks her over. Fran suffers two broken legs, five broken ribs and a black eye as a result of the collision. So Fran has suffered bodily injuries and financial loss, as she will have to pay for medical treatment. To find out whether Andile is a factual cause of Fran's loss, we can use the 'but for' test and ask, 'but for Andile going through the red light, would Fran have suffered two broken legs, five broken ribs and a black eye?' The answer to this question is no, so Andile is a factual cause of Fran's loss.

When conduct is in the form of an omission, we can ask, 'if the wrongdoer had acted, rather than omitting to act, would the wronged party still have suffered damages?' If the answer is yes, then the wrongdoer is not the factual cause of the wronged party's loss.

Professor says — Factual causation

A situation may sometimes arise in which it is difficult to use the conditio sine qua non test. In the case of *Lee v Minister for Correctional Services* 2013 (2) SA 144 (CC) the Constitutional Court was faced with a situation in which it was difficult to use the traditional test. Lee had been incarcerated in prison for a few years and he contracted TB during this period. Lee sued the minister for damages however he could not conclusively prove that he contracted TB while he was in prison as he periodically left the prison to appear in court and he had for a brief period of time been released from prison. He could however show that he had been incarcerated in prison for five years and had only been released from prison for a brief two months during that time. In addition he had made approximately 70 appearances in court. He did not have TB when he initially entered prison although he did have TB when he was released from prison. In addition, TB was rife in the prison and spread easily through the overcrowded cells. The traditional conditio sine qua non test could not help Lee prove factual causation as he could not prove that he did not contract TB while appearing at court or during his brief period of release although it was more likely that he had contracted TB while being held in the overcrowded prison cells with other prisoners who already had TB. The Constitutional Court held that the test for factual causation was not an inflexible test and that our law did not prevent the court from simply enquiring whether, on the facts, it was more probable that he had acquired TB while incarcerated. The court answered this question in the positive and concluded that factual causation was present.

Legal causation

It is not enough that the wrongdoer is the factual cause of the damages. The wrongdoer must also be the legal cause of the damages. There must be a direct link or chain between the wrongdoer's conduct and the wronged party's loss. Where there is a third party, and the third party's conduct also contributes to the wronged party's loss, the third party's conduct may break the chain of causation.

Here is an example. Two friends, Ranjith and Phillip, fight about who is the better soccer player. Ranjith pushes Phillip and Phillip falls on a glass table and breaks it. Some pieces of glass get stuck in Phillip's arm and he may need a few stitches. The injury is not serious but Ranjith feels bad about what happened so he decides to take Phillip to the local hospital. When they arrive at the hospital, Dr Robert attends to Phillip. The doctor seems very tired and almost falls asleep while stitching Phillip's wound. After they leave the hospital, Ranjith and Phillip promise to be good friends and never to fight again. A year later, Phillip goes for a routine HIV test for an insurance policy. The test shows that Phillip is HIV-positive. Phillip is shocked. He eventually finds out that he got the disease because Dr Robert used an **unsterilised** needle when he stitched Phillip's wound.

If a needle is **unsterilised** (made free of germs), it can pass on diseases from the other people who were injected with it.

In this situation, Ranjith is a factual cause of Philip contracting HIV. But for Ranjith pushing Phillip through the glass table, Phillip would not have needed stitches and would

not have got HIV through Dr Robert using an unsterilised needle. But it would not be fair to hold Ranjith liable for Phillip contracting HIV because the act of pushing a person through a glass table does not usually lead that person to getting a dangerous disease.

Dr Robert's action breaks the chain of causation, so Dr Robert is the legal cause of Phillip's damages since it was his negligent act of using an unsterilised needle that led to Phillip getting HIV. Since Ranjith is a factual cause but not the legal cause of Philip's damages, he cannot be legally liable.

Dr Robert is the legal cause of the damages. We must now find out whether Dr Robert is also a factual cause of Phillip's damages. We can ask, 'but for Dr Robert using an unsterilised needle, would Phillip have contracted HIV through the injury?' The answer to this question is no, so Dr Robert is a factual cause of Phillip's damages. Since Dr Robert's conduct qualifies as both factual and legal causation, he is legally liable for Phillip's damages.

Damages

The wronged party must also have suffered damage to succeed in a delictual claim. The loss or damage must be patrimonial loss. Patrimonial loss is a loss that we can measure in terms of money. In some cases, you can have an action for non-patrimonial loss, such as for pain and suffering. Non-patrimonial loss is the damages a person has suffered that cannot be easily measured in monetary terms. Patrimonial loss usually results from the following:

- damage to, or destruction of, property, as when you are involved in an accident and damage the other person's car,
- injury to a person, as when you punch someone and give him a black eye, or
- economic loss, such as loss of business goodwill, which is suffered when you cause customers not to buy at a certain shop and cause the business to suffer from a decreased profit.

If the other party, the wronged party, has not suffered damages, there can be no delictual claim. Let's look at an example. Vusi drives his car through a red traffic light. No one is injured. Vusi is guilty in criminal law of a traffic law violation but there can be no delictual claim, as no one was injured.

However, if Vusi knocks over a pedestrian and injures him when he drives through a red traffic light, Vusi is liable both in criminal law for the traffic law violation and in delict for the damages he caused by injuring the pedestrian.

17.2.2 *Actio iniuriarum*

The *actio iniuriarum* deals with claims about personality rights. Once a legal subject has a personality right, all other legal subjects have a duty to respect that right. South African law recognises the right to a good name, dignity, privacy and feelings.

Your right to your good name means that another legal subject may not make rude or defamatory remarks about you. Defamatory statements are statements that lower your status in society, such as when someone calls you an 'immoral adulterer' or a 'baboon'. If people **defame** you, you may sue them for damages.

When you **defame** people, you damage their good reputation.

A person also enjoys a right to privacy. This means that other people may not enter your home or spy on you in your home without your permission. They may also not listen in on private conversations by bugging your phones or taping your conversations without your permission, unless they have a court order.

If anyone violates your personality rights and you suffer damages, you can sue to recover these damages.

If someone violates or infringes your rights, they do not respect your rights.

The increasing use of social media sites in South Africa has led to an increase in litigation for damages caused by breaches of personality right. This mostly involves one user defaming or invading the privacy of another user on a social media site for example on Facebook or Twitter.

Our courts have allowed people who have been defamed by statements made on Facebook to sue for such damages. They have even extended liability for the defamatory statements to people who are tagged onto defamatory posts and who failed to remove themselves from the defamatory posts, even though

they had not personally made those defamatory statements. As the use of fake social media accounts is common our courts have held that if there is a doubt as to whom the social media account belongs then they will use a common sense approach to determine the identity of the wrongdoer who has defamed another social media user.

Read the following article and answer the questions below.

Zahara threatens to sue Somizi and Samas

The Country Girl hit maker says she is tired of the negative things said about her.

Singer Bulelwa 'Zahara' Mkutukana was not impressed with Somizi Mhlongo's jokes about her at the South African Music Awards (Samas) on Saturday. The Country Girl hit maker was not in attendance, but she said upon her arrival from Swaziland, friends told her what Somizi had said about her, and now she is fuming.

Somizi, who made jokes about everyone, including his friend Khanyi Mbau and Babes Wodumo, told the audience Zahara was probably in attendance, as there was a free bar. He was referring to the rumours last year that Zahara was struggling with alcohol, with some reports claiming she had checked in to rehab.

Funny or not, Zahara does not think Somizi should have made such comments about her, and she is now threatening to sue him and the Samas.

"I only wish what I heard upon my return from Swaziland #BushfireFestival this past weekend about what Somizi said at the Samas is not true! Because if he did I am suing Somizi and the Samas for defamation of character. I am tired of this," she wrote on Instagram.

Her fans were not impressed with her for "taking things too seriously".

These were some of the comments on her post:

"Hi Zahara I was watching the SAMAs honestly what @somizi said was a joke he did it with many other celebrities like @babes_wodumo…. Dont take it personally he was just entertaining us and had no intention of destroying your character. God bless. @somizi loves you like crazy."

"The minute you can concentrate on something else ppl will stop doing this things to u, you give them attention way too much , somizi made a joke even with other ppl don't be so touchy they will always provoke you."

"Hai suka you need to chill and work on your next song. We all know Somizi loves messing around. Just by the way,Somizi didn't threaten to sue you when you called him out about walking away from Grace Bible church and preaching about how the bible is true and whatever but you wanna catch feelings?? Sit down please."

Do you think Zahara is blowing things out of proportion?

Source: http://citizen.co.za/your-life/your-life-entertainment-your-life/entertainment-celebrities/1528279/zahara-threatens-sue-somizi-samas/ accessed on 27/06/2017

Defamation claims form part of the *actio njuriarium* in South Africa. In order to be successful in such a claim you have to prove that the statement made other people think less of you and so damaged your reputation.

After reading the article above, do you think people would think less of Zahara, i.e. would they think that Somizi is stating that Zahara is an alcoholic? Or do you think most readers would think of the statement he made as a joke?

What do you think?

There are roadworks in the centre of town and you cannot cross the road to get to university. You walk further down the road and cross carefully but you trip as you get onto the pavement on the other side. A car is driving too fast and catches your feet, partially driving over them. You have to go to the clinic to get your wounds cleaned and your other injuries checked.

Can you make a claim in delict? Why or why not?

Chapter summary

In this chapter, we discussed the law of obligations; namely, the law of contract and the law of delict:

- A contract is an agreement between two or more people to do something, not to do something or to deliver an object. There are six requirements that must be fulfilled in order for a valid contract to come into existence.
- The first requirement is that the parties to the contract must have the contractual capacity to enter into a contract.
  - A minor under the age of 7 has no contractual capacity and can never validly enter into a contract himself. Any contract must be entered into on his behalf by his parents or guardians.
  - A minor between the ages of 7 and 14 has limited contractual capacity and he may enter into a contract only with the assistance of his parents or guardians.
  - In the case of marriage in community of property, both spouses have equal contractual capacity regarding the joint estate. However, the Matrimonial Property Act specifies contracts for which the written consent of the other spouse and two witnesses is required, contracts for which the written consent of the spouse is required and contracts in which the informal consent of the other spouse is sufficient.
  - In the case of marriage out of community of property, both spouses retain full contractual capacity and may freely enter into contracts with third parties without the consent of the other spouse.
  - Once a person has been declared insolvent, her contractual capacity is limited.
- The second requirement of a valid contract is that there must be agreement between the parties in the form of a valid offer and acceptance.
  - The offer must be complete, clear and made with the intention that a contract be created. In addition, the offer must be communicated to the offeree and the offer must also not have lapsed, been rejected or revoked.
  - A contract is concluded only when the offer is accepted.
  - Acceptance of an offer must come from the offeree, who must know about the offer. The acceptance must be clear and definite and it must comply with the terms of the offer. The acceptance must also be made within the given time and in a form agreed to by the parties. Lastly, the acceptance is only complete when it is communicated to the offeror.
- The third requirement for a valid contract is that if formalities are specified in terms of the law or the contract then these formalities must be adhered to.
- The fourth requirement of a valid contract is that there must be certainty in terms of the contract. This means that if the contract is so vague that the parties do not know what they need to do to carry out their side of the contract, then the contract is invalid.
- The fifth requirement for a valid contract is that it must be physically possible for the contract to be performed.
- The final requirement for a valid contract is that the contract must be legal in that it must be a contract that is allowed by the law. A contract will be illegal if it is contrary to public policy or if it is prohibited by statute.
- Delict deals with situations in which a wronged party can claim damages for any loss caused by the wrongful act of a wrongdoer.
- There are two types of actions in delict: the Acquilian action and the *actio iniuriarum*.
- The Acquilian action provides remedies for damages to property interests.
- There are four essential elements that must be proved in every claim: conduct, fault, causation and damages.
- Conduct can take the form of an act or an omission.
- Conduct must be voluntary human conduct.
- Fault can take the form of intention or negligence. A wrongdoer has intention when he intends the outcome. A wrongdoer is negligent when he does not live up to the standard of a reasonable person.

- In order for causation to be present, there must be both factual and legal causation. To find factual causation, we use the 'but for' test. In legal causation, we look to see if a new cause has broken the chain of causation.
- Damages can take the form of patrimonial or non-patrimonial loss.
- The *actio iniuriarum* deals with claims about personality interests and rights. If a person's personality rights are infringed, she may sue for damages using the *actio iniuriarum*.

Review your understanding

1. What is meant by capacity to contract? Who does not have capacity to contract?
2. Explain what is meant by implied consent and express consent.
3. What is a limping contract?
4. List three circumstances in which the written consent of a spouse and two witnesses is required and three circumstances in which the written consent of the spouse without witnesses is required.
5. When is the informal consent of a spouse sufficient for a person married in community of property to enter into a contract?
6. List the requirements for a valid offer and acceptance.
7. Identify the time at which a contract comes into existence if it is concluded by postal acceptance. Does the time differ for a contract concluded by means of telephonic acceptance?
8. Distinguish between objective impossibility and subjective impossibility.
9. When is a contract deemed to be illegal?
10. What are the two main branches of delict called? How do they differ?
11. What is an omission?

Further reading

Bhana, D., Bonthuys, E. and Nortje, M. 2015. *Student's guide to the law of contract,* 4th edn. Cape Town: Juta and Co. (Pty) Ltd

Christie, R.H. 2016. *The Law of Contract in South Africa*, 7th edn. Durban: LexisNexis South Africa
(This book is a very thorough exploration of the law of contract.)

Neethling, J., Potgieter, J.M. and Visser, P.J. 2015. *Law of Delict,* 7th edn. Durban: LexisNexis South Africa
(You will find more information on delict in this textbook.)

Chapter
18 Commercial law

The main ideas
- Types of business enterprise
- Insolvency law
- The law of negotiable instruments
- Labour law
- The law of sale and lease

The main skills
- Analyse different forms of business enterprise and their respective advantages and disadvantages.
- Understand voluntary surrender, sequestration, insolvency and rehabilitation.
- List various negotiable instruments.
- Understand the employer/employee relationship.
- Explain the elements of a contract of sale.
- Explain the elements of a lease.

Apply your mind
South Africa has a very high unemployment rate with nearly 9,3 million people looking for a job. Many experts have theorised that the only solution to such a high unemployment rate is to develop a culture of entrepreneurship. In addition to business skills entrepreneurs need to have a solid grasp of commercial law as it will effect their ability to open a business and run it.

In this chapter, we are going to consider various branches of law that together make up commercial law. While commercial law is part of the private law branch, its importance in the economic activity of our country means that you should be able to understand the law as it relates to everyday commercial transactions, or business.

Commercial law is a name for all the sub-branches of the law dealing with commercial transactions. Examples of these sub-branches are insolvency law, which deals with businesses that go bankrupt or labour law, which protects people when they enter into employment contracts. Some authors refer to commercial law as business law, mercantile law or entrepreneurial law. No matter the different names, they all refer to the same branches of the law. We are using the name 'commercial law' here.

We are going to introduce you to the various commercial bodies that people use to carry out their business – in other words, the different forms that businesses can take. Then we'll look at the laws controlling insolvency, which apply when business entities are unable to pay their debts. We also consider the laws on negotiable instruments, which deal with our means of payment like cheques or credit cards. We will move on to the important area of labour law, which sets out the rights and duties of an employer and employee. The law of sale and lease is the final topic of this chapter. As you can already see, a wide range of types of law belong under the umbrella of commercial law.

Before you start

Law and commerce are very closely linked. All **commercial transactions** must be lawful, or we would constantly be the victims of **fraud** and other crimes. For this reason, our law controls commercial transactions to protect customers and business employees. Without the law, there would be confusion.

Commercial transactions are business dealings.

Fraud is the crime of deceiving people in order to gain something such as money or goods.

Have you ever bought something like a radio, taken it home and then found that there was something wrong with it? You may have wondered whether the shopkeeper would refuse to replace it or give your money back. The fact is that the law is on your side and if the shopkeeper does not help you, you have a legal remedy.

Or perhaps you are living in rented accommodation while you are a student. Imagine signing up with the landlord for a year, but a month later being ordered from the property because his son has decided to start a business there or because he had found a tenant who is willing to pay a higher rent. What would you do if you were not protected by law?

These are just everyday examples of why we need the law. You may never have realised what a protective covering it provides and why we need to know what it can do for us.

18.1 Types of business enterprise

While we all, as individuals, enter into commercial transactions such as buying or selling textbooks or entering into a lease for a flat, commercial transactions for larger sums of money are usually entered into by business **enterprises**.

An **enterprise** is a business firm, large or small.

Business enterprises enter into many commercial transactions every day. For example, each time a consumer purchases an enterprise's goods, they have entered into a contract of sale. A busy supermarket may enter into hundreds or even thousands of such contracts daily. Most businesses also have employees and must therefore comply with **labour law**.

Labour law is the branch of commercial law that regulates the relationship between employers and employees.

Since it is likely, once you are in practice as an attorney, that businesses will approach you for advice on commercial transactions, it is important that you understand that business enterprises can take on different forms and that each of these forms has its own consequences, advantages and disadvantages. One must also take the Companies Act 71 of 2008 into account as this Act has changed the structure of companies to a certain extent.

Before someone decides to start a business, she must first decide what form of enterprise she wants to run. This choice is probably the most important one she will make, because one type of business is very different from another, and the person has to be very sure of what she wants.

The structure or type of business enterprise someone chooses affects the extent of his personal responsibility (or liability) towards **creditors** and whether his business would survive if he died. In other words, the person has to decide how much debt he is willing to take on in the course of buying and running the business.

Creditors are persons to whom a business owes money.

These are only two of the consequences that flow from the choice of a business form. You will see that the type of business chosen affects how it operates.

A business enterprise may adopt the following forms:

- sole proprietorship
- partnership
- close corporation
- private or public company.

Each of the above enterprises has advantages and disadvantages, and we are going to discuss them each in turn.

18.1.1 Sole proprietorships

A sole proprietor means that there is only one owner of a business. This is the most basic form of commercial trading. One person decides to start a business and starts without adopting any of the forms of business enterprise. For example, Nhlanhla decides that she no longer wants to work for other people and would like to be her own boss. She decides to sell fruit and vegetables at the side of the road. She buys her trading stock, fruit and vegetables, from a local farmer and sets herself up at the roadside.

If Nhlanhla begins trading in this manner, she is a sole proprietor and there is no separation in **legal personality** between herself and her business. As such, she is completely liable for its debts.

Natural persons and juristic persons both enjoy **legal personality**, which means that they enjoy the rights of a legal subject and they have legal status.

If she fails to pay them, her personal property can be **attached**. As we pointed out, only one person may be a sole proprietor and, while Nhlanhla may have other people working for her, she may not take on any further business partners. The sole proprietor has to pay taxes on all the income earned from the business. Only the sole proprietor can enter into contracts on behalf of the business. One of the major disadvantages of a sole proprietorship is that the business ends once the sole proprietor dies or becomes insolvent**.**

If property is **attached**, it is seized by the court and sold to pay the debts of the business.

18.1.2 Partnerships

A partnership is an agreement between two or more people to contribute money, skills, labour or property to a business and to use this contribution to make a profit, which they will share. The partnership agreement may be verbal or the parties may write down their agreement to enter into a partnership in a written contract.

For example, Nhlanhla meets Nolwazi, who has recently inherited money from her father and who wants to invest this money in a business. Nhlanhla needs more money to open up another stall on the main road and buy her trading stock in bulk. Her supplier, the farmer, has agreed that if she buys in bulk, he will give her a **discount**. This discount will allow her to make a greater profit. Owing to the informal nature of her business, Nhlanhla is reluctant to approach the bank for finance. She agrees to enter into a partnership with Nolwazi in which Nolwazi will contribute money and Nhlanhla will contribute her labour and skill. What are the consequences of this partnership?

A **discount** is a certain percentage deducted from the full price.

The partners do not need a written contract of partnership (although this is strongly recommended to prevent misunderstandings in the future) and they may agree orally to form the partnership. A minimum of two persons are necessary for a partnership. In the past, the maximum amount of partners was capped at twenty persons with the exception of certain professional partnerships such as attorneys or accountants. This cap has however been removed since the 1 May 2011. This means that there is no longer any maximum amount of partners who can enter into a partnership agreement. This means that, as Nhlanhla's and Nolwazi's business expands, they may take on more partners and there is no limit to the number of partners they may take on. However, each time a new partner is included in the partnership, the old partnership is terminated, or ended, and a new one must be formed. While there is no longer a maximum limit of partners, it is not advisable to enter into partnerships with large numbers of people due to the nature of a partnership.

Each of these further partners will also contribute their skill, labour, property or money. The purpose of the partnership must be to make a profit. It is not possible to form a partnership for **social or charitable reasons**.

Social and charitable reasons would mean that your purpose was to do good for others, and that you were not concerned about making any money.

Each contribution by the partners goes into a partnership fund, which is kept separate from the personal assets of each partner. The property of the business belongs to the partners. Partners do not have to contribute equally to the business, nor do they have to share equally in the partnership property or profit. The partners could agree on dividing the profits proportionally. If there is no agreement, then partners share profits in proportion to the contribution that they have made to the business.

A partnership is not recognised as a separate legal entity. However, for the sake of convenience, the partnership is sometimes extended, or allowed, a limited form of legal personality. For instance, a creditor of the business could try recovering the full amount of his debt from the partnership assets. If he cannot do this, he could proceed to recover it from the personal assets of the individual partners.

A partnership does not usually have to be registered with the Registrar of Companies. The Registrar of Companies is the official term used for the person who monitors the activities of companies to ensure that they fulfil the duties the company has to carry out. A Registrar of Close Corporations performs the same functions for close corporations.

Partners do not need to be **natural persons**. A partnership can enter into partnership with another company or another partnership. Generally any of the partners is allowed to enter into contracts on behalf of the partnership.

A **natural person** is a human being as opposed to a company or a corporation.

If the partners wish to end the partnership, they can **dissolve** it. No formalities or official procedures are needed to bring the partnership to an end. Usually, the partnership assets are reduced to money rather than objects, the creditors are paid, and whatever is left is divided among the partners. If a partner's personal estate is sequestrated or one of the partners dies, the partnership is automatically terminated. When someone is declared insolvent, the court sequestrates his estate. This means that control over the person's estate will be handed over to a liquidator or trustee, who then brings the person's affairs to a close and uses the assets to partially pay the debts owed to his creditors.

To **dissolve** a business entity is to close, end or break it up.

18.1.3 Close corporations

Close corporations were created in 1984 by the Close Corporations Act 69 of 1984. This Act provides for the formation of a business entity known as a close corporation, which is cheaper and simpler to run than a company and which uses less formal legal structures.

In a partnership, natural persons who are owners of the business are known as partners. In a close corporation, the owners of the close corporation are known as members. A close corporation may not have more than ten members. Each of these members makes a contribution to the close corporation of money, services or property. These contributions are recorded in the founding statement, which contains information like the name of the close corporation, its intended business, the members' interests and contributions and the name of the accounting officer. A member cannot have shares in a close corporation but instead his interest shows as a percentage. When there are two or more members of a close corporation, it is advisable for the members to enter into an association agreement to govern the relationship, rights and duties of each member to each other and to the close corporation. Where members fail to enter into an association agreement, their relationship is governed by the Close Corporations Act.

A close corporation is relatively cheap to form. If you wish to form a close corporation, you have to register a founding statement with the Registrar of Close Corporations. Once it has been registered and the Registrar has issued a certificate of incorporation to show that the corporation is valid, the close corporation has a separate legal personality from that of its members. This means that a close corporation enjoys perpetual succession, as it can continue even if one of the members dies or resigns or sells his interest in the business. The legal personality of a close corporation ends only if the close corporation is deregistered or if it is dissolved in terms of the insolvency laws.

A close corporation has its own legal personality, enjoying rights and corresponding duties in its own capacity. If the close corporation owns property, the corporation is the owner of the property, not the members. When the close corporation falls into debt, it is liable for these debts, not the members. A member will incur liability for these debts only in the following limited circumstances (this list contains the most important points):

- The member has stood personal **surety** for the debts of the close corporation.
- The name of the close corporation has been used without the abbreviation 'CC' or 'BK' following the name of the close corporation – for example, Sifiso's Panelbeaters

If the person who owes a debt does not pay, the person standing **surety** can be sued for payment.

instead of Sifiso's Panelbeaters CC or Sifiso's Panelbeaters **BK**. If the abbreviation CC or BK is not used, a third party may not know that he is dealing with a juristic person rather than the natural person who has entered the transaction with him, with the result that he could extend credit to a person or entity other than the one he intended. He could be prejudiced by this transaction.

The Afrikaans term 'beslote korporasie' is abbreviated as **BK**.

- There have been more than the maximum of ten members for a period of six months. Each member will then be personally liable for the debts of the close corporation that were incurred while there were more than ten members.
- A member fails to deliver his starting contribution. He is then personally liable for the debts of the close corporation from the date of registration of the close corporation to the date on which he delivers the contributions.
- The business of the close corporation is carried out in an irresponsible or fraudulent manner. The court may, on **application**, find that anyone who knew that this was going on, and allowed it, should be personally liable for the debts. In addition, this person will be guilty of an offence.

An **application** is when a formal request is made to the court.

The sequestration of one member does not result in the liquidation of the close corporation.

Members of a close corporation owe the close corporation a fiduciary duty. This means that the members must act in good faith and honestly with the corporation, trusting the corporation and behaving in a trustworthy way themselves. They must avoid **conflicts of interest** between the close corporation and their own concerns, and should not go into business competition with the corporation.

An example of a **conflict of interest** is when someone gives a job to his brother in preference to better applicants.

In terms of s 54(2) of the Close Corporations Act, any member of a close corporation can enter into contracts for the close corporation and incur debt on its behalf if the close corporation clearly, or **by implication**, authorises this or if it takes place during the normal course of business. Sometimes an association agreement, or another agreement between the members, restricts a member from acting on behalf of the close corporation or carrying out transactions on its behalf. Despite having set down limitations, the close corporation is still bound by the member's transactions with non-members, unless it can prove that the non-member knew, or ought reasonably to have known, that the particular member was not authorised to carry out the transaction. A member who acts outside of any limitations set down has, in fact, breached his fiduciary duty and the close corporation can sue him for damages.

By implication means that the corporation has not openly, or expressly, allowed the member to act for it, but it is nevertheless understood that this is acceptable.

Every close corporation must keep accounting records at its place of business or registered office. The records must show the corporation's financial transactions and status, and must be available at all reasonable times for inspection by any member. Failure to do this is an offence in terms of the Act. The close corporation must have an annual financial statement drawn up to be approved by or signed by members holding a membership interest of fifty-one per cent or more.

The Companies Act 71 of 2008 has changed the status of close corporations. It does not allow [as of the 1 May 2011] for the incorporation of new close corporations while allowing for close corporations to retain their status as such until their members decide to convert the close corporation to a company in terms of the new Act or until the Close Corporation is de-registered or wound up.

18.1.4 Companies

A company is a juristic entity that enjoys or has legal personality from the moment the Registrar of Companies issues a **certificate of incorporation**.

A company comes into existence and assumes or takes on a juristic personality when it is issued with a certificate of incorporation. This legal personality is completely separate from that of its directors, members or shareholders, so a company can enjoy its own rights and

A **certificate of incorporation** can be compared to the birth certificate issued after the birth of a natural person.

incur its own obligations. It means that a company may own property in its own name and may incur its own debts.

To **incur** means to bring something on yourself, or cause it to happen to you.

Also, if a company commits a delict, it is the company itself that will be liable for the damages it has caused and not the directors or **members of the company**. A director or member of a company will be liable for the delicts of a company only when she took part in or knew about the delictually wrong behaviour.

A shareholder has shares of the stock belonging to a corporation. Shareholders may be referred to as **members of the company**.

A third party is someone else, not a person representing the company.

If someone wishes to sue the company, he has to do so in the company's own name. On the other hand, if a company wishes to sue a third party, the company can start legal action in its own name. Since the company enjoys legal personality separately from those of its members and directors, the directors and members of the company can also sue the company.

A company enjoys perpetual succession and continues to exist when members die, retire, become insolvent or sell their shares in the company. The legal personality of a company can end only when the company is wound up in terms of the insolvency laws or if the company is deregistered. When a company is declared insolvent, we say that it has been liquidated.

Companies are governed by the Companies Act 71 of 2008. This Act allows for only two types of company – profit companies and non-profit companies. These are explained in greater detail below.

Profit companies

A company will be regarded as a profit company if its purpose is to gain a financial advantage or profit for its shareholders. There is no maximum amount of members who can hold shares in a profit company.

There are four types of profit companies. These are:

- a state-owned company
- a personal liability company
- a private company
- a public company.

Non-profit companies

These are companies which are not incorporated to make a profit, but are rather incorporated to achieve some public benefit. A non-profit company does not need to have any members although the Act does allow it to have members. Additionally a non-profit company may not distribute any of its income or property to a member or director of the non-profit company.

18.2 Insolvency law

When the **amount of money** owed by a person exceeds his assets then this person, the debtor, is unable to pay his debts. Naturally, all his creditors, the persons to whom he owes money, want those debts to be paid. This could result in the debtor making payment to the creditors who make the most or the loudest demands. But this would prejudice the less demanding creditors, who might not get paid at all because there are no funds left. This would be very unfair. The law therefore allows creditors, or even the debtor himself, to apply to the court for an insolvency order. Once an insolvency order has been granted, the estate of the insolvent debtor is placed in the hands of a trustee or liquidator, who will make sure that the creditors receive equal treatment.

The **amount of money** owed by a person are his debts or liabilities.

The insolvency process may take the form of a declaration of insolvency or else a sequestration of property. Sequestration means that the debtor's goods can be seized or confiscated to pay creditors.

18.2.1 Declaration of insolvency

The debtor, or the insolvent as she is known once the insolvency procedure has begun, may decide to declare insolvency. This means that she has realised that she cannot pay her debts and wishes to hand her estate over to the court. Having made this decision, she can apply to the court to make voluntary

surrender of her estate. She must follow certain formalities prescribed in the Insolvency Act 24 of 1936 if she is a natural person.

The insolvent must notify her creditors and the South African Revenue Service of her application for the voluntary surrender of her estate. If she is an employer, she also has to notify her employees and their trade union. This is because all these parties will be prejudiced by her application for the surrender of her estate, and they should be given an opportunity to oppose her application by saying that they do not agree with it. Opposition to an application for the surrender of an estate is usually made when the parties who are going to be affected believe that the insolvent may be hiding certain assets to evade payment of her debts. They would obviously like to bring this to the attention of the courts.

The insolvent must prove to the courts that her assets are fewer than her liabilities and that the surrender of her estate will be to the advantage of her creditors. She does not need to prove that her creditors will be paid in full, which would be impossible anyway. All she needs to prove is that her creditors will receive a reasonable portion of the debt owing to them. In addition, the insolvent must be able to pay the costs of the sequestration.

18.2.2 Sequestration

Where the debtor does not wish to declare insolvency, a creditor who is owed more than R100 by the debtor, or two or more creditors who together are owed at least R200 by the debtor, may approach the court for the **compulsory** sequestration of the debtor's estate. If the application succeeds, the debtor's estate may be sequestrated even if he does not want this.

Compulsory sequestration means that the sequestration must take place. The debtor would not have a choice in the matter.

If a creditor applies for the compulsory sequestration of a debtor's estate, the creditor must either prove that the debtor's liabilities exceed his assets, or that the debtor has committed an act of insolvency. Proving that a debtor's liabilities exceed his assets is often difficult, because the creditor does not usually have access to the debtor's financial records. However, if he can prove that the debtor has committed an act of insolvency then the court will not in addition also require him to prove that the debtor's liabilities exceed his assets. The following are some examples of acts of insolvency:

- The debtor gives written notice to any one of his creditors that he is unable to pay his debts.
- The debtor leaves the country or his house with the intention of delaying or avoiding payment of his debts.
- The debtor removes or attempts to **remove property** with the intention of prejudicing his creditors.
- A creditor has obtained a judgment against the debtor and the sheriff arrives to attach goods to sell in order to satisfy the judgment and the debtor is unable to point out sufficient property for attachment and sale. A sheriff is an official of the court whose duties include serving or delivering court documents to defendants in court actions. He also attends to the attachment and sale of goods belonging to people who cannot settle their debts. The money received from the sale of goods at auctions is used to settle the debts of a debtor.

An example of **removing property** is if a person hides his Porsche to prevent creditors from attaching and selling it.

The creditor who applies for a debtor's sequestration must also prove that the sequestration will be to the creditors' advantage, in that they will receive a reasonable portion of the debt.

18.2.3 Consequences of insolvency

Once an application for voluntary surrender or compulsory sequestration succeeds, the insolvent is no longer the owner of his estate. Ownership is vested in the Master of the High Court until a trustee has been appointed, who then takes control of the insolvent estate. The trustee will liquidate the estate and attempt to pay the creditors the amounts owing to them.

Certain consequences follow a sequestration.

- An insolvent is not allowed to be a director of a company.
- He may not run a business as a general dealer or manufacturer without the written consent of the trustee of his insolvent estate.
- He may also not dispose of the property of the insolvent estate.
- If he has been involved in civil proceedings relating to the now-insolvent estate, these will be postponed until a trustee has been appointed. The trustee will then conduct the litigation.
- The insolvency has no effect on any criminal proceedings pending against the debtor at the time of insolvency or on any brought against him after insolvency has been declared.

If an insolvent was married in community of property, the joint estate is sequestrated. If he was married out of community of property, then only the insolvent's estate will be sequestrated, not that of the spouse.

18.2.4 Rehabilitation

Once a person has been declared insolvent, her **contractual capacity** is limited in certain respects. The aim of insolvency law is to allow a debtor to realise that she has overestimated her financial ability and to attempt to settle her debts in a reasonable or just fashion. After that, the insolvent should be allowed to make a fresh start.

A person must have **contractual capacity** in order to enter into a valid contract.

The insolvent may apply for rehabilitation, which will bring her insolvency to an end and will re-establish her previous status, allowing her once more to be a company director or to carry on business as a general dealer or manufacturer.

An insolvent may apply to the court for rehabilitation under the following circumstances:

- Her creditors have agreed to an offer of settlement of the outstanding debts and the Master of the High Court has issued a certificate to this effect. An offer of settlement usually refers to an agreement by the creditors that they will accept a portion of the debt due to them. They realise that they will otherwise receive nothing.
- The insolvent has paid the full amount of the debts outstanding to her creditors together with any interest owing on the debt and the costs of the insolvency or sequestration application.

After a period of ten years the insolvent is automatically rehabilitated and no application to court is needed.

Activity 18.1

If a creditor wishes to sell goods belonging to a debtor at a sale in execution, he must advertise the goods to be sold. These advertisements usually appear in the legal notices section of a newspaper's classified section. Consult the newspaper and make a note of the different types of goods that are usually sold at these auctions. You can also go online to www.iol.co.za and look in the classified section.

18.3 The law of negotiable instruments

Let's imagine that you walk into a shop and see a really nice shirt that you would like to buy. You can pay for the shirt in a number of ways. You can pay cash, or, if you do not have any with you, you can pay with your credit or debit card. But people do not carry enormous sums of money for large-scale commercial transactions. Can you imagine carrying R10 million in cash? Instead, the law of negotiable instruments was developed to allow for convenient methods of payment in commercial transactions.

Some of the most common instruments of payment currently in use in South Africa are:

- cheques
- **stop orders**
- **debit orders**
- credit cards
- letters of credit
- **promissory notes**
- electronic transfers of money through internet payments.

A **stop order** is a written instruction from the holder of a bank account to the bank instructing the bank to pay a fixed amount of money to a third party on a regular basis from the money held in the account. For instance, you may have a stop order for your cell phone account.

The law of negotiable instruments is embodied mainly in the Bills of Exchange Act 34 of 1964 and partly in the common law.

A **debit order** is identical to a stop order, except that the instruction to pay is given by the third party, not by the account holder himself. The account holder signed a debit form and gave it to the third party.

18.4 Labour law

Labour law governs the relationship between an employer and its employees and ensures that employees are not exploited or treated unfairly.

The three most important pieces of legislation governing employment law are:

1. the Labour Relations Act 66 of 1995 (LRA)
2. the Basic Conditions of Employment Act 75 of 1997 (BCEA)
3. the Employment Equity Act 55 of 1998 (EEA).

A promissory note is a promise, reduced to writing, to pay the sum owed at a future date.

18.4.1 Employees and independent contractors

First, we must distinguish between an employee and an independent contractor. An employee works under his employer's control and is subordinate to the employer. An independent contractor is hired to perform a certain job but is usually not under the control of the employer, and nor does the employer supervise her. An employee usually works the hours set down by his employer, whereas an independent contractor may choose her own hours. In addition, while an employee usually qualifies for extra benefits like sick pay or membership of an employment-based medical aid scheme to which his employer contributes, the independent contractor is not a member of these schemes, and nor does the employer make contributions on her behalf.

This distinction between an employee and an independent contractor is important, because the Acts listed above apply only to employees and not to independent contractors. Also, while an employer is **vicariously** liable for the acts of an employee, this does not apply to acts by an independent contractor. The concept of vicarious liability is best understood with an example. Let's assume that Rico works for Johnny as a driver delivering bread to all the local shops daily. One day, Rico is speeding to a delivery and causes a collision between his delivery van and another vehicle. The driver of the other vehicle can sue Johnny for the damages to his vehicle because Rico is employed by Johnny and caused the accident while performing a work-related task. Johnny is thus vicariously liable for Rico's actions and can be sued for damages caused by Rico, even though Johnny personally did not cause them.

Vicariously means that someone is not directly liable, but is liable through another person.

If, however, Johnny hires Eddy, an independent contractor, to landscape his garden, Eddy is not an employee. He has been hired to perform a certain task and Johnny cannot control how he does this. If Eddy is speeding on his way to the nursery to buy plants for Johnny's garden and causes an accident, the other driver cannot sue Johnny for the damages. He must sue Eddy.

Read the following article to see the outcome of the CCMA ruling regarding Uber employees and the Labour Relations Act:

CCMA rules in favour of drivers in Uber case

The Commission for Conciliation, Mediation and Arbitration (CCMA) ruled last week that Uber drivers are employees of Uber SA in terms of the Labour Relations Act. The ruling, delivered on 7 July, was part of a case of unfair dismissal that seven South African drivers brought before the CCMA.

In the case, the CCMA was asked to address whether or not it had the jurisdiction to rule on the unfair dismissal cases. Attorney and labour law lecturer at the University of Johannesburg, Kgomotso Mokoena, told *The Daily Vox* the CCMA only has jurisdiction to deal with the relationships between employers and employees in terms of the Labour Relations Act. The case of unfair dismissal itself is yet to be addressed.

The matter is unlikely to end here. CCMA rulings are subject to review in the Labour Court.

In a statement, Uber said it will be reviewing this ruling before the Labour Court. "There is a long legal challenge ahead before this ruling can be considered a win, or a loss for any side in this important issue," it said.

Mokoena said this battle could take years to resolve and will likely end up in the Constitutional Court.

"Around the world, all the courts or tribunals that have so far ruled that Uber drivers are employees, are still wrapped up in appeal processes. It's still not final," she said

Uber has faced challenges about its status as an employee in other countries. Last year, the UK employment court ruled that Uber drivers are not self-employed and should be paid the national living wage. The case was brought before court due to government's concern with the trend towards self-employed workforces. Uber took the ruling to an employment appeal tribunal, and there are still long court processes to go through before the ruling can be implemented.

According to Section 213 of South Africa's Labour Relations Act, an employee is: a) Any person, excluding an independent contractor, who works for another person or for the state and who receives, or is entitled to receive, any remuneration; and b) Any other person who in any manner assists in carrying on or conducting the business of an employer.

In a normal employment relationship, employees have a right to a fair hearing, to be represented, and to have an internal appeal hearing before they even get to the CCMA.

Uber defines itself as a company offering "information and a means to obtain transportation services offered by third party transportation providers, drivers or vehicle operators" which can be requested via a mobile app. Uber argued that it does not employ drivers, that it does not own any vehicles, and that its only role is to offer users the app.

However, the CCMA found that an Uber driver cannot do business without the app.

Uber also claims it does not control when the drivers work or require them to work at specific times. But the CCMA said in its ruling that there are clear consequences of not accepting enough trips – drivers can be deactivated from the app if they do not accept a certain number of rides.

The CCMA now has jurisdiction to arbitrate in the case of these seven drivers. This CCMA ruling is the only precedent we currently have in South African law concerning Uber.

Source: https://www.thedailyvox.co.za/ccma-uber-drivers-employers/

18.4.2 What are the duties of an employer?

An employer may be a natural or a juristic person. Once an employer employs an individual as an employee, certain automatic common law obligations come into existence in addition to **statutory obligations**.

A **statutory obligation** is that the BCEA does not allow any employer to employ a person under the age of fifteen years.

1. As a general rule, an employer has no obligation to provide work for the employee, although it must pay the employee. However, if an employee is reliant on the commission he gets from the work, such as in the case of a salesman, or if he is an apprentice, such as a candidate attorney, who must perform work to acquire skills, then the employer will be in breach of the contract of employment if it fails to provide work.
2. An employer must pay the agreed remuneration specified in the contract. If nothing is specified in the contract, the employer must pay a reasonable wage. The BCEA allows for a minimum remuneration rate to be set. Some sectors regularly set minimum wages, for example, the domestic worker and farm worker sectors. A minimum wage does not mean that is what an employee must

earn. This minimum remuneration rate is merely the lowest amount that the employee can be paid. An employer can pay an employee more than the minimum remuneration rate, however he may not pay her less than this rate. If the employee does not provide his services as required by the contract, the employer does not have to pay him. This is known as the 'no work, no pay' rule.

3. An employer must provide safe working conditions for the employee in terms of the common law. This means providing the employee with safe tools and protective clothing. In addition to the common law duty, statutes such as the Occupational Health and Safety Act 85 of 1993 place a statutory duty upon employers to ensure the safety of the work environment for their employees.
4. An employer is not permitted to victimise an employee who exercises his rights. In other words, an employer may not prejudice or single out an employee who joins a trade union or takes part in a lawful strike.

18.4.3 What are the duties of an employee?

Once an individual enters into a contract of employment, she owes certain duties to her employer.

1. The employee must make her services available to the employer.
2. The employee must obey reasonable orders from the employer given in the course of employment. If she does not, her refusal amounts to insubordination, which, if serious enough, may amount to a breach of the contract of employment.
3. The employee has a duty to perform the work competently, and not negligently. By entering into the contract of employment, the employee implicitly guarantees that she is capable of performing the work.
4. The employee has a duty to act in good faith towards the employer. This means that the employee must not compete with the business of the employer and must advance the employer's business during working hours.
5. In addition, an employee must not divulge the employer's confidential information to others, nor may the employee use this confidential information to her own advantage. The employee must act honestly and should not steal from the employer, commit fraud or act in any other dishonest way. She must not use her position to make a secret profit nor should she use the employer's property for her own benefit.

18.4.4 Termination of employment

The termination of employment relationships is closely regulated by the LRA. The particular circumstances of a termination will determine whether it is lawful or not.

- If an employee is employed for a fixed period of time or to carry out a certain task, the employment contract is automatically terminated at the end of the fixed period. However, the employee might have a legitimate expectation that the contract will be renewed. This would be in circumstances where he has previously had fixed term contracts with the employer and the contracts have always been renewed on completion of the task.
- Where the contract of employment is for an indefinite period, where there is no fixed time limit, either party can terminate the employment by giving notice. Where the employee has worked for the employer for a period of less than six months, the notice period is one week. Once the employee has worked for the employer for more than six months, but less than one year, the notice period is two weeks (the exceptions to this rule are farm workers and domestic workers, who are entitled to a minimum of four weeks' notice after they have been employed for six months). If the employee has worked for the employer for more than one year, the notice period is four weeks. However, according to the LRA, an employee can be dismissed only on three grounds: misconduct, incapacity or for operational requirements.
- The parties can mutually agree to terminate the employment relationship without notice.
- If it is impossible for either party to perform in terms of the contract, then the contract is terminated. For example, if an employee dies, the relationship is terminated because it is no longer

possible for the employee to render his services. However, if an employer dies, the relationship is not terminated and the employer's estate is substituted as the employer.

- If an employer becomes insolvent, contracts of employment are suspended. This means that the employee does not have to provide his services and the employer does not have to remunerate the employee. During this period, the employee is entitled to collect benefits from the Unemployment Insurance Fund [commonly referred to as UIF]. A trustee or liquidator appointed to administer an insolvent estate may, after consultation with the employees and trade unions, decide to continue or terminate the employment relationship. If an employment relationship is terminated, the employee is entitled to **severance** benefits as set out in the BCEA. This usually means that an employee whose job has been terminated is entitled to at least one week's pay for each completed year of continuous service with the employer. On the other hand, if the employee becomes insolvent, then his insolvency does not generally affect the employment relationship. There may however be additional requirements he may have to comply with. For example if he was employed by a general dealer or a manufacturer, he may require the consent of his trustee. This is a requirement of the Insolvency Act and not a requirement of the labour legislation.

To '**sever**' means literally to 'cut off'. Here, the person has been cut off from his work.

- Where a business is an employer and the business is sold as a going concern, the employment contracts are also taken over by the new owner of the business. The relationship is thus not terminated.
- The employment relationship may also be terminated by dismissal. If an employer dismisses an employee, it must follow the procedures set out in the LRA. In terms of this Act, an employee may generally be dismissed only on the grounds of misconduct, inability to do the work or the operational requirements of the employer. A dismissal must be both substantively and procedurally fair. This means that the reason for the dismissal must be fair as far as the employee's rights are concerned and the correct procedure must be followed in carrying out the dismissal.
- If an employee does not behave properly, this is misconduct. An employer can fire an employee for gross misconduct. But before an employee is fired, he must be given a hearing that will allow him to present his point of view. If the misconduct is very serious, an employer may in limited circumstances fire an employee without giving notice.

18.4.5 The law of sale and lease

Contracts of sale and lease are some of the most common contracts that people conclude daily. Almost every day, we buy things – something to drink or eat or new clothes. We may do this without being conscious that each time we buy something, we are entering into a contract of sale. A contract of sale automatically imposes upon us certain duties and, in turn, gives us certain rights. Lease agreements may also be familiar to you already – you may have entered into a contract of lease when you rented your accommodation. In this section, we will look more closely at the rights and duties of the parties in contracts of sale and lease.

Contracts of sale

A sale is a contract in which one person (the seller) agrees to sell a thing (the merx) to another person (the buyer) for a certain price.

The essential elements of a contract of sale are as follows:

- Agreement on the merx: The parties must agree on the object for sale. The merx must be described exactly (for example, a Mercedes-Benz, engine number XP 54321). If the merx cannot be described exactly, it must be **ascertainable**, meaning that you could identify it. If you were selling one ton of wheat, you would not be able to describe precisely which heads of wheat you were selling, but the merx would still be ascertainable, because you would be describing the thing to be sold as well as the quantity. You can sell corporeals and incorporeals, whether they are movable or immovable. However, you cannot

Ascertainable means you can definitely find out something, or learn about it with certainty.

enter into a valid contract of sale where the law prohibits the sale of the merx, as in the case of drugs and other illegal substances.
- Agreement on the purchase price: The parties must agree on the purchase price of the merx. This must be definite, for example, R100. Or it must be ascertainable, for example, R1 000 per ton. This price must be expressed as an amount in money.

Once a valid contract of sale has been entered into, the buyer of the merx enjoys certain rights in respect of the merx and owes certain duties towards the seller.

Rights and duties of the seller

The seller of a merx has the following duties towards the purchaser of the merx:
- He has a duty to take care of a merx that has been sold until it has been delivered.
- He has a duty to deliver the merx to the buyer.

In return, the seller of the merx has the right to receive payment of the purchase price from the buyer.

Rights and duties of the buyer

The buyer of a merx has the following duties towards the seller:
- The buyer must pay the seller the purchase price. This payment must be made in the **legal tender** of South Africa. If movable property such as a car is sold, then the buyer must pay the purchase price on delivery of the property. Where immovable property like land is sold, then the purchase price must be paid when the property is registered in the name of the buyer.
- The buyer must accept delivery of the merx.

Legal tender is the legally accepted currency of a country, such as the rand in South Africa or the dollar in the United States of America.

Generally, the owner of a merx bears the loss if the merx is damaged, unless it is damaged through the fault of another person. However, where a merx is sold, the buyer will bear the risk of loss as soon as the contract of sale has been concluded. This is known as the passing of risk, which applies even if the buyer has not yet taken possession or ownership of the merx. The buyer of a merx has the following rights:
- The buyer is entitled to free and undisturbed possession of the merx. When immovable property like land or a house is sold, the seller must protect the buyer from eviction from the property. If a third party claims that she is the property's owner, the seller must assist the buyer in putting up a defence against the third party's claim. This is known as the implied warranty against eviction.
- The buyer is also entitled to receive a merx with no latent defects, or faults. A latent defect is a material defect in the merx. It was there when the merx was sold, but the buyer was unaware of it as it was latent or dormant. For example, the brakes on a car might have been about to fail, but they were still working when the car was sold. The latent defect must also reduce the effectiveness of the merx, as the faulty brakes would do. This is known as the implied warranty against latent defects. The seller is liable for the latent defect even if he was not aware of it, as long as the defect was there at the time of the sale.

If the implied warranty against latent defects is breached, the buyer may use one of the following two remedies:
1. He may use the ***actio redhibitoria***. This remedy allows the buyer to claim the return of the purchase price as well as repayment of all expenses regarding the preservation and acceptance of delivery of the merx, and also interest on the purchase price. A buyer would use this remedy if he claimed either that he would not have bought the merx had he known of the defect, or if the defect renders the merx useless.
2. The buyer may also use the ***actio quanti minoris***. This remedy is used when the latent defect is a minor one and the buyer would still have bought the merx had he known

Actio redhibitoria was made available by the Praetor in Roman law and was received into our law through the Roman-Dutch law, which is part of our common law.

Actio quanti minoris was also based on one of the Praetor's edicts in Roman law.

of the defect. He would, however, have paid a lower price. In such a scenario, the buyer would keep the merx but would ask for a reduction in the purchase price.

The warranty against latent defects may be excluded by the use of a voetstoets clause. This type of clause allows the merx to be sold as is. The buyer will then not have a remedy when he discovers the latent defect, unless the seller knew of the defect and did not tell the buyer. If the seller was not aware of the latent defect that appeared after the sale, then the seller is not liable for any loss incurred by the buyer.

Contracts of lease

If the owner of a merx does not wish to sell it, she may decide to lease it. A contract of lease is an agreement that the owner of the merx (the **lessor**) will allow another (the lessee) the use and enjoyment of the merx in return for a sum of money (the rent).

A **lessor** of immovable property is often known as a landlord.

A lessor may decide to let out, or lease, any corporeal merx, be it movable or immovable property. For example, the lessor may decide to lease her house, a car or a horse.

Have a look at the following example of a typical lease agreement before we consider the rights and duties of the parties.

AGREEMENT OF LEASE

1. The parties to this lease are
   1.1 Siyabonga Khumalo ("the Lessor"); and
   1.2 Bongi Gama ("the Lessee).

2. Letting and Hiring
   The Lessor lets and the lessee hires the premises, being Flat No 9 of Ubuntu Mansions Complex, situated at 12 Sparrow Road, Pietermaritzburg, on the terms of this lease.

3. Duration
   This lease shall come into operation on the 1st of January 2018 and shall subsist for one year from that date.

4. Deposit
   The Lessee must pay to the Lessor a deposit of R 5000 [FIVE THOUSAND RANDS], within 5 working days of signature of this agreement.

5. Rent
   5.1 The rent shall be R 5 000 [FIVE THOUSAND RANDS] per month.
   5.2 The Lessee shall pay the rent monthly in advance on or before the 26th of every month.

6. Additional Charges
   In addition to paying the rent, the Lessee shall reimburse the Lessor monthly in arrears within 7 days after receiving an account from the Lessor reflecting the amount so payable, with the cost of electricity and water consumed on the premises, determined at the prevailing municipal tariff of charges.

Signed at Pietermaritzburg on this the 5th day of December 2017 in the presence of the undersigned witnesses.

Witnesses:

1 _____

2 _____ _____

(Signature of witnesses) (Signature of Lessor)

Witnesses:

1 _____

2 _____ _____

(Signature of witnesses) (Signature of Lessee)

Rights and duties of the lessor

A lessor of property has certain rights over the leased property in terms of the contract of lease. He also has duties regarding the leased property.

Rights of a lessor

A lessor has the following rights:

- A lessor has the right to receive rent from the lessee.
- If the lessee does not pay the rent, the lessor has a tacit hypothec over all movables situated on leased immovable property. The hypothec exists only when the rent is in arrears. A tacit hypothec allows the lessor to obtain a court order directing the sheriff to attach movable property belonging to the lessee and that is situated on the leased property. When a sheriff attaches property, it means that he has claimed the property in the name of the creditor. The attached property can then be sold at a **sale in execution** to recover the arrear rental.
- If the lessee is in arrears with the rent, the lessor may also obtain an automatic rent interdict and attachment order in terms of the Magistrates' Courts Act 32 of 1944. If the application for an automatic rent interdict is granted, the court will issue a notice prohibiting anyone from removing property that is part of the lessor's tacit hypothec until the court makes an order.
- If the lessee misuses the property, the lessor is entitled to claim damages to compensate him for the misuse of the property. If the misuse of the property is significant, then the lessor may cancel the contract of lease in addition to claiming damages.
- If the lessee fails to return the property in a proper condition, the lessor may ask the court for an order compelling the lessee to repair the property or to restore it to its proper condition. Should the lessee refuse to return the leased property on termination of the lease, the lessor may ask the court for an order compelling the lessee to return the property.

A **sale in execution** is an auction held by the sheriff at which he sells the attached property to the highest bidder. The money received from the sale of the property, less the expenses incurred by the sheriff in the attachment and sale of the goods, is used to settle the debt.

Duties of a lessor

In a contract of lease, the lessor generally has the following duties:

- He must deliver the leased property to the lessee. For example, if you were leasing a house, the lessor would have to ensure that the property was vacant so that you could acquire undisturbed possession. The lessor would also have to give you the property in a satisfactory condition so that you could use and enjoy it. For example, the lessor could not give you a house without a roof.
- The lessor has a duty to maintain the leased property in a proper condition. If the lessor refuses to maintain the property, the lessee may carry out any necessary repairs and maintenance and then recover the cost from the lessor.
- The lessor also has a duty to ensure that the lessee receives undisturbed use and enjoyment. This means that the lessor must protect the lessee from any unlawful interference by a third party in the use of the property. In this context, interference does not refer to the rowdy behaviour of a third party, such as a neighbour playing loud music; rather, it refers to someone who claims to have a legal right to that property. For example, someone else might claim that they lawfully own or had already lawfully rented the property in question. However, not all interference would be unlawful. For example, the lessor may enter the leased property when carrying out repairs to the property or when inspecting it. He may do this as long as it is done in a reasonable manner.

Rights and duties of the lessee

The lessee of the property also has rights and duties towards the lessor and the leased property.

Rights of the lessee

The lessee's rights in respect of the leased property are, to a large extent, a mirror image of the lessor's duties. For example, he has a right to delivery of the leased property, a right to have the leased property properly maintained by the lessor and a right to free and undisturbed use of the leased property. If there is no contractual clause to say that the property may not be sublet, the lessee is entitled to do this. Subletting means that the lessee may himself lease the leased property to a third party. Here, the contract of lease is between the original lessee and the new lessee in terms of the sublease. The original lessor owes no duties to the new lessee.

If the lessor dies, the lease is not cancelled, but the lessor's estate is then substituted as the lessor.

If the lessor sells the leased property while the lease is still in force, the new owner of the leased property is bound to the lease in terms of the maxim *huur gaat voor koop*. This maxim means that a lease takes precedence over a sale. In other words, the new owner is not entitled to terminate the lease prematurely. The new owner must take ownership of the property subject to the lease and its conditions concluded by the previous owner.

Duties of the lessee

The lessee has the following duties towards the lessor:

- The lessee has a duty to pay rent. The lessor and lessee cannot decide that rent on the leased property need not be paid, because rent is an essential element of every contract of lease. However, the lessor and lessee may decide upon the rate, time and manner of payment. Rent is usually payable in money, but the lessor and lessee may decide that rent will take the form of a share of the fruits or proceeds of the leased property. For example, if you rented a farm, the parties may agree that, instead of paying money for rent, the rent could instead be a percentage of all crops reaped on the property.
- The lessee must use the property in a proper manner and must take care of the property. She must use the property only for the purpose for which it was leased. This means that if you rent a flat for the purposes of accommodation you may not use it to run a nightclub. The lessee must maintain the property in a good condition.
- The lessee has a duty to return the leased property undamaged on termination of the lease. But she is not liable for ordinary wear and tear or damage caused by a third party for whom she is not responsible.

Termination of the lease

The agreement for the lease of a property can be terminated in the following ways:

- Where the lease is for a specific period of time, the lease is terminated at the end of the specified period.
- Where the lease does not specify a period, either party may give reasonable notice to the other of their intention to terminate the lease. What amounts to reasonable notice will depend on the facts of each case.
- The lease is not terminated if either the lessor or the lessee becomes insolvent. However, once the trustee of the insolvent estate has been appointed, she may terminate the lease on written notice. Additionally, the trustee must inform the lessor of her intention to carry on with the lease. If she does not inform him of this within three months of his appointment, then the lease is automatically terminated. Where the lessee is a close corporation or a company, the Master of the High Court may grant permission to the liquidator to terminate the lease before a general meeting is called.
- Generally, the death of a lessor or lessee does not terminate a contract of lease, as the rights and duties of the deceased party pass on to their heirs. However, if the contract specifies that the lease is to be terminated on the death of the lessor or the lessee, the death of either party terminates the lease.

What do you think?

It is predicted that in the South Africa of the future, most school leavers will need to open their own businesses because there are too few job opportunities in the formal sector. You have just studied a brief introduction to certain fields of commercial law. Do you think this is sufficient knowledge for business people? Most people start their businesses without any formal exposure to the law. Do you think lay people know the basics of commercial law? How do you think this problem can be solved, if at all?

Chapter summary

In this chapter, we have learned the following about commercial law:

- A new business can adopt various business forms.
- These are sole proprietorship, partnership, close corporation and private or public company.
- Each form of business enterprise has advantages and disadvantages that the entrepreneur should consider before deciding on the form of enterprise he should adopt.
- Insolvency law deals with the sequestration of an individual whose liabilities exceed her assets.
- A debtor may make application to court for the voluntary surrender of her own estate or
- her creditors may apply to the court for the compulsory sequestration of her estate.
- After a period of time, and provided she meets specified requirements, the insolvent may apply for rehabilitation.
- The law of negotiable instruments deals with various payment mechanisms available to consumers.
- Labour law governs the relationship between an employer and an employee. Both employer and employee have duties to each other. The employment relationship lasts until it is terminated.
- The essential elements of a contract of sale are agreement on the merx and agreement on the purchase price.
- Both buyer and seller reciprocally have rights and duties towards each other. A new business

can adopt various business forms. These are sole proprietorship, partnership, close corporation and private or public company.

- A contract of lease is an agreement that the owner of the merx (the lessor) will allow another (the lessee) the use and enjoyment of the merx in return for a sum of money (the rent).
- The lessor has a right to receive rent from the lessee. If the lessee does not pay the rent, then the lessor's tacit hypothec comes into operation. In addition, the lessor may apply for an automatic rent interdict and attachment order in a Magistrates' Court.
- The lessor also has a right to have the property restored to her in a proper condition at the end of the lease.
- The lessor must deliver the property to the lessee and she must maintain the leased property in a proper condition.
- The lessee has a right to delivery of the property, a right to ensure that the property is properly maintained by the lessor and a right to free and undisturbed use of the property. He is also, if there is no agreement to the contrary, allowed to sublet the property.
- Where the lease is for a specified period, the lease terminates at the end of that period.
- The lease may also be terminated by notice.

Review your understanding

1. What are the consequences that flow from a person being declared insolvent?
2. How can a creditor prove that a debtor is insolvent?
3. Give four examples of methods of payment.
4. Rakesh is an accountant. He does accounting work for Acme Bean Company and has an office in their building. He also does work for five other companies besides Acme and Acme is aware of this. He is often away from the office, as he is also a competitive surfer. The Acme Bean Company have often complained to him, stating that they would like him to spend more time at the office and less at the beach. One day Rakesh is on his way to pay a bill that Acme Bean Company owes to a supplier. He is driving very recklessly and causes an accident with a BMW Z3. The BMW is completely destroyed. The owner of the vehicle decides to sue Acme Bean Company on the grounds that Rakesh is an employee of the company and that Acme Bean Company is vicariously liable for his actions. Advise the company.
5. Philani decides to rent a flat on the Durban beachfront from John for R2 000 per month. John gives Philani keys to the flat. When Philani arrives at the flat he finds that it is occupied by the Naidoo family who refuse to move out. They say that they have rented the flat from John. In addition, the flat is in a very bad condition, as the walls are cracking, the ceiling is falling down and the water pipes have burst. Philani complains to John who states that none of this is his problem since he gave Philani the keys to the flat. He says that Philani must evict the Naidoo's and repair the flat if he wants to stay there. Is John correct?
6. Ronnie rents a house from Phyllis for R4 000 per month. He has very expensive furniture and lives a lavish lifestyle. He does not pay the rent for two months and Phyllis is scared that he will move away without paying her rent as she has heard rumours that he is emigrating to Tanzania. She asks you for advice. Advise her.
7. Nhlanhla and Nolwazi decide to open a business selling fruit and vegetables, but they are unsure which form of business entity they should choose. They meet a new friend, Joe, who is a lawyer. While chatting, they discover there are other ways to conduct business without risking personal liability. Nhlanhla and Nolwazi now have to decide which form of business enterprise will best suit them. Write a note to them telling them about the different forms of business enterprise available, and suggest the one you believe will be the most appropriate for their new business. Give them the reasons for your opinion.

8. What is meant by the terms 'voluntary surrender' and 'compulsory sequestration'?
9. List and explain three acts of insolvency.
10. When may an insolvent apply for rehabilitation?
11. Think about the last time you went shopping. How did you pay for your purchases? Write a note about what methods of payment you used and what other methods were available to you. What are the advantages and disadvantages of each?
12. Distinguish between an employee and an independent contractor.
13. List four duties of an employer and four duties of an employee.
14. When can the employment relationship be terminated?
15. What are the essential elements of a contract of sale?
16. Explain the rights and duties of a buyer and a seller in a contract of sale.
17. List three rights and three duties of a lessor. Do the same for a lessee.
18. What are the rights and duties of a lessee?

Further reading

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Christie, R.H. and Bradfield, G. 2016. *The Law of Contract in South Africa.* 7th edn. Durban: LexisNexis South Africa
(This book is a very thorough exploration of the law of contract.)

Davis, D. and Geach, W. et al. 2014. *Companies and other Business Structures.* 3rd edn. Cape Town: Oxford University Press Southern Africa

Schulze, H. and Kelbrick, R. et al. 2015. *General Principles of Commercial Law.* 8th edn. Cape Town: Juta and Co. (Pty) Ltd
(This book explores the various branches of commercial law in greater detail.)

Sharrock, R. 2017. *Business Transactions Law,* 9th edn. Cape Town: Juta and Co. (Pty) Ltd
(This book also explores the various branches of commercial law in greater detail.)

Van Niekerk, A., Christianson. M., McGregor, M., Smit, N. and Van Eck, S. 2012. *Law@Work.* 2nd edn. Durban: LexisNexis South Africa

Commission for Conciliation, Mediation and Arbitration, **www.ccma.org.za**
(This website will give you more information on the rights of employers and employees.)

Department of Labour, **www.labour.gov.za**
(This website will give you information on different aspects of labour law.)

Law of evidence

Chapter 19

The main ideas

- What is evidence?
- Classification of evidence
- Important concepts in the law of evidence
- What needs to be proved in court?
- Can facts be proved without evidence?
- Examination-in-chief, cross-examination and re-examination

The main skills

- Interpret and explain all the main concepts in the law of evidence.
- Evaluate circumstantial and direct evidence.
- Demonstrate an understanding of the role played by the law of evidence in the legal system.
- Explain and relate what needs to be proved in court in different cases.
- Apply knowledge of examination-in-chief, cross-examination and re-examination to different scenarios.

Apply your mind

In *S v Libazi* 2010 (2) SACR (SCA) the Supreme Court of Appeal held that the right to challenge adverse evidence was one of the foundations of a fair trial as set out in s 35 (3) of the Constitution. Go to the case and explain why the basis of a fair trial is the right of the accused to test, challenge and discredit adverse or harmful evidence.

In this chapter, we will consider the law of evidence. You will see that it is essential to present evidence during a court case to help the court find the facts. Generally, a court should hear and examine all the evidence to do with a case, but there are instances when evidence is excluded.

The law of evidence forms part of procedural law. Procedural law is an area of law that puts legal principles and rules into practice. The roots of procedural law can be found in the English common law, but you will also see how new shoots have developed from the Constitution, from statutory law and through the development of the South African common law, to protect citizens who are involved in civil and criminal litigation.

Think about the picture of the law as a tree on page 2 of this book, protecting its citizens. Sometimes evidence is unreliable or will not be allowed because it is not in the interests of the party in court. In this chapter, we will investigate the rules governing the hearing of evidence and the reasons for excluding evidence in certain circumstances.

Before you start

Almost every newspaper you read will have an account of some or other court case that is in progress. You should start looking for these reports every day, because you will find in them a number of the new terms you are going to learn about in this chapter, all of them related to the law of evidence. The reports will show you how each term is used. Whether it is a civil or criminal trial, you will see references to evidence being heard and tested by **cross-examination**, after which it is weighed and evaluated by the court. This means that the judge considers the evidence and makes a decision only after she has done so.

Cross-examination is the questioning by an attorney, advocate or prosecutor in court of a witness who has already given evidence for the opposite side. The purpose of cross-examination is to test that witness's version.

The newspaper report might tell you that the judge said, "It is difficult to believe that piece of evidence." On the other hand, the judge might 'accept it as believable'. Evidence and whether it is seen as true or unreliable is absolutely crucial when a presiding officer is giving a judgment in a case.

19.1 What is evidence?

Evidence in its widest form refers to information that can be used to prove or disprove a fact in issue in a legal action. A fact in issue is a piece of information that must be proved in court so that a party can be successful.

The most important aspect of any legal action, whether civil or criminal, is the evidence. There are many rules applying to statutes, the common law and the Bill of Rights that may exclude or limit evidence. We have already mentioned the fact that evidence can sometimes be left out. A lawyer's success can depend on being able to recognise, collect and present relevant and **admissible** evidence.

If something is **admissible**, it can be allowed as evidence in court.

19.1.1 What is the law of evidence?

The law of evidence is a body or collection of rules that tells people how they should use evidence in legal or court proceedings. The law of evidence also provides the rules of procedures and tells officers of the court how they should behave.

What are the sources of the law of evidence? In countries like the United States of America, the law of evidence is codified. In South Africa, the law of evidence has not yet been codified, but there are various sources where we can find the rules and regulations.

The most important sources of the law of evidence are:

- English common law at 30 May 1961
- the Bill of Rights
- the Criminal Procedure Act 51 of 1977
- the Civil Proceedings Evidence Act 25 of 1965
- the Uniform Rules of Court
- the Magistrates' Courts rules
- South African common law.

Other statutes, such as the Law of Evidence Amendment Act 45 of 1988 and the Electronic Communications and Transactions Act 25 of 2002, also contain relevant law in this area.

Although the Criminal Procedure Act (CPA) deals mainly with criminal procedure, certain rules of evidence are also covered in this statute. Where a topic, such as the fitness and suitability of witnesses, or their rights and privileges, for example, is not dealt with in sufficient detail, there is usually a provision, or statement, to say that the law to be applied in this case is the one that was in use on **30 May 1961**. This refers, of course, to the law that applied in the supreme court of judicature in England on that day.

30 May 1961 is the day before South Africa became a Republic.

In the same way, the Civil Proceedings Evidence Act (CPEA) contains a section stating that the law of evidence dealing specifically with the competency, compellability, examination and cross-examination of witnesses, which was in force on 30 May 1961, will apply if this topic is not dealt with in the CPEA or any other South African law. Some of the terms that we have used here are new to you, but we are going to explain and use them later in the chapter.

19.1.2 The role of the law of evidence in the legal system

Evidence is the key factor in proving a case in a court of law. As you know, the South African legal system is mainly based on an adversarial process. In other words, something like a battle or contest occurs in court, based on specific rules. This battle between two sides is carried out so that we can learn the truth about what happened.

In a civil dispute, this contest is between the plaintiff and the defendant. In a criminal case, the contest takes place between the prosecutor, who prosecutes the accused on behalf of the state, and the accused and her defence lawyer.

The law of evidence has two important functions. First, in the light of the Bill of Rights, we can say that the law of evidence is there to make sure that each accused person receives a fair trial. It also ensures that the facts are fairly decided on by, *inter alia*, excluding evidence that has not been obtained in a constitutional manner. In civil cases, fairness is also the purpose of the law of evidence, as the rules of evidence are there to ensure that there is no unfair or biased treatment of either party and that every trial is heard according to the same principles of fairness, justice and truth.

Secondly, the law of evidence ensures that a court case runs efficiently so as not to waste time determining, for instance, that irrelevant evidence is inadmissible or not allowed.

19.2 Classification of evidence

Lawyers must make sure that they have all the possible evidence so that they can present it at trial. Evidence is a fact or a matter at issue and can be classified by type and form.

- The type of evidence is either direct evidence or circumstantial evidence.
- The form of evidence is either oral, real, machine-generated or documentary.

These are explained below.

19.2.1 Types of evidence

It is important for you to realise that, as far as the law is concerned, there is no difference between direct and circumstantial evidence in terms of weight or importance. Either type of evidence could be enough to prove guilt.

Direct evidence

Evidence is direct evidence if it establishes a fact in issue directly, usually through the testimony of a witness who saw or heard the incident that is the subject of the court case. Testimony is a statement given by a witness in court, giving evidence under oath that the facts are true.

The most common example of direct evidence is the account of an eyewitness. An eyewitness is a person who sees the crime (or another relevant incident) being committed. For example, if Sally saw John stab Peter with a knife, and Sally **testifies** about what she saw, this would be direct evidence.

To **testify** means that you tell the court.

Circumstantial evidence

Many cases are proved by circumstantial evidence. Circumstantial evidence is not provided by a direct eyewitness, but has to be reasoned out. People often think that circumstantial evidence is weak evidence, but this is not true at all.

Consider the following example. Sally hears a disturbance in the next room and hears someone shouting, 'Help! Help! He's stabbing me!' She opens the door and sees the accused, John, standing over Peter holding a bloody knife in his hand. Except for John and Peter, there is no other person in the room. Did John kill Peter? This is the question before court. It is a fact that Sally saw John with the bloody knife, and nobody else was there. An inference can be drawn from this – that is, you can work out what seems to have happened, based on the information that you have. We can presume that John is the murderer because of all the details we have mentioned. This is how circumstantial evidence works, with the fact in dispute (Is John the killer?) being proved by another fact (Sally heard the shouts and saw John with the bloody knife).

If Sally were to testify in court, she would be giving circumstantial evidence. Other circumstantial evidence in the criminal trial might include John's fingerprints on the bloody knife, matching the blood on the knife with that of the victim, bloodstains on the clothing of the accused and evidence of threats

by the accused to the victim before the murder. On the basis of Sally's testimony, along with other circumstantial evidence, it could be concluded that the accused stabbed Peter.

Any facts upon which an inference of guilt can be drawn must be proved beyond a reasonable doubt. This means that the evidence is so strong that there is hardly any doubt at all. However, before an inference of guilt can be drawn, that inference must:

- be the only one that can fairly and reasonably be drawn from the facts
- be consistent with the facts that have been proved, that is, it cannot be contradictory
- flow naturally, reasonably, and logically from them.

The inference of guilt must be the only one that can be made fairly and reasonably. These points were made in *R v Blom* 1939 AD 88.

19.2.2 Forms of evidence

You can imagine that the evidence collected from the scene of a crime can take many different possible forms. Typically, we categorise evidence as falling into the following forms of evidence:

- oral
- real or physical evidence
- machine-generated evidence
- documentary evidence.

Oral evidence

Evidence that is given in court by a witness to the incidents in question is oral evidence. For example, if a violent assault has occurred, the victim or other people who witnessed the assault are eyewitnesses. Perhaps there are neighbours who heard the commotion and saw the accused running away from the scene. These people should all be called as witnesses to testify orally as to what they saw or heard.

Real evidence

Also called physical evidence, real evidence refers to objects or materials that can be seen, touched or felt and which are presented in court as evidence.

In criminal cases, there are many examples of real evidence: fingerprints or bloodstains found at the scene of the crime; little bits of someone's nails; illegal drugs; a stolen car; or the knife used in a violent crime. These items of circumstantial evidence can help to prove a crime or link the accused to it.

Examples of real evidence in civil actions include things like a faulty steering wheel in a brand-new car that has been involved in an accident, or a surgical object found in a patient after an operation.

To be admitted as legal evidence, these objects should be handed in as exhibits. Exhibits are the physical objects that are shown to a court during a trial. Witnesses are able to **authenticate** or verify this evidence by explaining that it was taken from the crime scene, for example. Certain witnesses can explain the significance of an item. For instance, a doctor would be able to tell the court what a certain instrument is used for.

To **authenticate** means to say that this is indeed the document or object in question.

By its nature, real evidence varies widely. We will now look at some particular kinds of real evidence that are dealt with in a particular way. Bear in mind that some items of real evidence are sometimes also regarded as documentary evidence as there is an overlap in categorisation.

Photographs

A photograph is real evidence, but this does not mean that it will always be admissible. If a photograph is submitted as evidence, but not by the person who took the photograph, it may be regarded as hearsay. Hearsay is usually something that you have heard about from other people but do not know to be definitely true or correct. In such a case, it has to be shown that hearsay was allowed in some other case before it may be received.

Section 222 of the CPA says that ss 33–38 of the CPEA also apply to criminal cases.

A photograph is a 'document' for the purposes of the CPEA. Because of **s 222 of the CPA**, this also applies to criminal proceedings. This being so, as long as someone states in

writing that he is personally responsible for the accuracy of the photograph (see s 34(4) of the CPEA), it will be acceptable in court without any further identification.

According to the decision in *S v W* 1975 (3) SA 841 (T), if the quality of a photograph is poor, it will still be allowed, but the court may not attach as much importance or weight to it. The court also said that photographs may be admitted as real evidence of an object, as long as there is evidence to identify the photograph as a true likeness of the article it claims to represent.

Audiotapes and videotapes

The contents of tape recordings may be admitted as evidence of what was said on a particular occasion. However, a court must consider the possibility that someone could have altered or edited the tape recordings.

In *S v Ramgobin* 1986 (4) SA 117 (N), the court said that tape recordings, being mechanical, are no different from photographs. Milne JP found that audiotapes are admissible in criminal proceedings, but only if the state has proved, beyond a reasonable doubt, that the tapes:

- were original; not copies
- had not been interfered with, edited or changed
- were related to the occasion in question
- were reliable
- proved who the speakers were
- could be understood by whoever was trying the case.

In *S v Mpumlo* 1987 (2) SA 442 (SE) the court held that a video recording was real evidence and admissible as long as it was relevant and could be produced subject to any dispute as to authenticity or interpretation.

Machine-generated evidence

Our increasing reliance on machines and electronic gadgets means that we also often use material generated by machines as evidence in court.

Automatic recordings

An obvious example is the print-out from a piece of equipment that checks telephone calls and records the numbers to which calls have been made, as well as the length of the calls. Such a print-out should be seen as an item of real evidence. This is not contrary to the hearsay rule, because the recording is entirely automatic and does not depend on anything passing through a human mind.

Electronic communications and transactions

The Electronic Communications and Transactions Act 25 of 2002 states that data or information from an electronic communications transaction, such as an email transaction (like a payment or an agreement), is allowed as evidence in court.

Documentary evidence

Evidence in the form of writing is documentary evidence and consists of letters, contracts, affidavits, **deeds**, notes, printings, pictures, sketches or recordings.

Deeds are legal documents that often show the change of ownership of something such as a piece of land.

In terms of s 33 of the CPEA, a document is, apart from its usual meaning, 'any book, map, plan, drawing or photograph'. Even though this is a broad definition, covering many forms of document, there are other ways of storing information or thoughts, such as in tape-recordings. There are also other ways in which we could understand the word 'document'.

- Section 221 of the CPA states that 'document' also means 'any device by means of which information is stored or recorded'.

- Sections 246 and 247 include as a 'document', a newspaper, magazine, book, pamphlet, letter, **circular letter**, list, register, **placard** or poster.

A **circular letter** is a printed general letter that is sent to everyone involved.

A **placard** is a large, printed or written advertisement to be pinned up or held so that the public can see it.

You can see that no one, particular, definition of a document exists in South Africa. However, it is clear that a court will not rely on documentary evidence, unless:

- the contents of the document are relevant to the facts in issue,
- the authenticity of the document has been proved, and
- the original document has been handed in.

The last point agrees with the **best evidence rule**.

The **best evidence rule** states that the original document is better evidence than copies of that document.

19.3 Important concepts in the law of evidence

There are a number of aspects of the law of evidence that you must be clear about. These are:

- the relevance and admissibility of evidence
- the weight attached to admissible evidence
- the burden of proof
- the standard of proof.

We will discuss all of these in the following sections.

19.3.1 Relevance and admissibility

Courts will consider only relevant or applicable criminal and civil evidence. Relevance is a crucial, or key, principle in both criminal and civil evidence. But what does the law mean by relevant evidence?

- Evidence is relevant if it can be used to prove or disprove a fact in issue.
- Evidence is relevant if it is logically relevant and legally relevant.

Let's look more closely at what logical and legal relevance mean. The party wanting to prove her case must be able to show that the evidence is both logically relevant and legally relevant for the court to accept it. This is another way of saying that the evidence is admissible. But we must still ask what we mean by the *logical relevance* of a piece of evidence. Obviously, evidence must logically relate or be connected to the case and must prove or disprove something that will help the court decide on the case.

The next step is that the evidence has to be legally relevant. If it is not relevant, the court won't admit the evidence. For a piece of evidence to be legally relevant, it must not **violate any other evidence** rule or other law. Evidence that breaches other laws can be excluded, even though it might be logically relevant to the case.

To **violate any other evidence** means that it must not go against or contradict another law.

Although we have just taught you the basic rule that relevant evidence is admissible and evidence that is not relevant is not admissible, there are some exceptions to this rule.

- There may be constitutional provisions, statutes, or other laws that provide for the exclusion of relevant evidence. For example, our Bill of Rights may limit or exclude evidence that is obtained in violation of the Bill of Rights.
- Evidence can also be excluded if it was acquired by means of an illegal search and seizure or a confession obtained in violation of the rights against self-incrimination. Self-incrimination takes place when, for instance, a suspect is questioned and gives information that would seem to support an accusation against himself.
- The common law is also a source of some of the kinds of relevant evidence that will be excluded. Examples include character evidence, similar fact evidence, privileged communications, certain kinds of opinion evidence and hearsay evidence. These terms will be discussed below, so be on the lookout for them.

19.3.2 Weight

Once evidence has been found to be relevant and admissible, the magistrate or judge (also referred to as the presiding officer) must determine how much weight or probative value can be placed on it. In other words, the presiding officer has to decide how important the evidence really is. For example, the weight that a judge will attach to a witness's evidence depends, in part, on an assessment of the witness's credibility – if the judge believes the witness, the evidence will carry much greater weight than if the witness was not believable.

The question of relevance and admissibility is a question of law, whereas the question of weight is a question of fact. The weight or probative value is determined, as you will see later, by a number of factors, when all the evidence is evaluated to determine the verdict.

The Roman goddess, Lady Justice, is often depicted with **a set of weighing scales** by which she measures the strengths of a case's support and opposition.

It is useful to think of the **scales of justice** when considering the **weighing** of evidence. At the end of a trial, all the evidence in favour of one side and the other is weighed in the mind of the presiding officer. The result of the weighing will determine the court's finding on the facts.

The weight of evidence needed in any particular case is determined by the applicable **standard of proof**. The weight of evidence in criminal justice proceedings must be sufficient to convince the magistrate or judge that the guilt of the accused has been proved beyond a reasonable doubt. In civil cases, the weight of the evidence only needs to be sufficient to tip the balance of probabilities in one side's favour. Both proof beyond reasonable doubt and proof on a balance of probabilities require you to understand the concept of the burden of proof, which we will discuss now.

The **standard of proof** is either 'beyond reasonable doubt' or 'on a balance of probabilities'. You will learn more about this later in the chapter.

19.3.3 The burden of proof

The law of evidence lays down that the parties or litigants to a case have to provide sufficient admissible evidence to prove the facts in issue and that they have to do so in a particular way. We say that there is an onus or **burden of proof** on a party to provide sufficient evidence if he wants the case to succeed. We will now look at the different burdens of proof and how the law determines, or decides, who should carry the burden.

The **burden of proof** is the duty to meet a certain standard to convince the presiding officer about the evidence submitted.

In all cases, there are two types of burden of proof:

1. a legal burden of proof
2. an evidential burden of proof.

We will explain these concepts below.

The general rule in criminal cases is that the prosecution bears the burden of proving the accused's guilt beyond a reasonable doubt. The substantive law defines what the prosecution must prove in order to convince the court that the accused is guilty. In other words, the prosecution must prove the elements of the crime. While the substantive law determines 'what' needs to be proved, the rules relating to the burden of proof decide 'who' (which side) must prove the elements set down by the substantive law. The evidential rules relating to the standard of proof determine 'how much' proof is required for a party to persuade the court.

The general rule about where the legal burden of proof lies in civil proceedings is that whoever **asserts** must prove. For example, if Vusi wants to prove that John caused a motor vehicle accident, Vusi, who asserts that fact, will bear the legal burden of proving, on a balance of probabilities, that John caused the accident.

To **assert** something is to claim or allege it.

What is the legal burden of proof?

The party who bears the legal burden of proof in a matter must prove the elements required by the part of substantive law (whether criminal or civil) that is relevant to its claim. That party must also meet the applicable standard of proof.

In criminal cases, the legal burden of proof is borne by the prosecution, who must prove all the elements of the offence, as set out in the substantive law, beyond a reasonable doubt. The term 'legal burden' can often be confusing because it is also sometimes referred to as the 'overall burden', the 'persuasive burden', or the 'ultimate burden'. The fact that the prosecution bears the legal burden of proof is an aspect of procedural fairness, because the prosecution as the state's representative has many more resources than the accused has. More importantly, though, placing the burden on the prosecution is a fundamental expression of the fact that someone is innocent until proven guilty.

The legal burden of proof in civil matters, is usually borne by the party who makes the claim. For example, a party whose claims lies in the law of delict must prove all the elements of the delict. The applicable standard of proof is on a balance of probabilities or on a preponderance of evidence.

However, there are circumstances where the legal burden of proof of certain issues rests with the accused for example where she claims as her defence that she has a mental illness or mental defect, or if she bases a defence on a brief **loss of criminal responsibility for non-pathological reasons**.

Loss of criminal responsibility for non-pathological reasons is a mental state that is not the result of illness, but of a brief, uncontrollable emotion like rage or jealousy. There is nothing mentally wrong with the person.

What is the evidential burden of proof?

The evidential burden, also sometimes called the 'evidentiary burden' or 'the burden to lead evidence', is **inextricably** linked with the legal burden of proof. The prosecution cannot discharge its legal burden of proof without **adducing** evidence.

Inextricably means that the two cannot be separated.

The evidence before the court may take the form of oral evidence, real evidence, documentary evidence or machine-generated evidence. The evidential or evidentiary burden means that one party has to produce enough evidence for a judge to call on the other party to answer, by also placing evidence before the court.

Adducing evidence means bringing admissible and relevant evidence before court.

He can answer to the burden only by producing enough evidence to convince the court on a balance of probabilities. In these circumstances, an accused takes a risk if he decides to stick to his right to silence throughout a trial without

- putting his case through cross-examination of prosecution witnesses
- calling his own witnesses
- giving evidence himself.

In exceptional circumstances, where a legal burden of proof is cast on the accused, the accused will also have the evidential burden of proof.

The legal burden of proof of any particular fact in civil proceedings is on the party who asserts the fact, which means that whoever states the fact must provide enough evidence to prove it**.** This principle is reflected in the **pleadings**. A plaintiff sets out his claims in the statement of case and he must prove these claims. If a defendant, in denying liability, makes an assertion about the facts of the case, then he will bear the legal burden of proving the fact in issue. For instance, if there was an action against him for negligence, he could claim that the plaintiff was also negligent to a certain extent (contributory or partial negligence), but he would have to prove it. If the defendant makes a **counterclaim**, he must prove the counterclaim.

Pleadings are documents in the court file that set out the details of a case.

A **counterclaim** is a claim made by a defendant against a plaintiff in response to the plaintiff's claim.

19.4 What is the standard of proof?

The rules on the standard of proof determine the **degree of proof** required of the party who bears the legal burden of proof. The standard of proof is either 'beyond reasonable doubt' or 'on a balance of probabilities'.

The **degree of proof** is the extent or amount of proof needed.

As far as the prosecution in a criminal case is concerned, the question is: What is meant by 'proof beyond reasonable doubt'? In *S v Mavinini* 2009 (1) SACR 523 (SCA), Cameron JA, as he then was, stated:

> "It is sometimes said that proof beyond a reasonable doubt requires the decision-maker to have 'moral certainty' of the guilt of the accused … It comes down to this: even if there is some measure of doubt, the decision-maker must be prepared not only to take moral responsibility on the evidence and inferences for convicting the accused, but to vouch that the integrity of the system that has produced the conviction – in our case, the rules of evidence interpreted within the precepts of the Bill of Rights – remains intact. Differently put, subjective moral satisfaction of guilt is not enough: it must be subjective satisfaction attained through proper application of the rules of the system".

Proof beyond reasonable doubt does not mean proof beyond a **shadow** of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. This means that the law cannot allow unlikely or unfounded claims to influence justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible, but not in least probable', the case is proved beyond reasonable doubt, but nothing short of that will suffice.

Beyond a **shadow** of doubt means that there would be no doubt at all.

In the *Miller v Minister of Pensions* 1947 2 All ER 372 at 374, Denning J took the opportunity of explaining the concept of a balance of probabilities as follows:

> "If the evidence is such that the tribunal can say 'we think it is more probable than not', the burden is discharged, but, if the probabilities are equal, it is not."

This was adopted by the Appellate Division in *Ocean Accident and Guarantee Corporation Ltd v Koch* 1963 (4) SA 147 (A).

The difference between evidence and proof

Although the two concepts are often confused, evidence is the means by which a fact is presented to prove or disprove an issue in dispute, while proof is the conclusion drawn from the evidence that has been submitted before the court. The means of proof would be the way in which evidence is brought before the court – for example, oral evidence is by means of the voice of a witness. Once all the evidence is before court, the judge has to weigh the evidence according to things like the standard of proof or the credibility of the witnesses.

Prima facie case

A plaintiff and a prosecutor both have to establish a *prima facie* case to be able to continue with a matter against a defendant or an accused. A *prima facie* case is one that seems to be true on the initial facts presented, even though it may later be proved to be untrue.

For example, in order for a prosecutor to establish a *prima facie* case of theft against an accused, she will have to examine the legal definition of theft thoroughly and then determine, from the witness statements in the police docket, whether she has a *prima facie* case. For a *prima facie* case, she must have evidence that the accused:

- appropriated/removed/took
- movable corporeal property
- belonging to another
- with the **intent to deprive** the owner permanently of the property.

Intent to deprive means that there was no intention of returning the property.

19.5 What needs to be proved in court?

Factual disputes in both criminal justice and civil proceedings can be proved only by submitting admissible evidence. A factual dispute is a dispute between two parties to litigation as to whose version, or factual story, is correct. This must be distinguished from a dispute in law, where the parties have different interpretations of what the law means regarding an element that has to be proved. It is, therefore, necessary to identify the legal elements (facts) that require proof in a particular case.

The party who bears the onus of proof must take three steps:

1. identify the legal elements (facts) that need to be proved
2. identify the facts in issue (because there can also be facts on which both parties agree)
3. prove the legal elements by producing relevant and admissible evidence of the facts in issue.

19.5.1 The facts in issue

A fact in issue is one that the parties disagree on and which must be proved in court if the case is to be successful. Facts in issue appear both in criminal and in civil cases. We are going to discuss both.

In criminal cases

The substantive law determines what the prosecution must prove in order to establish an accused's guilt, that is, the legal elements that need to be proved. For the prosecution to succeed, it must:

- prove all the essential elements of the crime by providing relevant and admissible evidence
- this evidence must be proved beyond a reasonable doubt.

For example, if David Smith is on trial on a charge of theft, the prosecutor will have to prove beyond reasonable doubt that Smith took property belonging to the complainant, Daisy Rusa, with the intention of permanently depriving her of her property. If the accused pleads not guilty, all the elements of the crime will be facts in issue. In this example, Daisy Rusa's version of how the theft took place will therefore comprise the facts in issue.

In civil cases

In civil trials, the facts in issue are found in the pleadings – that is, in the plaintiff's **particulars of claim**, and also in any defence put forward by the defendant. The pleadings identify the substantive law and the facts requiring proof.

Where a defendant denies responsibility for an accident and asserts that the plaintiff was responsible for an accident, the defendant has nothing to prove – the plaintiff's version is in issue and the plaintiff must therefore prove his version. Where a defendant admits some of the facts in issue – for example, if he agrees with the plaintiff on how the accident occurred – the result is that no evidence needs to be adduced or presented on those particular issues.

The **particulars of claim** in a civil case comprises a statement (pleading) attached to the summons, containing the averments (facts) alleged by the plaintiff.

19.5.2 Collateral facts

A **collateral** fact is a fact that is not of direct relevance to the outcome of the case. The general rule is that collateral facts are inadmissible. However, they may be raised at the trial in certain circumstances.

There are three kinds or categories of collateral fact that may be presented to court:

1. facts that affect the **competence** of a witness to give evidence, such as that the witness suffers from a mental illness and cannot understand the proceedings
2. facts that can affect the credibility (believability) of a witness – for example, evidence exposing a motive (personal reason) for the witness to lie under oath is admissible
3. facts that must be proved as a condition to the admissibility of certain types of evidence – for example, if a party wants to submit an original document to the court, the **authenticity** of the document may have to be proved to the court before it can be admitted in evidence.

'**Collateral**' means related to something or happening as a result of it, but not as important.

In this context, the word '**competence**' means legal capacity.

A testifying witness gives evidence that the document is what it claims to be; she **authenticates** the document.

Where a witness is cross-examined on a collateral issue, his answer is final – in other words, no evidence may be led to show that the answer is not true. This is known as the finality rule.

19.6 Can facts be proved without evidence?

The general rule is that all facts in issue in a case must be proved by relevant and admissible evidence. However, there are exceptions to this rule and we are going to look at them next.

Facts can also be proved:

- by the court taking judicial notice of them
- through irrebuttable presumptions
- through formal admissions.

19.6.1 Judicial notice

Some facts are so well known in the community or can be so easily and accurately determined from a reliable source that the judge or magistrate may recognise and accept them as true at trial without any evidence or further proof. A court is said to take judicial notice of such facts. The court may do this because it would be a complete waste of time and expense to call evidence to prove these facts.

A judge or magistrate may, for example, accept the fact that Cape Town is in South Africa, without hearing any evidence. Other examples of well-known facts that are common knowledge are that Christmas Day falls on 25 December or that one cannot travel by rail from Cape Town to Johannesburg in half an hour.

The elements required for judicial notice to be taken are as follows:

- the fact to be judicially noted must be one that is not subject to reasonable dispute
- the fact must be either common knowledge or generally known within the geographical jurisdiction of the trial court
- the fact must be capable of accurate determination and easily decided on by reference to reliable sources.

19.6.2 Irrebuttable presumptions

A presumption is an **inference** from facts. An irrebuttable presumption is a presumption based on certain basic facts, which then establishes a specific legal right or legal status. An irrebuttable presumption forms part of the substantive law. An example would be the presumption that children under the age of 7 cannot be guilty of a crime. An irrebuttable presumption cannot be contradicted and no evidence needs to be led for it to be accepted.

You **infer** something when you understand or work something out without it being told to you explicitly.

19.6.3 Formal admissions in criminal trials

An admission is a statement made by an accused that is to her disadvantage. For example, an accused may admit that she stole a car belonging to someone else. This admission is conclusive proof (meaning that no further evidence is required) that she stole the car. We say that an admission is conclusive proof of the fact admitted. As you can see from the above example, an admission is an acceptance by the accused of a fact or facts that may prejudice her.

A formal admission differs from other admissions because it is made, not out of court, but either in court or in the documents (the pleadings) before court. It is, therefore, considered formal. In criminal justice proceedings, a formal admission is made in court, while in civil proceedings a formal admission is usually made in the pleadings.

19.7 Which kinds of evidence are not admissible?

There are a number of categories of evidence that are usually not admissible. These are:

- character evidence (Table 19.1)
- similar fact evidence (Table 19.2)
- previous conviction (Table 19.3)
- hearsay evidence (Table 19.4)
- opinion evidence (Table 19.5)
- privileged communications (Table 19.6).

We will look at each of these in turn.

Table 19.1 Character evidence

Kind of evidence	Character
Meaning	Evidence of reputation (for example, voluntary aid worker (good) and previous convictions (bad))
General rule	Determined by s 227 of CPA, and thus depends on whether admissible/ inadmissible on 30 May 1961, unless subsequently changed by statute
Evidence of good character of the accused	If accused or his witness gives evidence of good character of the accused, prosecution may cross-examine or give evidence of bad character; otherwise inadmissible.
Evidence of bad character of the accused	Usually inadmissible, unless: ■ witnesses are asked questions to establish the accused's good character ■ the accused testifies to his own good character ■ the accused's defence involves a claim about the bad character of complainant or any prosecution witness ■ the accused gives evidence against the co-accused ■ proof of previous conviction shows that he is guilty of the offence he is charged with (s 197 of CPA).
Character of complainant in sexual offences	Usually inadmissible, unless court grants permission that she may be questioned about sexual intercourse or sexual experience, if relevant to the matter before court.
Character in civil cases	As a general rule, inadmissible, unless in claims for seduction or defamation.

Table 19.2 Similar fact evidence

Kind of evidence	Similar fact evidence
Meaning	Propensity to act in a certain way
General rule	Inadmissible, if the only purpose is to show the court that the accused is a person likely to act according to prior conduct. Admissible only to prove accused's guilt in case before court and then it must have a high probative value.
Exceptions	To show or prove: ■ opportunity, means and ability ■ acts of preparation ■ identity and to contradict alibi ■ the act element of an offence ■ motive ■ intention ■ systematic conduct ■ negligence.
When can the accused use a similar fact evidence?	If evidence has sufficient value, it will be admissible to prove accused's version.

Table 19.3 Previous convictions

Kind of evidence	Previous convictions
General rule	Inadmissible, except: ■ certain categories covered by CPA discussed above ■ where facts of previous conviction are an element of offence with which the accused is charged.

Table 19.4 Hearsay evidence

Kind of evidence	Hearsay
Meaning	Usually a statement made outside court, but offered in court by someone who heard the statement as evidence to prove the truth of the statement.
General rule	Inadmissible
Exceptions	■ Consent ■ Declarant to testify in person ■ In the discretion of the court

Table 19.5 Opinion evidence

Kind of evidence	Opinion
Meaning	Testimony by a witness who offers a conclusion based on her view of what certain impressions or data mean
General rule	Inadmissible
Exceptions	■ Lay witnesses who give opinions about ordinary things based on their observations ■ Expert witnesses with: ■ special knowledge, skills, experience, training and/or education ■ knowledge that does not fall within the common knowledge of the court ■ knowledge with a basis for the opinion

Table 19.6 Privilege

Kind of evidence	Privilege
Meaning	A rule of law that allows a witness to refuse to give evidence or allows a person the right to prevent someone else from testifying on a matter
Types	■ Private privilege ■ Lawyer-client privilege ■ Marital privilege ■ Privilege against self-incrimination ■ Public privilege ■ Crime investigation details ■ Police dockets ■ Police informers ■ State and public policy privilege

19.8 Examination-in-chief, cross-examination and re-examination

Now that we have discussed different aspects of the admissibility and relevance of evidence in court, we can discuss the testing of evidence in court. Litigation in court will stand or fall on the strength or weakness of the evidence presented.

19.8.1 Examination-in-chief

When a legal representative calls a witness on behalf of her client and questions him in court, this process is called examination-in-chief.

Table 19.7 on the next page gives you an overview of what you need to know about examination-in-chief.

Table 19.7 Summary of examination-in-chief

Definition	Initial (first) questioning of a witness by the party that called that party to the witness box
Aims	■ to establish a party's case ■ to make the evidence clear memorable and persuasive ■ to protect the evidence, as far as possible, from expected attack in cross-examination
Rule against **leading questions**	Exceptions ■ matters preparatory (to Introduce a witness, for example: "Is it correct that you are Thandokazi Mtini, an adult female residing at 2 Pear Lane, East London?" ■ matters not in dispute (for example, where the place at which the incident took place is not In dispute) ■ questions on facts already on records (for example, where certain facts are common cause) ■ hostile witnesses (where a witness for one party changes his version that party's representative can ask whether it Is correct that a statement was made that is contrary to what s now being testified to in court) ■ by agreement.

19.8.2 Cross-examination

When does this take place? After the examination-in-chief of each witness, the opponent has the opportunity to cross-examine, or question, the witness. The aims of cross-examination are to:

- gain advantage for your client's case by eliciting, or drawing favourable facts from the witness
- put your client's case
- undermine or weaken your opponent's case
- achieve **impeachment**
- expose prior **inconsistent** statements
- reveal inconsistent behaviour
- point to inconsistency with other material such as the charge or the pleadings
- expose improbabilities.

Leading questions are questions that suggest the answer.

Impeachment is the process of calling something into question, as in impeaching the testimony of a witness through cross-examination.

Inconsistent statements contradict each other.

Who is liable to be cross-examined?

- Where a witness has been intentionally called by a party and has taken the oath, whether or not examination-in-chief takes place, the other party has the right to cross-examine.
- Where an accused elects to testify, he will be open to cross-examination, not only by the prosecution but also by his co-accused. The co-accused is entitled to cross-examine him, whether he has given unfavourable evidence or has merely given evidence in his own defence.

Look at *S v M* 2006 (1) SACR 67 (SCA) for an example of cross-examination that exposes improbabilities. Table 19.8 gives you the principles of cross-examination, but you will find a more detailed discussion of cross-examination in Keane's book, *The modern law of evidence*, on page 170 of the 5th edition.

For now, let's look at Table 19.8 on the next page, which sets out the basic principles of cross-examination.

Table 19.8 The basic principles of cross-examination

Definition	Questioning of a witness by the opposing party on a matter relevant to the dispute, usually by discrediting the witness and evidence or by extracting facts favourable to cross-examiner's case

Aims	■ Advancing client's case
	■ Putting client's case to witness
	■ Undermining witness's version by:
	  ■ impeachment (challenging witness's evidence)
	  ■ exposing prior inconsistent statements
	  ■ showing inconsistent behaviour
	  ■ revealing improbabilities

Who can be cross-examined?	■ Any witness who is under oath or affirmation, even if no evidence has been led
	■ An accused who elects to testify can be cross-examined by prosecution and by co-accused
	■ Exceptions:
	  ■ A witness summonsed merely to produce a document in court
	  ■ A witness who is genuinely unable to give evidence on a particular issue
	  ■ A party may not cross-examine own witness, unless he is declared hostile or unfavourable

What is the scope of cross-examination?	■ Not limited to matters raised in the examination-in-chief, as long as relevant. ■ Any question that reflects on credibility, unless prohibited by statute ■ Answers to questions on collateral matters as a general rule are final and cannot be rebutted, unless biased or only partially alleged. ■ Cross-examiner may not twist witness's evidence.
If evidence not challenged	Generally accepted as correct, unless manifestly incredible or where notice is given that the honesty of the witness will be challenged
How can evidence be discredited?	By testing witness's perception, memory, powers of communication/appreciation
How can witnesses be discredited?	By showing inconsistency in conduct or behaviour of witness, or inconsistencies/improbabilities in witness testimony
How to challenge a witness to indicate that little weight should be given to her evidence	By showing: ■ bias ■ motive ■ interest in the outcome of proceedings ■ previous convictions.

19.8.3 Re-examination

After cross-examination, a witness may be re-examined, or re-questioned, by the party calling him. Unless the judge gives permission, re-examination must be confined to matters that arose on cross-examination. Re-examination can be said to be an exercise in **damage** control.

Damage has been done, but can be prevented from going further.

As in examination-in-chief, leading questions may not be asked in re-examination. You have the right to re-examine only on matters arising from cross-examination. Never ask a question in re-examination to which you do not already know the answer, as you may otherwise expose yourself to some nasty surprises.

Re-examination is likely to take place when:

- the cross-examiner **selectively** drew out of the witness or brought to attention only information favourable to her case,
- a cross-examiner attacked the witness's character or conduct,
- an inconsistency in the witness's evidence has been pointed out, or
- the witness has become so confused that common sense and reason have to be restored.

Selectively means that the cross-examiner asked questions that would provide the answers she wanted and nothing else.

Table 19.9 is a summary of what you should know about re-examination.

Table 19.9 Re-examination

Definition	Re-examination consists of questions asked by a party whom that party had examined in chief and follows after cross-examination of that witness by the opposing party.
Aims	To repair any damage done by cross-examination by: ■ clearing up any misunderstandings ■ giving the witness an opportunity to explain his answers ■ correcting wrong impressions ■ putting before the court the full picture and context of facts elicited during cross-examination
General rule	Re-examination is confined to matters arising from: ■ cross-examination. In extraordinary circumstances, the court can ■ grant leave to a party to re-examine on a matter not raised in cross-examination.

What do you think?

This chapter has shown that our law of evidence is not codified, but is to be found in different sources. Use the internet and research the United States of America Federal Rules of Evidence. This codified uniform set of rules was drafted in response to the numerous statutory rules that developed because of the many exceptions arising under the common law judicial interpretations of evidentiary rules. Do you think that the South African rules of evidence should also be codified? In your argument, refer to the United States of America Federal Rules of Evidence.

Chapter summary

In this chapter, we discussed the following about a branch of procedural law – the law of evidence:

- Evidence is information that can be used to prove or disprove a fact in issue in court. The law of evidence is a collection of rules that tells people how they should use evidence in court proceedings.
- The law of evidence is not codified and can be found in various sources, including English common law, the Bill of Rights, the Criminal Procedure Act, the Civil Proceedings Evidence Act, the Uniform Rules of Court, the Magistrates' Courts rules and South African common law.
- Evidence may be direct evidence or circumstantial evidence. It may take the form of oral evidence, real evidence, machine-generated or documentary evidence.
- Ordinarily, only relevant evidence is admissible, but there are some exceptions.
- Evidence is relevant when it can prove or disprove a fact in issue.
- Evidence must be logically and legally relevant.
- Evidence may be excluded, even though relevant, if it was obtained in breach of the Bill of Rights or some other common law rule.
- The weight of a party's evidence refers to its importance in proving that party's case.
- The law of evidence determines which party has the onus or burden of proof in a particular matter or particular fact in issue.
- The burden of proof is the duty to meet a certain standard to convince the presiding officer about the evidence submitted.

- The legal burden of proof is the requirement by the substantive law to prove the elements of the crime or civil action to the required standard of proof.
- The evidential burden requires one party to produce sufficient evidence for a presiding officer to call on the other party to answer by also placing evidence before court.
- The standard of proof in criminal cases is 'beyond a reasonable doubt'. In civil cases, it is 'on a balance of probabilities'.
- Collateral facts are not directly relevant to the outcome of a case, but may be admissible in certain circumstances.
- Certain facts can be proved without evidence, using judicial notice, irrebuttable presumptions and formal admissions in criminal cases.
- There are a number of categories of evidence that are usually not admissible. These are:
  - character evidence
  - similar fact evidence
  - previous convictions
  - hearsay evidence
  - opinion evidence
  - privileged communications.
- Witnesses are questioned by means of examination-in-chief, cross-examination and re-examination in order to prove and test their evidence.

Review your understanding

1. Define the term *prima facie* and discuss the importance of this concept in establishing a case.
2. Distinguish between logical and legal relevance.
3 If Ramona is charged with murder, what legal facts must be proved beyond reasonable doubt?
4. Should a judge be able to take judicial notice of the fact that Nelson Mandela's birthday is on 18 July?
5. How can you achieve the aims of cross-examination? Give examples of how you would go about this.
6. Where the identity of the perpetrator of the crime is in doubt, it is important to lead evidence-in-chief that will show the court that the accused was the perpetrator. Reflect on your strategy. What kind of questions would you ask to achieve this goal?
7. Under which circumstances would opinion evidence in the form of expert evidence be admissible?
8. Which factors will a court take into consideration to determine whether hearsay evidence may be admissible?
9. Peter Peterson is charged with the statutory offence of receiving and/or being in possession of a stolen car. He pleads not guilty and alleges that he did not know that the car was stolen. Can similar fact evidence that Peter had received stolen cars in the past be used against him?

Further reading

Keane, A. 2000. *The modern law of evidence,* 7th edn. London: Butterworths
(This book gives you an English perspective on evidence.)

Schmidt, C.W.H. and Rademeyer, H. 2000. *Bewysreg.* Durban: LexisNexis South Africa
(This is a loose-leaf publication that is regularly updated.)

Schwikkard, P.J. and Van der Merwe, S.E. 2016. *Principles of Evidence.* 4th edn. Cape Town: Juta and Co. (Pty) Ltd
(You will find this to be a good basic text for the law of evidence and the most up-to-date.)

Zeffertt, D.T. and Paizes, A.P. 2009. *The South African Law of Evidence* (formerly Hoffmann and Zeffertt). 2nd edn. Durban: LexisNexis South Africa
(This is an excellent in-depth source of the South African law of evidence.)

Chapter
20 Criminal procedure

The main ideas

- Investigation of crime
- Arrest and detention
- Pre-trial procedures and the prosecution
- The trial on the merits
- Procedures after conviction

The main skills

- Explain how a criminal trial unfolds.
- Explain the powers of the police regarding search and seizure.
- Discuss the rights of arrested or detained persons.
- Apply your theoretical knowledge to real cases.
- Apply the basic principles, regarding on the evaluation of evidence, to real cases.
- Discuss the relevance of a fair criminal justice procedure.
- Distinguish between judgment on the merits and judgment on sentencing.

Apply your mind

In *Crowther v S* the Western Cape Division of the High Court case A458/2015, the court found that the accused had a grossly unfair trial. The right of an accused to a fair trial is entrenched in s 35(3) of the Constitution of the Republic of South Africa 108 of 1996, which requires a criminal trial be conducted in accordance with the notions of basic fairness and justice. It is alleged that the magistrate committed certain irregularities which **vitiated** the trial. What were they and what is expected from a presiding officer in a trial where the accused is unrepresented?

This chapter deals with the main aspects of criminal justice procedure. We will trace the procedures that must be followed by the police, the prosecuting authorities and the criminal courts from the time that a crime is discovered to the end of a criminal trial.

To **vitiate** means to impair, to make void, to destroy or annul.

We look at the powers and duties of the prosecution services and the criminal courts, the rights and duties of the police as they relate to the investigation of crime, and the rights of **suspects**, as well as arrested, accused and detained persons. We also explain issues like bail, charge sheets in the lower courts, indictments in the high courts and plea-bargaining, as well as the trial process. We will also focus briefly on the verdict and on sentencing. This chapter also briefly discusses post-trial remedies, such as appeal and review.

A **suspect** is a person who is believed to be guilty of a crime.

Before you start

South Africa is known for its high crime statistics for murder, robbery and rape. You will probably have no difficulty in imagining the following scenario:

Maria Thornton and her husband were farmers. Mr Thornton left the farm to attend to business in Bloemfontein. That very day, Mrs Thornton was assaulted outside her house by Niel Gooding. He forced her inside, where he raped her several times. He then made her open the safe, from which he took a number of firearms, as well as some money. Finally, Gooding shot Mrs Thornton three times. It was later found that she had died from a gunshot to the neck. Gooding fled with the family's BMW.

Not difficult to imagine, you say, as every daily news reports and newspapers tell of tragedies like these. The scenario sketched above is based on a case heard in the Eastern Cape division of the High Court of South Africa. The names and places have been changed.

20.1 Investigation of crime

The flowchart in Figure 20.1 gives you a very simple outline of the way in which the criminal justice system typically proceeds after the commission of a crime. Because it only shows a simplified process, some of the paths a criminal investigation may take are not shown here. We will follow this process closely throughout the chapter.

Figure 20.1 From crime to sentencing

Some of these steps will be considered in the context of the real cases. You will see how the principles of both the law of criminal procedure and the law of evidence come alive in the real world.

You might have wondered how the police gather the evidence they need when they first arrive at a crime scene. Many of you have probably watched crime films on television and have noticed the ease with which evidence seems to accumulate. In real life, it is not always that easy, and there are formal procedures that must be followed.

In terms of the South African Constitution, every person is guaranteed the rights to human dignity (s 10), to security and freedom (s 12) and to **privacy** (s 14). However, crime investigation sometimes means that someone's home, property or body has to be searched when evidence is looked for. A possession like a knife, for example, may have to be seized – that is, taken or confiscated – as evidence in a trial. However, even though the human rights guaranteed in ss 12 and 14 are not absolute, any act of search or seizure must be carried out legally.

A person's right to **privacy** is her right to be undisturbed, not be intruded on and for her body, home and possessions to be protected.

In terms of s 36 of the Constitution, a person's freedom can be limited by an Act of Parliament. The Criminal Procedure Act 51 of 1977 (the CPA) authorises certain acts that limit basic human freedoms – they curtail, or limit, the constitutional rights to human dignity, security and **freedom**, and privacy.

For example, a serial rapist will no longer have total **freedom** of movement after being found guilty.

20.1.1 The limitations clause applied to search and seizure

Section 36 of the South African Constitution provides that the guaranteed freedoms may be limited if certain conditions are met. First and most importantly, any limitation must be contained in a law that is generally applicable. Such generally applicable law is law that is commonly applied to everyone and is found in case law, and statutory law that includes Acts of Parliament, regulations published in the Government Gazette and provincial ordinances.

Trafficking is dealing or selling.

The laws of general application controlling search and seizure include the following:

- Criminal Procedure Act 51 of 1977 (CPA),
- Firearms Control Act 60 of 2000,
- Drugs and Drug **Trafficking** Act 140 of 1992
- Immigration Act 13 of 2002
- Prevention of **Organised Crime** Act 121 of 1998
- South African Police Service Act 68 of 1995 (s 13)
- Stock Theft Act 57 of 1959
- Interception of Communications and Provision of Communication-based Information Act 70 of 2002.

Organised crime is crime committed by groups like the Mafia. It is not casual crime, but occurs on a very large scale and is not associated with one particular place or country.

If basic human rights are to be limited, this must also be done in a reasonable way, and must take into consideration the circumstances surrounding the **alleged** crime. In any criminal investigation, those in charge must try not to limit the freedoms of those being investigated more than is necessary. Any actions carried out during search and seizure should be justifiable in a court of law. In this regard, a court of law will, in view of s 36(1)*(a)* to *(e)* of the Constitution, always apply the principle of proportionality. This means that any **infringement** of a person's human rights must be in proportion to the seriousness of the alleged crime and to how dangerous the criminal is to society.

If a crime is **alleged,** it is suspected. The term 'alleged' is applied in expressions like 'the alleged crime', or 'the alleged perpetrator', until the crime has been proved.

An **infringement** is a violation, in this case, acting against someone's rights.

20.1.2 Search with a warrant

In terms of s 23(1)(a) of the CPA, a **peace officer** is allowed to search an arrested person and to seize any article referred to in s 20 of the CPA that they find in a suspect's possession.

Section 21(1) provides that an object or article may ordinarily 'be seized only by virtue of a search warrant'. A search warrant is required by s 21 for seizures affecting both arrested

In s 1 of the CPA, a **peace officer** is defined to include any magistrate, justice of the peace, police officer and correctional official, as defined in s 1 of the Correctional Services Act 8 of 1959. 'Correctional services' refers to the prisons department.

and other persons. A warrant is written, formal permission or authorisation to carry out a search or an arrest. In other words, s 21 says that something like a gun or a knife can be seized only if the officer has written authorisation. The following officials are allowed to issue a search warrant:

- a judge
- a magistrate
- a justice of the peace
- a commissioned police officer, as long as he is not involved in the investigation for which the warrant is required.

An **oath** is an undertaking to tell the truth, in the name of God.

The application for a warrant by a police officer must contain information under **oath** or affirmation indicating reasonable grounds, or reasons, to believe that:

- an offence was committed or is about to be committed
- certain articles are involved in an offence or an intended offence or may be evidence of the commission of an offence (s 20 of the CPA)
- such articles are in the possession of a certain person or on certain premises.

The requirements for a valid warrant are as follows:

- A warrant must specify the specific premises to be searched.
- A warrant must specify the person to be searched (this may include any person found on the identified premises).
- A warrant must be executed, or carried out, by day, unless otherwise authorised after the police official has stated good reason why it must be done at night.
- A warrant remains in force until executed or cancelled by the person who issued it, or by a person with the same authority.
- Before the search the warrant must be shown to the person whose rights will be affected and afterwards a copy of the warrant must be handed to the person concerned.
- A warrant should be executed strictly within the specifications mentioned in the warrant.
- The search must, as a general principle, be conducted in the presence of the owner or occupier of the premises.

Injuring someone's dignity is the crime of ***crimen iniuria***.

The authorities take the kind of police conduct regarding the right to privacy seriously (s 28 of the CPA). If a police official disobeys any of the terms of the search warrant, he is guilty of a crime himself and the victim could lay a civil claim against the police. Offences against someone's right to privacy are common law crimes such as ***crimen iniuria***, assault, **malicious** damage to property and theft.

In a legal context, **malicious** means intentional or done on purpose.

Another **deterrent** is the fact that s 35(5) of the Constitution states that evidence gained in this way cannot be used in a trial. It could make the trial unfair or prevent justice from being carried out. This means that such evidence could be held to be inadmissible – that is, unacceptable or not allowed in court.

A **deterrent** is something that discourages someone from doing something.

20.1.3 Search without a warrant

The Constitution guarantees the right to privacy, so the general rule is that, wherever possible, the police should apply for the warrant before they carry out any search. An objective official, such as a judge or magistrate, who would have no personal connection to the case will decide whether a search warrant is to be given to the police. However, in certain circumstances, search and seizure can be carried out without a warrant. This is ruled by section 22 of the CPA.

A police official is allowed to search someone he has just arrested. In terms of s 23 of the CPA, a police officer may carry out a search or seizure in order to:

- prevent an arrested person from absconding (running away)

- prevent an arrested person from destroying evidence
- prevent an arrested person from injuring herself
- prevent an arrested person from attacking and/or injuring a police officer or any other person.

Whenever a search and seizure is carried out without a warrant, the courts carefully examine the circumstances surrounding such actions to make sure that all the legal requirements for the search and/or seizure have been met.

20.1.4 Bodily or intimate searches

Section 37 of the CPA provides for the search of **intimate bodily orifices**. Other than the mouth, which is not a sensitive or embarrassing part of the body, these are any of the private openings in the body. They are searched if there are reasonable grounds, or reasons, to suspect that articles referred to in this section of the Act are hidden in an orifice. Only medical practitioners (doctors) are allowed to carry out these searches.

Drug traffickers, also known as 'mules', often hide drugs in **intimate bodily orifices** when they are on international flights with their merchandise.

20.1.5 The use of force in search and seizure

Because the police often need to investigate crime on an urgent basis and because people involved in crime may not cooperate with the police, it is sometimes necessary for the police to use force when searching or seizing property. However, force may only be used if certain conditions are met.

The use of force to enter premises

Section 27 of the CPA allows a police officer to use force, such as breaking down a door, to get into the premises. The police do this when they have good reason to believe that valuable evidence could be destroyed if whoever was inside heard that the police were there. You can imagine that if criminals heard a police announcement, they would delay opening up so that they could swiftly tear up papers or hide things like drugs before letting in the police. However, a demand for entry must be loud and the reason for wanting to go in must be clearly stated before the police force their way in. A forced entry would also be justified if someone's life was in danger.

The use of force to search premises for the purpose of seizing articles

The use of force is legally permitted, only if there is no other way of searching premises. Section 27 of the CPA allows for the use of force to enter premises to conduct a search. It also authorises the use of force to conduct the search itself if suspects are putting up resistance – that is, trying to prevent the search.

The use of force to search a person

In terms of s 23 of the CPA, a police official has the right to search an arrested suspect and to seize any article referred to in s 20 of the CPA that he finds in the suspect's possession. The principle of minimum force, that is, the least force possible, should always be used so that a suspect's constitutional rights are protected. The rules on intimate search, as outlined above, should be strictly obeyed.

20.2 Arrest and detention

Once the police have collected enough evidence for them to believe that a particular person is most probably the perpetrator of the crime, the police may arrest him, with or without a warrant. When a person is arrested, he is told by a police officer that he is now arrested. This can be done with or without a warrant, either by touching the body of the arrestee or, where the suspect does not submit to being taken into custody, by force. People often imagine that, once a suspect has been arrested, he is guilty and the case has been solved. This is far from true. A person who has been arrested may in fact not be guilty of the crime. The remaining steps in the criminal justice procedure are designed to ensure, as far as possible, that accused persons are only found guilty if enough relevant evidence has been collected against them.

20.2.1 The purpose of an arrest

The law regards an arrested suspect to be innocent until proven guilty in a court of law. An arrested person, whether proved guilty or not, must always be treated in accordance with her basic human rights, as guaranteed by the Constitution.

The purpose of arresting a suspect and holding her in custody is to make sure that she appears in court.

Instead of arresting a suspect, someone can also be brought to court in terms of s 38 of the CPA by means of:

- a written notice
- a summons to appear in a Magistrates' Court
- a charge sheet (containing the charge brought in a Magistrates' Court) or an indictment (a document containing a formal charge in a high court) on a criminal charge.

20.2.2 The fundamental rights of an arrested person

An arrested person has certain fundamental constitutional rights, such as:

- human dignity (s 10 of the Constitution)
- freedom and security (s 12)
- freedom of movement (s 21)
- privacy (s 14)
- association (s 18).

It makes sense that, under certain circumstances and for the good of society, the law must allow for some limitations of these basic human rights.

20.2.3 Specific rights of an arrested person

Subsections 1, 2 and 4 of s 35 of the Constitution provide for the following rights of an arrested person:

- to remain silent about the alleged offence (but his personal particulars must be given to the arresting official)
- not to admit to anything or make a confession when he does not want to (in terms of ss 217 and 219A of the CPA, a statement made under **duress** will not be **admissible** in a court of law)
- to apply for bail
- to be released from **detention** if this is allowed by the law (s 35(1)*(f)* of the Constitution).

Duress is pressure or force.

An **admissible** statement will be allowed and accepted by the court as evidence.

Detention means that the person is kept in custody and has no freedom of movement.

Section 60(4) of the CPA and the Criminal Procedure Second Amendment Act 85 of 1997 explain in detail certain instances where it would not be in the interests of justice to release the arrested person.

Section 50 of the CPA states that an arrested person must appear in a court of law within forty-eight hours after arrest, while s 35(1)*(d)* of the Constitution says that an arrested person should appear in court as soon as possible.

When someone is arrested, he should immediately be told of his right to legal representation – that is, that he has the right to a lawyer. If the person arrested cannot afford to pay for a lawyer to represent him, he should be informed of his right to have a lawyer appointed and paid for by the state. This will be decided by a legal aid official.

20.2.4 The use of force during arrest

When force has been used during an arrest, s 49 of the CPA applies. Force can be used when an arrestor attempts to arrest a suspect and the suspect resists the attempt or flees when it is clear that an attempt to arrest him or her is being made, and the suspect cannot be arrested without the use of force to overcome the **resistance** or to prevent the suspect from fleeing.

If the suspect **resists** or tries to run away during the arrest, then a certain amount of force can be used. However, the type of force used must suit the situation.

Deadly force that is intended or likely to cause death or grievous bodily harm to a suspect, may only be used if he or she believes on reasonable grounds in terms of s 49(2):

Deadly force could kill the suspect.

"(a) that the **force** is immediately necessary for the purposes of protecting the arrestor, any person lawfully assisting the arrestor or any other person from imminent or future death or grievous bodily harm

(b) that there is a substantial **risk** that the suspect will cause imminent or future death or grievous bodily harm if the arrest is delayed; or

(c) that the offence for which the arrest is sought is in progress and is of a forcible and serious nature and involves the use of life-threatening violence or a strong likelihood that it will cause grievous bodily harm".

Force can be used to protect the arrestor, or those assisting him, from death or injury.

Force can be used if there is a **risk** that the suspect will kill or injure anyone.

20.2.5 Detention

Anyone who has been arrested is **detained**. However, not everyone being detained has been arrested.

Both detention and custody refer to acts that limit a person's freedom. If a person is **detained**, her movement is restricted by a police official. The following are examples of detention:

- being stopped at a road block
- being questioned in terms of general legislation such as s 41 of the CPA and s 125 of the Road Traffic Act 29 of 1989
- being kept in prison in terms of a court judgment
- being prevented from leaving an area cordoned off by the police in terms of s 13(7) and (8) of the South African Police Service Act.

A person is taken into custody when he is kept in prison until he goes to court.

A person who has been arrested can either be held in custody or be given bail or merely be warned to appear before a court when summoned. If an accused is given bail, she is allowed to pay a stipulated amount of money to the court, in return for which she is not held in custody until her next required appearance in court. The purpose of bail is to ensure that the accused is motivated to appear in court on the appointed day. Bail money is repaid to the accused if the accused meets her duties to appear in court.

A person in custody must be brought before court within forty-eight hours.

The court will generally postpone the matter, if, for example, further investigation is to be done. The court can postpone and give an order that a person must:

A release on his own **recognisance** means a person undertakes before a court to observe a certain condition, such as appearing before court when summoned.

- remain in custody
- be granted bail
- be let out on their own **recognisance**.

A person will not be granted bail, if 'there is a likelihood that the accused, if released, upon bail' will:

- attempt to evade his trial
- attempt to influence or intimidate witnesses or conceal or destroy evidence
- undermine the proper functioning of the criminal justice system
- disturb the public order, security or peace.

20.3 Pre-trial procedures and the prosecution

There are a number of steps that need to be taken between the time that a suspect has been arrested or identified and the time that the prosecution is ready to prove its case in a trial before court. In the first place, the prosecution needs to assess the evidence collected and to decide whether it will indeed go ahead with a trial. If it decides to do so, the prosecution must draw up charges in formal documents and make these available to the accused and her defence lawyer. A process of plea bargaining may follow to finalise the matters that will go before the court. We will now look at these procedures.

20.3.1 Decision to prosecute

The director of public prosecutions (DPP) will decide to prosecute if there is a ***prima facie*** case. If there is no *prima facie* case, the DPP will withdraw the case and mark it *nolle prosequi*, which means the DPP is unwilling to pursue the case because there does not seem to be enough evidence.

Prima facie means at first sight. A *prima facie* case is one where it seems, after initial police investigations, that there is enough evidence for a successful prosecution.

20.3.2 Issuing of a charge sheet or indictment

If the prosecution decides to prosecute, it will prepare the allegations, or charges, in formal documents so that the accused knows what he is charged with before the trial starts. The charges are contained in a charge sheet (if the matter is to be heard in a Magistrates' Court) and in an indictment and summary of facts (if the case is to be heard in the High Court). The charge sheet or indictment contains the facts that the prosecution must prove in order to get a guilty verdict.

On the following pages, we will look at the actual indictment of the second case that we mentioned at the start of this chapter. These are excellent examples of what an accused and his defence lawyer will find in an indictment. If the defence requires more information, it must follow the procedure for docket disclosure.

Indictment in *State v Gooding*

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION)

In the matter between

THE STATE

and

NIEL GOODING

INDICTMENT

The Director of Public Prosecutions for the Eastern Cape Division of the High Court, who prosecutes for and in the name of the State, hereby informs this Honourable Court that:
NEIL GOODING, a 21-year-old male person from 12 Park Road, Elliott (hereinafter called the accused)
is guilty of the crimes of:

1. Murder
2. Rape
3. Robbery with Aggravating Circumstances as defined in section 1(1)(b) of Act 51 of 1977.

Count 1
The accused is guilty of murder.
In that on or about 30 January 2016 and at or near Delight Farm, Indwe, the accused unlawfully and intentionally killed **Maria Thornton**, a 55-year-old female person.

Count 2
The accused is guilty of rape.
In that on or about 30 January 2016 and at or near the place mentioned in count 1, the accused unlawfully and intentionally had sexual intercourse with **Maria Thornton** against her will and without her consent.

Count 3
The accused is guilty of Robbery with **Aggravating Circumstances** as defined in section 1(1)(b) of Act 51 of 1977.
In that on or about the date and at or near the place mentioned in count 1, the accused unlawfully, intentionally and through the application of force and violence, stole from **Maria Thornton** the items listed in Schedule 1 hereto, the property of, or in the lawful possession of the said **Maria Thornton**.
The State alleges that Aggravating Circumstances, as defined in section 1(l)(b) of Act 51 of 1977 were present in that the accused wielded a firearm and grievous bodily harm was inflicted.

SCHEDULE I
1. A BMW motor vehicle with registration number HWD 844 EC.
2. One .38 Special Revolver with serial No. W29960483.
3. Cash in the amount of R 5 800.
4. One Samsung cellular phone
5. Three bunches of keys

In the event of a conviction the said Director of Public Prosecutions requests sentence against the accused according to law.

In the event of a conviction on count 1, the State will rely on the provisions of section 51(1) of Act 105 of 1997, relating to a minimum sentence of life imprisonment, in that the death of the victim was caused in committing or after the commission of rape and/or robbery with aggravating circumstances.

In the event of a conviction on count 2, the State will rely on the provisions of section 51(1) of Act 105 of 1997, relating to a minimum sentence of life imprisonment, in that the victim was raped more than once and/or in that the rape involved the infliction of grievous bodily harm.

In the event of a conviction on count 3, the State will rely on the provisions of section 51(2) of Act 105 of 1997, relating to a minimum sentence of 15 years' imprisonment, in that Aggravating Circumstances were present.

In terms of section 144(3)(a) of Act 51 of 1977, a summary of substantial facts as well as a list of State witnesses are attached hereto.

DEPUTY DIRECTOR OF PUBLIC PROSECUTIONS: EASTERN CAPE

Figure 20.2 An example of an indictment

The following summary of substantial facts was attached to the *Gooding* indictment:

Summary of the substantial facts in *State v Gooding*

1. The accused was employed on Delight Farm, where the deceased and her husband lived.
2. The deceased's husband left for Bloemfontein on the morning of 30 January 2016 and the deceased remained behind with a number of labourers.
3. During the evening, the accused accosted the deceased outside her house and assaulted her.
4. He forced her inside where he raped her more than once. He demanded money.
5. He opened the safe, took out a number of firearms as well as money.
6. He shot the deceased three times. According to the post mortem report, the deceased died of a gunshot wound through the neck.
7. He then fled the scene in a BMW motor vehicle and drove around until the vehicle ran out of fuel.
8. The accused returned to the farmhouse, looking for more money and fuel. In the morning neighbouring farmers arrived looking for the deceased.
9. The accused then fled from the house, but was arrested on a neighbouring property after a police chase.

Figure 20.3 An example of a summary of substantial facts attached to the indictment

20.3.3 Plea bargaining

After the charge sheet or indictment has been handed to the defence, a process of plea bargaining may ensue. Plea bargaining refers to negotiations between the prosecution and defence lawyer to finalise the charges the accused will face and what sentence the court will be asked to hand down. The defence will also decide how the accused will plead to these charges. For our purposes, an accused's *plea* is either '**guilty**' or '**not guilty**'. There are certain other possible pleas that an accused could enter, but we will not cover these here.

Plea bargaining can save time and money. Section 105A of the CPA has codified the existing informal methods of plea negotiation and agreement that existed prior to 2000.

To summarise, the purpose of plea bargaining between the prosecution and defence lawyer is:

- to negotiate on charge and plea
- to reach agreement on sentence.

The court has the discretion – that is, it can decide – whether or not to accept an agreement on sentence.

20.4 The trial on the merits

Once trial preparations are complete, the trial can begin on the merits. The merits of a criminal matter concern the enquiry into the guilt or otherwise of the accused. They are not concerned with how a guilty person is to be sentenced. We will see how the trial on the merits itself has different phases.

- The first phase of a criminal trial focuses on the accused's plea.
- After a plea of not guilty has been entered, the prosecution opens its case and calls its witnesses. Only competent witnesses may give evidence.
- Witnesses are examined, cross-examined and re-examined in a structured way.
- The presiding officer then evaluates the evidence – that is, she considers what conclusions can be drawn from the evidence.
- Finally, the presiding officer will give her judgment on the merits – that is, a finding of guilty, or otherwise.

20.4.1 Beginning of the trial

At the start of the trial, the accused appears before the court. He may be **legally represented** or may act in his own defence. The presiding officer will then indicate to the prosecution to proceed. The prosecutor or state advocate then puts the charge to the accused and the **presiding officer** asks whether the accused understands these charges. The accused must tell the court how he pleads.

Have a look at s 73 of the CPA with regard to the right to **legal representation** of the accused.

The **presiding officer** will be the judge or magistrate. In serious matters, a judge can sit with two assessors to assist in fact-finding.

Guilty plea

If an accused enters a guilty plea, he admits all the elements of the offences with which he has been charged.

The presiding officer may then put any question to the accused in order to clarify any matter that has been raised in the accused's statement. These questions from the presiding officer are an example of the inquisitorial aspects of our law. The prosecutor may present evidence on any aspect of the charge and/or on any aspect of a statement by the accused.

We discuss procedures after conviction further on in this chapter.

If the presiding officer is satisfied that the accused is guilty of the offence to which he has pleaded guilty, the accused is then convicted, or found guilty, and the procedures after conviction will follow. If the presiding officer is not satisfied that the accused is guilty, despite his plea of guilty, a plea of not guilty will be entered by the presiding officer and the trial will proceed in the same way as if the accused had pleaded not guilty.

Not guilty plea

If an accused enters a not guilty plea, the accused does not admit all or some of the elements of the charges put to him and the prosecution is then required to prove all the elements of the charges. Where the accused has a legal representative, the representative must confirm that she appears on behalf of the accused and must state that the plea is according to her instructions. The basis of the accused's defence may then be disclosed to the presiding officer.

Certain informal admissions may be entered on record. The presiding officer will ask the accused whether he can confirm such informal admissions.

Once a not guilty plea has been entered into the court record, the prosecution will then be asked to start its case by calling its first witness.

20.4.2 Witnesses

Before we discuss how witnesses give their evidence to a court, it is important to understand that only certain persons may be called as witnesses. A witness is a person who has experienced a crime in some direct, or first-hand way. A person who actually watches crime being committed is called an eyewitness. A witness is called to testify in court because he has some important information to communicate to the court. People who are not in a position to assist the court with the particular matter before the court should not be called as witnesses.

A person must pass the legal test for competence before she is able to testify as a witness in court. A person is competent to testify if she has the mental ability to communicate properly and understands that she must tell the truth. A child of any age is a competent witness if she can tell the difference between what is true and what is false.

A compellable witness can, by law, be ordered by the court to give evidence. A compellable witness will be in contempt of court if she has been ordered to attend court, but she refuses to give evidence under oath or to answer some of the questions she is asked. She will not be in contempt of court if she refuses to answer questions about her spouse.

The general rule on the competence and compellability of witnesses is in two parts.

1. All persons are competent.
2. All competent witnesses are compellable (see s 192 of the CPA).

However, there are exceptions to the general rule. The following witnesses may be competent, but they are not compellable:

- an accused in his own defence (s 196(1) of the CPA)
- an accused as a witness for a **co-accused** (s 196(2) of the CPA)
- **diplomatic representatives** and their staff (s 202 of the CPA).

A **co-accused** is another person who, along with the accused, also took part in the crime and is prosecuted together with the accused at the same trial.

A further exception to the general rule is that mentally disordered and **intoxicated persons** are regarded as neither competent nor compellable. Section 194 of the CPA provides as follows:

A **diplomat represents** his country in another one.

> "No person appearing or proved to be afflicted with a mental illness or to be labouring under any **imbecility** of mind due to intoxication or drugs or the like, and who is thereby deprived of the proper use of his reason, shall be competent to give evidence while so **afflicted** or disabled".

An **intoxicated person** has drunk too much alcohol or is under the influence of drugs.

20.4.3 Procedures after plea

Once the accused has pleaded, the trial proceeds to the hearing of evidence, presented first by the state and thereafter, if necessary, by the defence.

Imbecility usually relates to a person of very little mental ability or understanding. For instance, an adult with the mental age of five would be termed an imbecile.

The state's case

The prosecution opens its case by calling its first witness, who takes up position in the witness box and either takes the oath or gives an affirmation to speak the truth. The prosecutor then leads the evidence-in-chief. Look back at Chapter 19 for more details on evidence-in-chief, cross-examination and re-examination.

Afflicted means to suffer from.

Next, the defence cross-examines the witness and the presiding officer may ask specific questions to clarify matters. The prosecutor then has the opportunity to re-examine the witness and the witness stands down.

Thereafter, the prosecution calls the second witness and the above process is repeated until all the evidence for the state has been presented.

The prosecution may want to prove an admission or confession during the evidence-in-chief.

Admissions

An admission is the acceptance by the accused of a fact that might prejudice him. Before an admission will be admitted as evidence, the prosecution must prove that it was made:

- by the accused
- to any person
- voluntarily.

Confessions

A confession is an unequivocal admission of guilt by the accused in which he admits all the elements of the offence and all the defences are excluded. For a confession to be admitted as evidence, the prosecution must prove that it was made:

- by the accused
- to a magistrate or a justice of the peace.

A confession will not be admissible if it was made to a peace officer, unless the confession is put in writing and confirmed before a magistrate or justice of the peace and unless:

- it was made voluntarily
- by the accused in his **sober senses**
- it was made without undue influence.

To be of **sober senses** means that he was in control of himself and knew what he was doing.

An accused's rights in relation to admissions and confessions

Prior to making an admission, confession or a pointing-out (admission by conduct) of anything related to the crime, the arrested person must be informed that:

- he has the right to remain silent
- his statement may be used in court as evidence against him
- he has a right to legal representation and legal aid.

If the accused was not informed of these rights, the admission, confession or pointing-out may not be admissible.

Where the defence disputes (argues against) an admission or confession, a trial-within-a trial must be held. This is a mini-trial within a main trial to determine the admissibility of an admission or confession.

Defence may apply for acquittal of accused

If, at the close of the prosecution's case, the court is of the opinion that there is no evidence on which a reasonable person acting with care can convict, the court can find the accused not guilty. The defence may apply for the acquittal of the accused without presenting its case. It will do this if it argues that the prosecution has failed to present *prima facie* evidence and that the accused should therefore be acquitted. This procedure is described in s 174 of the CPA.

The prosecution will be given the opportunity to address the presiding officer in reply to such an application by the defence and the presiding officer then gives judgment on the application.

If the application is successful, the accused is acquitted.

In *S v Legote* 2001 (2) SACR 174 (SCA), the Supreme Court of Appeal held that it was the duty of a trial court to ensure that an unrepresented accused against whom the prosecution has not made out a prima facie case, be discharged before giving evidence.

Defence presents its case

If the application is unsuccessful, the defence has the opportunity to present its case. The accused can give evidence and/or call witnesses.

A defence witness is then called by the accused or his legal representative. The oath or affirmation is administered and his evidence is presented. The prosecutor has an opportunity to cross-examine and the presiding officer may ask questions to clarify issues. The defence representative may re-examine the witness, whereafter the witness stands down.

This process is repeated until the defence lawyer closes the defence's case.

Closing arguments

After the defence has closed its case, the prosecutor may address the presiding officer before judgment on the merits of the case. The defence may also then address the presiding officer on the merits of the case. The prosecutor has the opportunity to reply to the address of the defence.

20.4.4 Evaluation of evidence

The court, after hearing all the witnesses and the closing arguments, must evaluate the evidence it has heard and draw its conclusions.

Generally, there is a variety of factors that the court will take into consideration when evaluating the evidence.

- The standard of proof determines how much evidence is needed to persuade the court to draw a particular conclusion.
- The type and form of any piece of evidence will affect the weight given to it by the court.
- Whether evidence is corroborated will affect the importance it is given. Corroboration means that evidence is confirmed in a material aspect by other evidence. For example, a confession that complies with all the requirements of the CPA must also be corroborated. If Rajee confesses to

killing Meetha by shooting her, his confession cannot be accepted if the cause of death is found to be strangulation.

- The credibility or believability of witnesses determines the weight that the court gives to the evidence given by the witnesses. Inconsistencies or improbabilities in a witness's evidence will lower his credibility. A witness's behaviour in the witness box can also be important. For example, if he is evasive or does not answer questions in respect of which he should have **peculiar knowledge**, this will tend to lower his credibility.
- A witness's presence in court before he testifies may have the effect that less credibility and weight is given to his evidence. This is because he has then heard the evidence of other witnesses and could adjust his own evidence to suit his case.
- Generally, if a party does not cross-examine or put his case to a witness, this may result in the version of the witness becoming **conclusive evidence**. Courts will be more lenient towards unrepresented accused and should carefully explain to such an accused how to conduct himself if he disputes the evidence.
- Depending on the facts of the case, the failure of an accused to give evidence may cause the court to draw an adverse inference, which means that the court forms a poor or negative impression of the accused that counts against him when it weighs up the evidence. If he does give evidence, he opens himself to cross-examination by the prosecution.
- An accused's failure to call available witnesses, may in certain circumstances lead to the drawing of an adverse inference.
- The court must approach the following evidence with caution: evidence of identification, children's evidence and single witnesses.

Peculiar knowledge is knowledge that belongs only to that witness.

Conclusive evidence is evidence that will be accepted as definitely true.

Only after evaluating the evidence, can a court make its judgment on the merits.

20.4.5 Judgment on the merits

The trial has run its course, and the presiding officer now delivers his judgment on the merits.

20.5 Procedures after conviction

Where the accused has been found guilty of a crime or crimes, the next task for the court is to decide on sentence, that is, to impose a suitable penalty. The court's decision on the sentence is its judgment on sentence. If the accused disputes the court's decision, certain further remedies may be available. We will briefly look at these procedures after conviction in this section.

20.5.1 Factors relevant to sentencing

The defence has the opportunity to address the presiding officer in mitigation of penalty and to call the accused to testify under affirmation or oath and/or to call witnesses in mitigation of penalty. Mitigation of penalty means to make the sentence less severe. For example, a defence lawyer may argue that an appropriate penalty will be ten years imprisonment instead of life.

The prosecutor has the right to cross-examine the accused and any witnesses called. The presiding officer may also ask questions. The defence then has the right to re-examine.

If an accused is charged with robbery, the prosecution will have the opportunity to present the court with evidence of aggravating circumstances. In terms of s 1 of the CPA, aggravating circumstances are:

- the use of a firearm or other dangerous weapon
- the infliction of grievous bodily harm
- the threat of grievous bodily harm by offender or accomplice during, before or after the offence.

If aggravating circumstances are proved, the court will impose a more severe penalty than it would otherwise do.

20.5.2 Possible sentences

The possible range of sentences is wide, but an appropriate sentence in any particular matter will depend on the nature of the crime and the surrounding circumstances. Possible sentences include:

- life imprisonment
- imprisonment for a certain period
- fines, usually for less serious offences
- correctional supervision, which is a form of community-based punishment that can include house arrest (confinement to one's home with exceptions such as going to work or attending religious meetings), community service such as working for a certain number of hours at a hospital
- correctional supervision linked to any other sentence
- committal to a treatment centre in circumstances where the accused shows a dependence on a substance such as alcohol and can be considered a threat to himself or the welfare of his family.

When a court has to sentence persons below the age of 21, all the sentences mentioned above may be imposed, but young people below the age of 18 should be treated more leniently. Convicted persons below 18 years of age can also be placed under the supervision of a probation officer or sent to a reformatory.

20.5.3 Judgment on sentence

Once the court has thoroughly considered all factors relevant to sentencing, it gives its judgment on sentence.

20.5.4 Legal remedies after judgment and sentence

An accused who has been found guilty may appeal against the verdict or the sentence or against both the verdict and the sentence. She may also take the matter on review. The prosecution may similarly **appeal** or take a case on **review** if it disagrees with the outcome.

Appeal and **review** procedures are also available to parties in civil proceedings if they disagree with the outcome of a case.

If the accused disagrees with the decision of the court because she believes that the procedure followed in the case was flawed or that the presiding officer displayed bias, or malice or was influenced by corruption of some kind, the accused may apply for the case to be reviewed in order to set aside the judgment. A review is brought when an irregularity in the proceedings is alleged. For example, where the magistrate was a friend of the accused whom he acquitted, the prosecution could use the bias of the magistrate as a ground for review.

If, on the other hand, either the accused or the prosecution is of the opinion that the decision reached was wrong on the facts found proven or on the legal merits held, then such a party may appeal against that judgment. A convicted person can either appeal against the judgment on the merits or against the sentence imposed. In an appeal, the appellant is confined to the evidence on the record.

In a review (an ordinary review), the applicant may mention matters not appearing in the record – for example, facts suggesting that the magistrate was drunk during the trial.

There are usually certain time limits for an appeal to be lodged. A review must be brought within a reasonable time. What length of time is reasonable depends on the circumstances.

What do you think?

Compare the basic rights of an accused person in South Africa with that of accused persons in England, the United States and Canada. Are there similarities? Can one say that there are universal minimum rights that an accused person has?

Chapter summary

In this chapter, we learned the following about criminal procedure:

- The police investigate crime by gathering relevant evidence. To do this, they must often search premises or persons and seize various articles of evidence.
  - Every person has constitutional rights to dignity, to security and freedom, and to privacy.
  - Section 36 of the Constitution allows these rights to be limited under certain circumstances.
  - Ordinarily, police may only conduct search and seizure operations if a warrant setting out the specific scope of the search and seizure has been issued.
  - If a person consents to his premises or body being searched and to his articles being seized, no warrant is needed.
  - A police officer may also search without a warrant if she believes, on reasonable grounds, that a search warrant will be issued to her and that a delay would defeat the object of the search.
  - Only medical practitioners may carry out searches of intimate bodily orifices.
  - The use of force by the police during search and seizure is allowed in limited circumstances.
- This chapter illustrates step-by-step how a criminal investigation should be approached according to the law.
  - The investigation of crime often requires the police to search premises and people and to seize items of evidence. Because these practices limit people's consitutional rights to dignity, privacy, and security and freedom, they are strictly regulated by the law to ensure that they stay within constitutional boundaries.
  - A person suspected of a crime may be arrested to ensure that he appears in court to face a criminal charge. He may apply for bail, which involves the payment of money to the court as an incentive to ensure that the accused appears in court on the date of the trial.
  - After a person has been arrested, the prosecution may decide not to prosecute if it has insufficient evidence. The case is then marked *nolle prosequi*.
  - If the prosecution decides to proceed with a trial, it must provide the accused with formal charges in a charge sheet (in the Magistrates' Courts) or an indictment (in the High Court).
  - Plea bargaining between the prosecution and the defence may follow, involving negotiation on the charges, plea and sentence issues to be provided to the court.
  - A criminal trial begins with the accused pleading to the charges against her. The prosecution then calls its witnesses to be examined, cross-examined and re-examined. The defence may apply for the accused's acquittal once the state has closed its case. If the application is unsuccessful, the defence then presents its case.
  - After closing arguments, the court evaluates the evidence and gives its judgment on the merits.
  - If the accused has been found guilty, the court considers factors relevant to sentencing and gives its judgment on sentence.
  - There is a clear difference between the judgment on the merits (whether a person is guilty or not) and the judgment relating to the sentence imposed.
  - An accused may apply for review of the trial or appeal against the judgments on the merits and/or on sentence.

Review your understanding

1. Pinda Mbuli has been charged with shoplifting. What are the possible pleas that she can plead in court? Explain each plea and the possible circumstances giving rise to such a plea.
2. John McLean is charged with robbery and, after his rights have been explained to him, he makes a confession to a magistrate. Indicate what the prosecution must prove to be able to rely on the confession.
3. What factors will the court take into consideration when evaluating the evidence before convicting or acquitting an accused?
4. Which factors play a role in determining the appropriate sentence that should be imposed on a convicted person?
5. Draft a table depicting the differences between appeal and review.

Further reading

Du Toit, E. et al. 1993. *Commentary on the Criminal Procedure Act.* Cape Town: Juta and Co. (Pty) Ltd
(This is the definitive loose-leaf authority on each section of the Criminal Procedure Act 51 of 1977. It is updated regularly.)

Joubert, J.J. (ed.) 2017. *Criminal Procedure Handbook,* 12th edn. Cape Town: Juta and Co. (Pty) Ltd
(This is a concise, but comprehensive book on South African criminal procedure.)

Civil procedure

Chapter 21

The main ideas

- What is civil procedure?
- Action proceedings
- Application proceedings

The main skills

- Explain the relevance of civil procedure.
- Discuss the relationship between substantive law and civil procedure.
- Compare action proceedings with application proceedings.
- Explain when a lawyer will institute action proceedings.
- Explain when a lawyer will institute application proceedings.

Apply your mind

In *Room Hire (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) 1155 (T), the court considered two types of civil proceedings. What are they and how do they differ?

The law of evidence and criminal procedure were discussed in Chapters 19 and 20. In this chapter, we turn to the other major component of procedural law, which is civil procedure. Here, you will learn about action proceedings and application proceedings in the civil courts. What you have learned about evidence and about procedure in the criminal courts will help you understand how matters are dealt with in the civil courts.

Before you start

By now you should have a good idea of the various branches of substantive law. You have been introduced to the main principles of administrative law, the law of persons, family law, the law of succession, the law of property, intellectual property law, the law of contract and the law of delict, to mention but a few of the branches. We have given you numerous examples from these branches, as well as problem-solving exercises, in which you had to apply your knowledge of the substantive law to find the answers.

When disputes arise in any of these fields of law, you will have to follow certain procedures to have the **dispute** heard and decided on in court. You could think of procedural law as 'substantive law in motion', or the law put into practice. Civil procedure is the way to go about litigating or going to court over issues arising from **civil law** and some branches of public law.

Legal **disputes** are differences of opinion on a fact or situation that have legal consequences.

Civil law is the law relating to the private affairs of citizens rather than law about crime.

21.1 What is civil procedure?

Civil procedure is the procedure used to bring a matter to court in a civil case.

Professor says The difference between criminal and civil procedure

Unlike a criminal court, the court in a civil case does not have to decide whether a crime has been committed. Instead, it has to decide whether the party applying for relief or **redress**, usually in the form of monetary damages, is entitled to it by applying civil or public law. In other words, does the person approaching the court really deserve to be paid a sum of money to compensate, or make up, for whatever she says has happened to her? For example, Unathi drives home after a party at which everyone was drinking heavily. On her way home, Unathi's car crosses the centre line and hits another vehicle, seriously injuring its driver. Unathi is immediately arrested for suspicion of driving under the influence of alcohol or other substances. This is Unathi's second **DUI** offence. She pleads guilty and is sentenced to 18 months in prison. Her license is suspended for two years and she is ordered to attend an alcohol treatment programme. Vusi, the driver of the other vehicle, files a civil lawsuit against Unathi, seeking payment for medical bills and repairs to his car, as well as for time off at work while his injuries heal. Then Vusi, in this personal injury lawsuit, also asks for a monetary award for his pain and suffering.

If something is **redressed**, it is put right.

DUI stands for Driving Under the Influence.

A court action usually follows when parties to a dispute have been unable to reach a satisfactory agreement between themselves. For instance, if someone was attacked by a vicious dog and had to go to hospital, this could be redressed if the dog's owner agreed to pay the injured person, let's say, R50 000 damages for the attack. The amount of damages payable, which we also call the quantum of damages, could be for the medical expenses incurred and for pain and suffering. If the dog's owner refuses to pay this much, the dispute will have to go to court.

Another example of a civil court case would be a dispute over how much should be paid to the owner of a car damaged in an accident on the road as explained above.

21.1.1 Two forms of civil proceedings

Civil procedure refers to the formal steps that need to be taken by the parties during the course of their dispute in order to get the matter heard by a court and finally resolved. There are two forms of civil court procedure that can be followed:

1. **action proceedings**
2. application proceedings.

Action proceedings are also referred to as civil trials.

In action proceedings, evidence is presented in court by witnesses who **testify orally** as to what happened. In application proceedings, the evidence is placed before the court by means of affidavits, which are written statements made under oath that have been prepared beforehand. Before proceedings are instituted, a letter of demand is sent to the defendant to give him an opportunity to settle the claim instead of becoming involved in litigation.

To **testify orally** means that the witnesses give spoken answers to questions put to them by legal representatives and presiding officers.

21.1.2 Pleadings in civil proceedings

Before a case is presented in court, whether in action proceedings or application proceedings, the parties and their legal representatives must draw up documents that set out their cases. In action proceedings, these documents are referred to as pleadings. In application proceedings, the documents consist of a notice of motion and affidavits and are usually referred to simply as 'the papers'. Here, we use the word 'pleadings' to refer to both types of documents.

Pleadings are statements made by the parties, each giving their views on the facts of the dispute. The parties' legal representatives exchange pleadings. The facts on which they agree and disagree are stated in the pleadings, so that the dispute between them becomes very clear. There are court rules stating what form pleadings should take. These rules aim to:

- reduce the points that the parties disagree on
- prevent the parties from surprising or trapping each other in court
- give the magistrate or judge an opportunity beforehand to become more familiar with the case.

21.2 How application proceedings differ from action proceedings

We will discuss the difference between application proceedings and action proceedings, and the reasons that a party or his lawyer will choose one or the other, in more detail, in the rest of this chapter.

21.2.1 Action proceedings

When there are basic, but important, differences of opinion about the facts in a dispute between two or more parties, these can only be settled by hearing oral evidence and testing that evidence under cross-examination. Therefore, the parties will need to bring their dispute to court using action proceedings.

The person who brings an action to court is called the **plaintiff**. The plaintiff is the one with a complaint and who wants it to be resolved, or put right by referring the dispute to be resolved in a hearing of evidence. The person against whom an action is brought is the defendant, so-called because he defends himself against the action.

In the case of a dog attack, the **plaintiff** would be the injured person, while the defendant would be the dog's owner.

Summons

In action proceedings, the plaintiff starts the process by having her attorney draw up a pleading that acts as a summons. A summons is a legal document that informs the defendant of the plaintiff's claim against him, that is, the accusations or allegations that the plaintiff is making against him. It includes the details of the parties involved, the facts of the case, what the plaintiff wants and/or the reparation or relief that will be requested from the court.

Defence

After he has received a summons, the defendant may put in a defence against the claim, which means stating the reasons why he does not believe the claim is a good one. The defendant must first file a notice of intention to defend his case within a certain time. This is a statement, for the record, by the defendant saying that he is going to defend the matter in court. If he does not hand in this notice, the court may grant the plaintiff a judgment by default. This is a judgment in the plaintiff's favour, given because the defendant has not answered the summons or has not appeared in court when informed to do so.

Exchange of pleadings

If the defendant intends to defend the claim, he must **serve** a pleading, known as the defendant's plea, on the plaintiff. The plea records the facts on which the defendant's defence is based. The defendant may even put in a counterclaim for damages or loss caused by the plaintiff. A counterclaim is also called a claim in reconvention.

To **serve** a pleading is a legal expression meaning that a summons or a pleading is handed to someone.

The plaintiff may answer the plea with a replication (in the High Court) or a reply (in a Magistrates' Court), which is her response to the plea, and may request **further particulars**, which is the legal term for more details.

Note that **further particulars** can be requested in the Magistrates' Courts, but not in the High Court.

Pleadings are closed a specific number of days after the summons has been served on the defence. The time period is stipulated in the rules of the High Court or Magistrates' Courts, whichever is applicable.

Once pleadings have closed, which is the stage known as *litis contestatio*, the dispute between the parties is fully described in the pleadings and no further pleadings can be handed in. The time limits set for submission of each set of pleadings ensure that the speed of litigation can be controlled.

Pre-trial procedures

After pleadings have closed, the parties must prepare for trial. There are also a number of interactions they need to have with each other before the trial can begin. First, they need to organise a date for the trial – known as the *set* down date. Once the matter has been set down for trial, the discovery phase follows.

Discovery is a process whereby documents and other recorded evidence that is in the possession of one party is made available to the other side. The purpose of such disclosure is to prevent any party from being taken by surprise.

In some cases, it may be necessary to inspect certain objects such as a faulty steering wheel or for a party suing for bodily injuries to be medically examined. Inspections and examinations take place in accordance with the rules that deal with technical and medical examinations. In the High Court, the parties can also at this stage ask for further particulars.

A party can also request the other side to admit certain real evidence such as photographs, plans, diagrams or models. If these are admitted, this saves time at trial.

During the pre-trial stage, witnesses for trial may be subpoenaed. Subpoenas are court documents that give a person notice that he will have to give evidence in court. Where expert witnesses are to be called, the other side should be given notice of this, so that they will be able to consult their own experts.

The final step before the trial is the pre-trial conference. At this meeting, the legal representatives of the parties meet and may make a final attempt to settle the matter before going to court. If the matter is not settled, they will decide, inter alia, which admissions the parties are willing to make, determine all outstanding queries and discuss any other matter that is related to preparation for trial.

Trial

The next stage in action proceedings is the trial. The parties and the presiding officers have the pleadings and, because they contain different facts, or versions of the dispute, they have to prove their cases in court, *inter alia*, by calling witnesses to give oral evidence.

Plaintiff's witnesses

Witnesses for the plaintiff – that is, people who support the plaintiff's case (including the plaintiff) – are called first. Each one has to take the oath or affirmation to tell the truth. The plaintiff's legal representative then questions the witness about what happened. This is the examination-in-chief. The witness is then cross-examined, or questioned, by the defendant's legal representative.

This is followed by a **re-examination** by the plaintiff's legal representatives to deal with and eliminate any uncertain or **ambiguous** words that may have arisen during cross-examination. After all the witnesses, including the plaintiff, have been called, the plaintiff's legal representative closes her case.

Re-examination means that the witnesses are questioned again.

When words are **ambiguous** it means that they can be interpreted in more than one way.

Absolution from the instance

At this stage, if the court is of the opinion that the plaintiff has failed to **adduce** evidence upon which a reasonable court could grant judgment in favour of the plaintiff, it can grant what is called absolution from the instance. This means that the plaintiff has been unsuccessful, even though the defendant has not presented his case. This would be the end of the proceedings.

To **adduce** evidence is to give facts or reasons to prove that something is true.

Continuation of case

If there is no absolution from the instance at the close of the plaintiff's case, the case continues and the defendant's legal representative presents the defendant's case by calling the defendant's witnesses. Now follows the same procedure that applied to the plaintiff's witnesses. The witnesses are called and take the oath or affirmation, after which they are questioned by the plaintiff's legal representative. This is followed by cross-examination and re-examination.

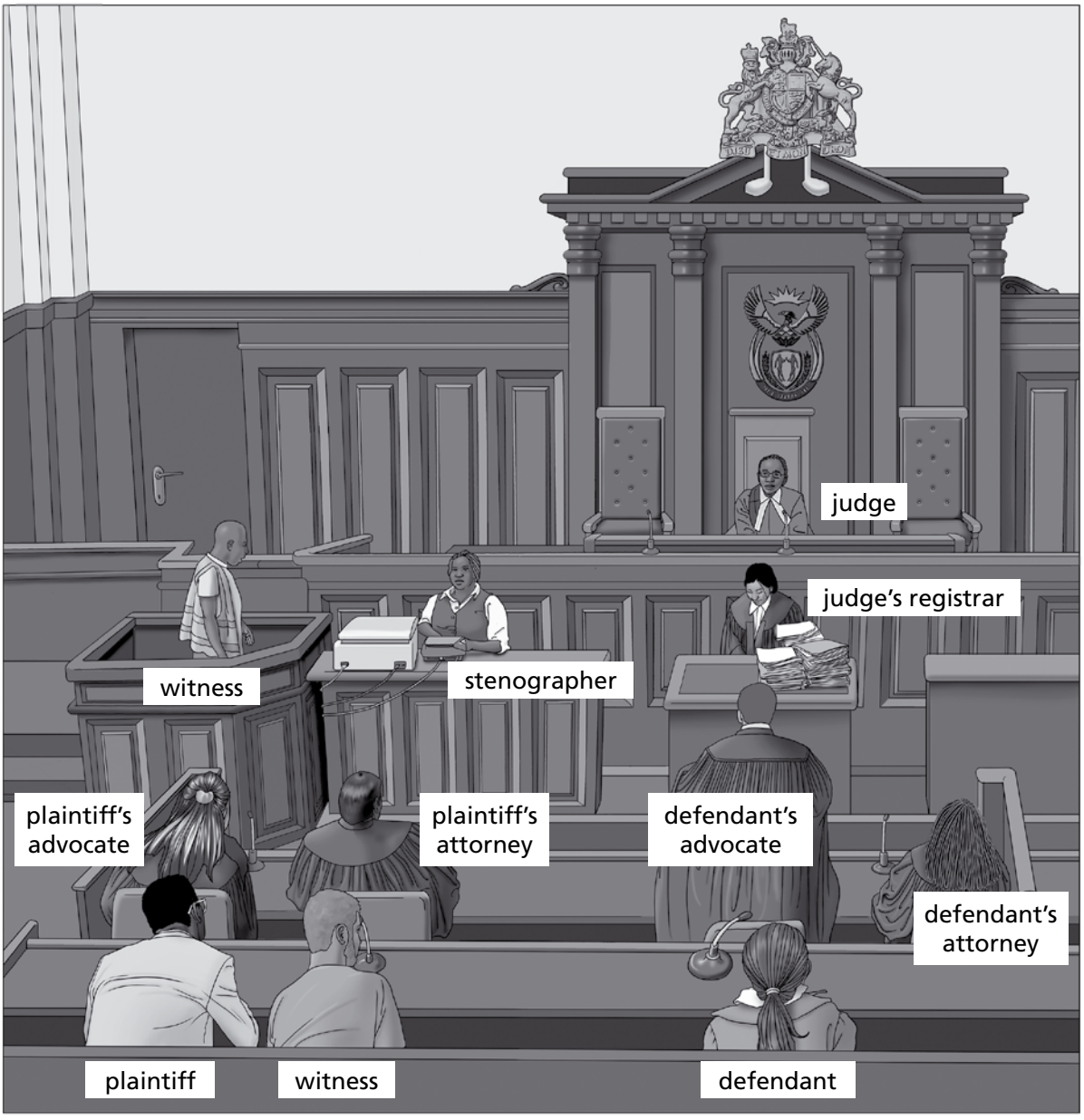

Figure 21.1 Who's who at a civil hearing in the High Court?

The plaintiff's legal representative addresses the court to give strong and convincing reasons why the claim should succeed. This is referred to as legal argument. It is then the turn of the defence to present its legal argument to the court. Each party tries to prove its case on **a balance** or a preponderance **of probabilities**. In other words, the party who shows that its version of the facts is probably more true or correct, than untrue or incorrect, will win the case, depending on who bears the onus.

A balance of probabilities means that one party has more supporting facts than the other party.

Look back to Chapter 19 to remind yourself about a party's onus, or burden of proof.

Judgment

When making its judgment, the court takes into consideration the evidence relating to the facts of the case and then applies the relevant legal principles to the case. Where neither the plaintiff nor the defendant has adduced sufficient evidence to obtain judgment in his favour, the court can grant absolution from the instance. If the plaintiff is later able to obtain additional evidence, she will be allowed to re-institute proceedings. The court will give full reasons for allowing the claim or for

dismissing it. If the claim succeeds, the court will order the defendant to pay an amount of money or return something to the plaintiff. In practice, the trial on the merits is often separated from the proceedings deciding on the **quantum**. Costs of the **suit** will usually have to be paid by the unsuccessful party.

The **quantum** is the amount to be paid by the defendant to the plaintiff.

Suit is used here as a reference to the action procedure, or trial.

After judgment

It is all very well for the plaintiff to be successful in her claim, but what does this mean in practice? If the defendant does not pay according to the judgment order, a writ in execution is granted. This puts the process of execution in progress. Execution is the way in which a judgment debtor's property can be attached and sold in order to pay the judgment debt.

Where a party believes that the trial court has reached an incorrect decision based on either law or fact, the aggrieved party can appeal. If an incorrect procedure is alleged, the matter can be taken on review. We have discussed appeals and reviews in Chapter 20.

The flowchart In Figure 21.2 summarises the steps that make up the procedure for action proceedings.

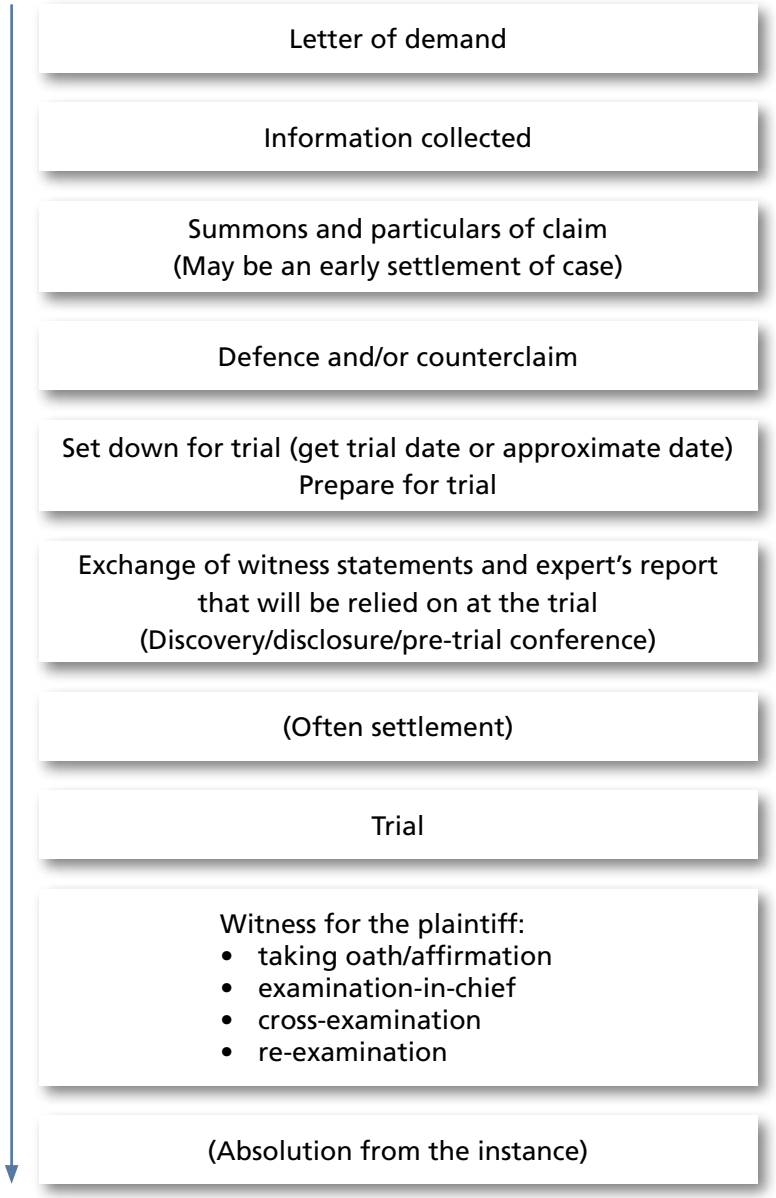

Figure 21.2 A summary of action proceedings

Case study Ruling on public drunkenness

Read the extract from *The Herald* that appears below. The newspaper article covers aspects of the law that are covered in Chapters 19 and 20, as well as in this chapter. It refers to a civil trial where the substantive law was not given effect to. This gave rise to a civil claim. The plaintiff, Van Niekerk, claimed compensation (damages) from the defendant, the Minister of Safety and Security.

Far-reaching ruling made on public drunkenness

In a ground-breaking judgment, which could have serious implications for the arresting rights of the police, the Port Elizabeth High Court has ruled it is unconstitutional to arrest someone for merely being drunk in public.

Even if police believed behaviour to be disorderly, the onus was upon them to prove this.

The ruling came in a civil matter between tradesman Antus van Niekerk and the Minister of Safety and Security.

Van Niekerk has claimed more than R100 000 for unlawful arrest, unlawful detention, assault, medical expenses and future medical expenses after a police raid in a parking area in front of the Golden Fountain nightclub.

Van Niekerk said he had been drinking with friends when 30 policemen arrived, arrested him without a warrant, handcuffed him, threw him to the ground, kicked him, unlawfully detained him and left him bleeding in a police cell.

Acting Judge Keith Matthee said he accepted the evidence of Van Niekerk and other witnesses, but found it difficult to believe the testimony of the arresting officer who had kept on changing his evidence under

Case study (continued) Ruling on public drunkenness

cross-examination to cover aspects of the case he had not thought of earlier.

The explanation that it was police practice to lock up drunk people for four hours for them to sober up 'could never pass the constitutional muster', Matthee said. Freedom was one of the cornerstones of the South African Constitution, he said.

Upon being questioned by Matthee, legal counsel for both the plaintiff and the defendant agreed that under the new Eastern Cape Liquor Act of 2003 a person must be both drunk and disorderly before they can be arrested. If a person is drunk and not disorderly, he may not be arrested. Matthee said counsel for the Minister of Safety and Security could not prove that Van Niekerk had been disorderly. He said evidence suggested that the conduct of the police had not been exemplary.

Matthee ruled that Van Niekerk had been arrested and detained unlawfully, that he had been assaulted by the police and that the minister should pay the cost of the application.

A date will be set to decide the sum Van Niekerk should receive in compensation. Specialist evidence will have to be led about this first.

Source: Extracts from Van Niekerk, Piet. 2006. 'Far-reaching ruling made on public drunkenness'. *The Herald*, 16 June, pp. 1–2.

Answer the following question:

1. Imagine that your friend, who is studying journalism, comes to you with this article. She asks you to explain the following terms or concepts found in the article in plain and simple language:
   a) 'judgment'
   b) 'arresting rights of the police'
   c) 'unconstitutional to arrest someone for merely being drunk in public'
   d) 'onus'
   e) 'civil matter'
   f) 'arrested him without a warrant'
   g) 'unlawfully detained him'
   i) 'difficult to believe the testimony of the arresting officer'
   j) 'cross-examination'
   k) 'Freedom was one of the cornerstones of the South African Constitution.'
   l) 'A date will be set aside to decide the sum Van Niekerk should receive in compensation.'

21.2.2 Application proceedings

Application proceedings (also known as motion procedure) are instituted when there are no fundamental differences concerning the facts of the dispute between the litigants. In this case, the two parties to the dispute are known as the applicant and the respondent. The applicant starts the proceedings and approaches or asks the court for specific relief or redress. The respondent is the party who is asked to provide the relief by paying money, returning something, doing something or not doing something. The latter two instances are asked for in the form of an interdict.

Notice of motion and founding affidavit

Application proceedings are instituted, or started, by means of a notice of motion, which is a document in which the applicant applies for a court order to obtain the desired relief. The notice of motion is accompanied by a founding affidavit. This is a sworn statement that sets out the facts of the case and is signed by the person who has made the statement. The sheriff of the relevant court serves or delivers this to the respondent. The statement is filed with the registrar or the clerk of the relevant court.

Answering affidavit

When the respondent receives the applicant's founding affidavit, he can reply with an answering affidavit, which presents the respondent's version of the case as far as the facts are concerned. The supporting affidavits of witnesses may also be attached. These documents are filed with the relevant registrar or clerk of the court and served by the sheriff on the applicant.

The applicant can reply to the answering affidavit in a further affidavit, known as the replying affidavit, in which the applicant comments on the respondent's answering affidavit. After the filing of these various affidavits, the case is placed on the court roll. The date, time and place of the court hearing is specified in a notice of set down.

When the parties' legal representatives appear in court on the specified day, the court will already have all the affidavits of the parties and their witnesses. This being the case, and because the parties do not differ seriously on the facts, it is unnecessary for the court to hear oral evidence. The sworn statements made and submitted or handed in by the parties replace the pleadings and evidence given under oath in court in action proceedings.

Continuation of motion proceedings

The legal representatives of the respective parties present their cases before the court, and try to persuade the court that the application should be granted or dismissed. If the court finds that the parties have real differences regarding the facts of the case, it may ask to hear oral evidence or refer it to trial. When the court has heard the reasoning of the respective legal representatives, it will **rule** whether the application is granted or dismissed. If it is granted, the court issues an order, which the respondent has to comply with or obey. If the respondent does not obey the order, the sheriff has to enforce the order. This is called execution of the court order.

Rule is commonly used to mean 'decide'.

As in action proceedings, a party who disagrees with the outcome of application proceedings may appeal or take the matter on review.

The ex parte application

Another type of application proceedings is the *ex parte* application, which is usually brought when no other party has an interest in, or will be affected by, the relief sought by the applicant. There is therefore only an applicant and no respondent. A prime example of this is the application brought to court when the applicant wants to be admitted as an attorney or an advocate.

In exceptional instances, an applicant may bring an *ex parte* application where the order can affect someone else's rights, for example where an applicant seeks an urgent interdict in circumstances where the court's order would be ineffective if the other party was given notice of the application ahead of time. In such a case, the court will issue a temporary, or **interim** interdict, and a **rule *nisi*** that sets a date upon which the other party must show cause (reasons) why the interim interdict should not become a final interdict.

Interim means 'in the meanwhile', or 'for the time being', until the interdict becomes final.

The court makes a **rule *nisi*** when its ruling will be enforced unless the other party can show good reason why it should not be.

Figure 21.3 is a flowchart summarising the steps that make up the procedure for that application or motion proceedings.

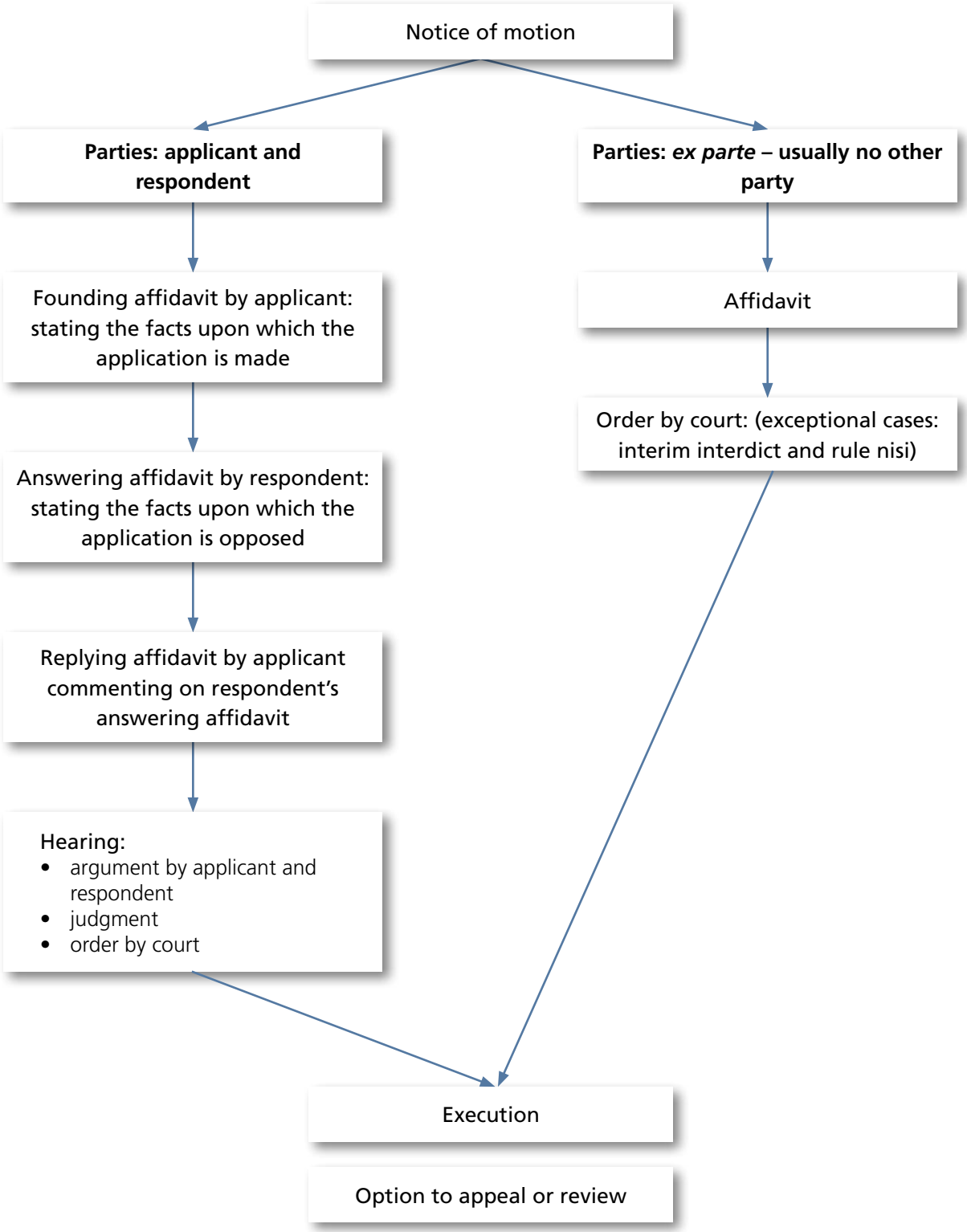

Figure 21.3 A summary of application or motion proceedings

What do you think?

Do you think application proceedings are an efficient way of dealing with civil claims? Give reasons for your opinion.

Chapter summary

In this chapter, we discussed the following about civil procedure:

- Civil procedure is used to bring a matter to court in a civil case where the parties are unable to settle their differences by themselves.
- There are two forms of civil procedure, namely action proceedings and application proceedings.
- Action proceedings are used when there are important disputes of fact between the parties and which can only be resolved by the presentation of oral evidence by witnesses whose testimony can be tested by cross-examination.
- Action proceedings are started by means of a summons and the parties are known as the plaintiff and defendant.
- A defendant's response to a summons is called a plea. The plaintiff may answer the plea with a replication (in the High Court) and a reply (in a Magistrates' Court).
- Trial preparations finalise the issues that will come before the court in action proceedings.
- A trial's main focus is the leading and testing of witnesses' oral evidence, whereafter the presiding officer must draw his conclusions and give his judgment.
- Application proceedings are used when there are no significant disputes of fact between the parties. The evidence is then placed before the court in affidavits.
- The parties in application proceedings are known as the applicant and the respondent. In exceptional cases, *ex parte* applications are brought, in which there is only an applicant and no respondent.

Review your understanding

1. Peter sells his motorcycle to David for R10 000. The agreement is that he should deliver the motorcycle on a given date. Peter does not do so, because after he sold the bike to David, he also sold the motorcycle to Onslow. The bike is already with Onslow, who is about to leave the country for Zimbabwe, with the motorcycle. Explain which procedure David should follow to prevent Onslow from leaving with the bike.
2. Explain what is meant by an *ex parte* application? Under which circumstances can an *ex parte* application be brought?
3. What is meant by a rule *nisi*?
4. What are the objectives of court rules?
5. How do application proceedings differ from action proceedings?
6. Give examples of civil claims.

Further reading

Pete, S., et al. 2016. *Civil Procedure: A Practical Guide.* 3rd edn. Cape Town: Oxford University Press Southern Africa
(This is a user-friendly guide to civil procedure in both the High Court and Magistrates' Courts.)

Theophilopoulus, T., van Heerden, C., and Boraine, A. 2015. 3rd edn. *Fundamental Principles of Civil Procedure.* Durban: LexisNexis South Africa
(This book deals with the High Court and Magistrates' Courts procedural rules in a manner that explains the broad procedures that apply to both.)

Section 4

The international branch

Chapters in this section

- **Chapter 22** Public and private international law

You will learn about

- The differences between public and private International law
- The role of public International law
- The historical development of public international law
- The sources of public international law
- The United Nations
- The role of private international law

International law

As explained in the preface to Section 3, all legal systems can be divided into two main branches, namely international law and national law. In Section 4, we look at international law or how law can apply beyond national borders. You will find international law a very interesting and increasingly important field of law as the world becomes a smaller place and its conflicts and challenges touch us all.

We will investigate both public and private international law in Chapter 22.

Public international law

Public international law is a set of rules generally regarded and accepted as binding in the relations between states. It arises principally from international agreements or from the customs practised by states.

Private international law

Private international law concerns issues that apply to the legal systems of two or more states regarding a private law dispute. Private international law is also referred to as the 'conflict of laws'.

Public and private international law

Chapter 22

The main ideas

- What is public international law?
- The development of public international law
- The main sources of public international law
- Important role-players in public international law
- Is public international law effective?
- International law and realism
- What is private international law?

The main skills

- Understand the history, nature, weaknesses and importance of public international law.
- Know the sources of public international law.
- Explain the objectives of the United Nations, the General Assembly, the Security Council, the International Court of Justice and the International Criminal Court.
- Debate the relevance of public international law.
- Distinguish between public international law and private international law.
- Understand the application of private international law.

Apply your mind

International law, generally speaking, is binding upon states in their relations with one another and since the Second World War numerous treaties have been signed, extending the protection of international law to individuals. The South African Constitution is also clear on the importance of international law. However, states, especially the powerful ones, do not always act in accordance with international law but instead protect their own interests, regardless of what the law says. In this regard, international law has been criticised for the inadequacy of its sanction mechanisms – the punishing of states for violating certain norms. Do you think that international law has a positive role to play in maintaining international peace and security?

In this chapter, we focus mainly on public international law, which governs relationships between states and international organisations. We will see how international law developed and we look particularly at the important role that the United Nations plays. Private international law is relevant to private law disputes that potentially involve the laws of more than one state. This is also dealt with briefly.

Before you start

A news item flashes across the television screen. Somewhere in the world, an agreement or treaty has been ratified. South Africa signs the Paris agreement to combat climate change, but many other countries do not. Thousands of people, including children, are killed in **Syria's civil war**.

In **Syria's civil war**, thousands of people, including children, were killed in intense bombings.

What are the legal consequences of these actions? Are there laws that countries are bound to obey? What do international agreements mean? Can and do we apply the law to bring order to a chaotic world? If so, what are the powers of these laws? Have you ever considered the regulations that air traffic from one state to another requires in order to prevent chaos? The same applies to

telecommunications across borders, the use of outer space, and maritime activities across our oceans. These issues all fall into the sphere of public international law.

Or, you may read the story of a young child of divorced parents. The mother is a South African citizen, but the father is a Swede. When it is time for the child to come back from a holiday in Sweden, the father refuses to allow her to return. What is the position of the law of Sweden and the law of South Africa when their citizens are involved in a private-law dispute like this? This is the sphere of private international law.

22.1 What is public international law?

The world today is a global village as we all move from country to country with increasing ease. This is not because the world has shrunk, but because technology and commerce have created closer relationships between states. In addition, modern societies pay more attention to basic norms such as universal human rights. Therefore, when a government commits human rights atrocities within its country's borders, or to neighbouring states, the international community becomes involved. To achieve effective relationships between states, certain laws are required to regulate the conduct between states.

Public international law is the law that regulates the relationships between states, as well as the relationships between states and international organisations like the United Nations. This does not exclude other role-players such as **multi-national organisations** and **non-government organisations** although the focus is primarily on states and international organisations. If a state or international organisation ratifies or becomes party to an agreement, then it will be bound to that treaty or agreement in terms of public international law.

The main sources of public international law are: treaties (conventions, charters, covenants or protocols) and customary international law. An example of an international convention, or treaty, is the Charter of the United Nations, which sets out the obligations of **member states** in an attempt to promote world peace and international cooperation matters, as well as the encouragement of respect for human rights.

A **multi-national corporation** is a business enterprise that operates in more than one country, for example the Coca-Cola Company.

A **non-governmental organisation** is an organisation which is independent from governmental control and does not have as its purpose the making of a profit, for example Greenpeace or the World Wildlife Fund.

Member states are the states that have ratified (accepted that they will be bound by a treaty or convention).

22.1.1 Basic concepts in public international law

Before we explore public international law more deeply, it is important to understand some basic concepts.

- Customary international law refers to acts or practices accepted as constitutive of law by many states because they have generally been taking place over a long period of time. These practices create norms that all states are bound to. An example would be the accepted norm among states in general not to violate each other's territory without justifiable reason. In many instances, customary international law has been codified into treaty law. We explain customary international law in more detail further on in this chapter.
- Treaties are written agreements between states, which result in such states being legally bound to the clauses in such a treaty. An example of a treaty would be an agreement on scientific and technological cooperation between the Republic of South Africa and France. Protocols and charters also constitute treaties.
- A convention is similar to a treaty. A convention usually has many states as members to such an agreement. The United Nations plays a major role in the establishment of conventions. An example is the United Nations Convention on the Rights of the Child.
- International courts are courts that deal with issues related to international law and are made up of various types of courts. Until the establishment of the United Nations towards the middle of the 20th century, states were authorised to resort to force to impose their terms of settlement. Since then, there are many courts and tribunals to address matters related to international law such as: the

International Court of Justice (ICJ); the International Tribunal for the Law of the Sea (ITLOS); the International Criminal Court (ICC); the International Criminal Tribunal for the former Yugoslavia (ICTY); the International Criminal Tribunal for Rwanda (ICTR) and the European Court of Human Rights (ECHR). The solving of disputes in international law can also take place beyond that of a formal court structure such as in **arbitration** and **negotiating** procedures.

In **arbitration**, states are given an opportunity to present the procedure under which their dispute will be resolved, and the decision by the tribunal is binding on the contending parties.

In **negotiation**, the solution is left entirely to the parties concerned.

22.1.2 The difference between public international law and national or domestic law

To understand the nature of public international law, it is helpful to compare the international legal system to the **national or domestic legal system**. Three key differentiating characteristics soon emerge in public international law.

1. There is no central legislative body in public international law (which implies also that law is not imposed from above)
2. There is no central executive authority in public international law.
3. There is no central judiciary in public international law.

A **national or domestic legal system** refers to the legal system within a specific state, for example South African law.

We will have a closer look at these differences.

No central legislative body in public international law

The first distinction between the two legal systems is that in public international law, unlike the domestic legal system, there is no central legislative body with the power to enact rules binding upon all states. In a domestic legal system, there is a legislature responsible for promulgating, or passing, legislation that is binding on everyone within a state. The nearest approximation to a central legislature in public international law is the United Nations, which is discussed below. Another distinction between public international law and domestic law is that the rules of the former, which are found mainly in agreements or treaties between states and in customary international law, are not imposed by any central law-making body. Instead they are created by the consent of states. Bear in mind that there are certain norms in international law that are so important that they merit obedience irrespective of whether states or individuals agree – for example, genocide is a crime even if one particular state does not agree. These norms are referred to as *jus cogens* norms. National law, by contrast, operates vertically, with rules imposed from above by the state, or government.

No central executive authority in public international law

Secondly, in international law, there is no central executive authority with a police force to enforce the rules of public international law. The United Nations is the nearest to an executive body, but it does not have the full powers of a domestic legal system. Consider the following example: if one of the most powerful states in the world goes to war against another (weaker or developing) state for no justifiable reason at all, it would be very difficult for other states to punish that aggressive state for its actions. In a domestic legal system, no matter how powerful or wealthy an individual may be, if a person commits a crime, there are effective mechanisms to punish such a person. In other words, a domestic legal system has a greater punishing or sanctioning value than international law does.

No central judiciary in public international law

Although there are various types of courts and tribunals in international law, there is no central judiciary such as in a domestic legal system. Appearance in front of the various international courts and tribunals is based upon consent by a state that is asked to appear before a court and there are no guarantees that a state appearing before a court will necessarily abide by the judgment of such a court. For example, if a wealthy and powerful state is asked to appear before the *International Court of Justice* (ICJ), then such a state may decline the request and even if it does appear, it will not necessarily abide by the judgment

of the ICJ because of the lack of sanction value in international law. In other words, how will the United States of America or China be punished if they do not appear before the ICJ or abide by the ICJ's judgment?

There are also regional human rights courts, such as the *European Court on Human Rights (ECtHR),* which are supported by the states that are party to the jurisdiction of such courts and that have committed themselves to the protection of fundamental human rights. Although the establishment of the International Criminal Court *(ICC)* was already on the cards since the Second World War, it was the conflict in Yugoslavia and Rwanda in the 1990s that lead the international community to work towards the establishment of the *Rome Statute of the International Criminal Court* in the late 1990s in order to bring people to justice for crimes against humanity and war crimes. The International Criminal Court is governed by the Rome Statute of the International Court and it was established to try people accused of the most serious crimes, such as **genocide**, **crimes against humanity**, **crime of aggression** and **war crimes**. The court will hear these cases only if they are not being investigated or prosecuted by the judicial system of a particular country, or if the proceedings undertaken in that country protect the person accused from criminal responsibility. This is referred to as the ICC having 'complementary jurisdiction.'

As explained, there is no central judiciary in international law, which results in a weakened international legal system.

Genocide refers to Acts committed with the intent to destroy a national or ethnical group.

An example of a **crime against humanity** is an attack directed against any civilian population.

An example of a **crime of aggression** is the arbitrary use of armed force by a state against another state.

An example of **war crimes** is the intentional torturing of captured soldiers during times of war.

Realism versus idealism

Realism in international law refers to the idea that states normally act in their own interests and that this especially applies to the wealthy and powerful states. According to realism, international law is formulated in accordance with the interests of powerful states and not necessarily in accordance with justice, equity or morality. Linked to this, is the view that the formation of international law mainly takes place by means of **consensus**. Here is an example. A powerful state will not be a party to a convention on the protection of the environment because this would be disadvantageous to such a state's economic interests as it would have to limit the pollution emissions from its factories and industries. Added to this, realists believe that states should be the only role-players in international law, and that power and not the law is the main currency aimed towards the solving of conflict between states. In this regard, there is the view that only war can solve conflict between states. This also entails the understanding that the international community constitutes an anarchic nature and that states must always be ready as conflict is always a reality. Realists have a rather negative outlook on international law because of the belief that international law has no sanction value due to the absence of a central legislative, judicial and executive structure (as explained in the above). According to the realists, the presence of powerful states is important so that they can, to a certain extent, act as counterweights to one another instead of having one powerful state that dominates all the other states.

Consensus in this regard means that states agree with one another as to what the law should be.

In contrast to the realist approach, idealism takes a more optimistic view of international law. Idealism believes that states do not necessarily solve conflict through the application of power, and that compromise, self-restraint, peace and moderation are essential attributes in the relationships between states. Idealism understands that there are certain **universal moral norms** that states feel obligated to respect and therefore it is not always about states prioritising their own interests. In other words, idealism supports the idea that the formation of international law by means of consensus amongst states based on self-interest is not the only means of the formation of international law, and that there are also fundamental moral norms that states naturally agree to uphold.

Universal moral norms are those norms that all states and people view as important and worthy of protection such as the prohibition of racism.

22.2 The development of public international law

In order to understand public international law properly, we need to briefly look at the historical development of this branch of law from its beginnings in around the 16th century to its functioning today. Keep in mind that there were agreements and laws in communities hundreds of years before the 16th century such as in Ancient **Rome** (where the *jus gentium* was applied to relationships between Romans and non-Romans), Egypt and the Middle East.

Rome as a city had its own law (jus civile) which was of relevance to its citizens. However, the jus civile was of no relevance to legal disputes pertaining to those persons who were involved in legal disputes in city-states of which they were not citizens.

22.2.1 Developments since the 16th century

Public international law developed mainly during the 16th century in Western Europe. This period in European history saw the beginning of modern states as we know them – that is, independent nations. There was a need for laws to manage the relationships between these nations, especially in their political and commercial interactions with one another. Public international law was based on agreements made between states. These transactions were binding on the particular nations that were party to them.

Because public international law from approximately the 16th century onwards was the international law of Europe, only European countries were initially involved with public international law. This continued until the late 18th century, when the United States of America, and later the independent South American republics became parties to the international law of the time.

Towards the end of the First World War a need arose to establish an international organisation aimed at preventing conflict between states and maintaining world peace, so the League of Nations was established in 1920. Due to various reasons, the League of Nations did not have the power to live up to its goals. After the Second World War, the international community was again reminded of the devastation that mankind is capable of. and a concerted effort towards the establishment of an international organisation was made in order to maintain world peace. This gave rise to the establishment of the United Nations in 1945. Since its establishment, new developments in international law took place to protect the fundamental human rights of individuals and in particular, ethnic groups. Therefore, it is no longer only about the interests of states but also about the maintenance and protection of the rights of individuals and groups of individuals who share the same interests. The United Nations plays a major role in the application of international law and therefore it is important to briefly focus on it.

22.2.2 The United Nations

The **United Nations** is an international organisation that has over 190 states serving as members to it. It aims to maintain international peace, to develop friendly relations among nations based on respect for human rights and to achieve international cooperation in solving international problems of an economic, social, cultural and/or humanitarian character, all in accordance with the **United Nations Charter**. In pursuing its goals, the United Nations acts through its principal organs, namely:

- the General Assembly
- the Security Council
- the Economic and Social Council
- the Trusteeship Council
- the International Court of Justice
- the Secretariat (consisting of the Secretary-General and staff).

The headquarters of the **United Nations** is situated in New York in the United States of America.

The **United Nations Charter** is the international instrument or treaty that sets out for example, the structure, aims, principles and mechanisms related to the functioning of the United Nations.

The General Assembly and the Security Council form the two most important structures of the United Nations. Currently, over 190 states are members of the General Assembly, including South Africa.

22.3 Sources of public international law

The sources of public international law are divided into two main categories. The first category comprises treaties. Treaties or written agreements between states form an important source of public international law. This makes sense, because, just as in a contract between two individuals, a treaty between states contains important rules on the obligations and claims for which parties to a treaty are responsible. This is also aligned with the principle of ***pacta sunt servanda***.

Pacta sunt servanda means 'agreements must be adhered to'.

The other important source of public international law is customary international law.

In this section, we are going to look at these and other sources of public international law that is applicable today.

22.3.1 Treaties

The most important norms of public international law are found in treaties. As discussed, a treaty is a legally binding written agreement between the two (bi-lateral) or more states (multi-lateral) that have ratified the treaty. There are various categories of treaties, such as contractual treaties that deal with trade agreements between states. There are also treaties, such as the United Nations Charter, that deal with the aims and responsibilities of international organisations, such as the United Nations. Then there are treaties that are mainly normative in character, such as specific human rights conventions. Another term for a treaty is an international convention.

There is an international written agreement between states referred to as the **Vienna Convention on the Law of Treaties** that contains rules directly related to international conventions (treaties) and deals with issues such as:

The **Vienna Convention on the Law of Treaties** entered into force on the 27 of January 1980.

- the capacity of states to conclude treaties
- how treaties should be interpreted
- the means of expressing consent to be bound by a treaty
- the grounds for the termination of a treaty
- the legal consequences when there is a material breach of a treaty by a state
- the obligation not to defeat the object and purpose of a treaty before a treaty enters into force.

Different names for treaties

Another term used for conventions and treaties is covenant, charter or protocol. Section 231 of the South African Constitution, which deals with matters related to treaties, refers to an **international agreement**. The common characteristic of all these terms is that they refer to treaties or written agreements that are legally binding on those states that have become party to what is in these documents. If South Africa were to sign and ratify a treaty on the limitation of pollution, it would mean that South Africa takes on the obligation to fulfil this treaty. It would also imply that, for example, South Africa could not cause excessive pollution that could affect the territories of other states.

An **international agreement** is a treaty, convention, covenant or protocol.

Treaties and the South African Constitution

Every state has its own procedures for becoming a party to a specific treaty. When a state becomes a party to a treaty, that state is legally bound to such a treaty.

Section 231 of the Constitution of South Africa gives the power to the **executive organ** of the government to participate, together with the legally bound representatives from other states, in the formulation, negotiation and signing of a treaty.

The **executive organ** is the part of government responsible for carrying out the government's obligations. It consists mainly of the president, the ministers and the members of the executive council (MECs).

Before South Africa becomes legally bound to the other states that are parties to the treaty, the treaty, in most cases, needs to be **ratified** by the two Houses of Parliament, namely the National Assembly and the National Council of Provinces. A treaty ratified by Parliament will bind South Africa in its external relations with other parties to the treaty. For such a treaty to be enforced in South Africa – that is, in the domestic legal system – the

Ratification refers to a final commitment, or final signature, by a state that binds it legally to a treaty.

treaty must be incorporated into South African law by national legislation. The treaty then has the same legal status as any other legislation and can be enforced by the South African courts. Here is an example. The South African government sends a duly appointed representative to take part in the formulation of the Convention on the Limitation of Atmospheric Pollution (the Convention). In essence, the Convention stipulates that member states to the Convention are obliged not to cause unnecessary atmospheric pollution.

Once the South African representative has signed the Convention, Parliament has to ratify it. Once this has been done, South Africa becomes bound to the content of the Convention in its relationship with the other state parties. In other words, the Convention now applies to South Africa as far as its relationships with other states are concerned – South Africa may not cause pollution that will affect the territories of other states.

However, the Convention will not be applicable within the territory of South Africa itself until the Convention has also been included in national legislation.

Professor says The relevance of international law to you

Legal advice or research regarding treaties may be important to a specific legal topic. For example, when you are dealing with a matter pertaining to discrimination against women, there may be a convention (or parts of a convention) that deals with this topic and which South Africa has ratified (and promulgated into local legislation). This means that you need to consult the relevant international law instruments regarding legal advice or research that you are asked to provide.

22.3.2 Customary international law

There are two pillars on which customary international law is based, namely *usus* (settled practice) and *opinio juris* (the intention to be bound to a norm). Settled practice refers to the practice by states regarding a certain norm, for example, the principle that a state respects the territory of another state, which is referred to as the principle of state sovereignty, has been observed over the years. States have, to a great extent, obeyed the territorial sovereignty of other states, and there is a settled practice among states to respect each other's territory. This implies that a state may not violate the territorial sovereignty of another state by attacking the other state without a **justifiable reason**.

A **justifiable reason** in international law for a state to attack another state would be for self-defence.

Opinio juris means that the behaviour of a group of states, on its own, does not create international norms; they also carry out a certain practice because they intend to be obedient and feel obligated to a certain norm. Customary international law norms bind all states, unlike treaties where only the states that are party to a treaty are bound by the contents of a treaty. States respect each other's sovereignty over their respective territorial areas because they believe such respect constitutes a norm that should be obeyed.

In South Africa, customary international law plays an important role. Section 232 of the Constitution of South Africa states:

> "Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament."

In other words, the Constitution, by way of s 232, ascribes a superior status to customary international law, because s 232 implies that customary international law is preferred to both the common law and South African customary law. In other words, it is only when the Constitution or an Act of Parliament comes into conflict with a certain customary international norm that customary international law will not be preferred.

We will see now how declarations and resolutions are influential tools in the formation of customary international law.

Professor says International law and the South African Constitution

It is important to note that both treaties and customary international law are mentioned in Sections 39 (1) and 233 of the South African Constitution. Section 39 (1) states that:

> "when interpreting the Bill of Rights, a court, tribunal or forum – (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law."

Note that mention is made here of 'international law', which implies that both treaties and customary international law must be consulted when interpreting the Bill of Rights. Section 233 states that:

> "when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."

This also implies that both treaties and customary international law may be of relevance regarding the interpretation of legislation.

Declarations

A declaration is not legally binding and is usually established by international organisations like the United Nations, by means of a resolution, or decision. Declarations should not be confused with treaties. A declaration is in many instances a precursor to what is to become a Convention. This was the case with the formulation of international norms for the protection of the rights of children, which first gave rise to the adoption of the Declaration of the Rights of the Child (in 1959), and in turn was converted into the Convention on the Rights of the Child (in 1989). Sometimes a norm in a declaration may give rise to a customary norm due to its support by the many states that have participated in the formulation of such a declaration.

Resolutions

A resolution is a decision by an international organisation, such as the United Nations, to take some form of action or to refrain from taking action. The best-known resolutions are those adopted by the United Nations with specific reference to the General Assembly and the Security Council.

22.4 Important role-players in public international law other than states

Because the United Nations plays such an important role in public international law, we will look at how it functions through its principal organs in some more detail now. Specifically, we will discuss:

- the General Assembly
- the Security Council
- the International Court of Justice.

22.4.1 The General Assembly

As discussed, the General Assembly currently consists of just over 190 member states. In addition to carrying out the general functions and obligations of the United Nations discussed above, the General Assembly deals with matters relating to the organs of the United Nations. For example, budgetary issues and membership issues of the United Nations is dealt with by the General Assembly. The General Assembly may also initiate studies and make recommendations on international cooperation and the promotion of human rights. The General Assembly may consider matters and make recommendations pertaining to international peace and security, keeping in mind the priority that the Security Council has in such situations.

The General Assembly also plays an important role in the adoption of important human rights conventions, such as the Convention on the Rights of the Child.

22.4.2 The Security Council

The function of the Security Council is to deal with matters relating to international peace and security. It is important to note that the General Assembly has a secondary role to play in considering such matters (and may make recommendations when requested to do so by the Security Council), but it cannot act directly in these matters.

The Security Council, by contrast, has the authority to deal directly with matters of international peace and security and it is only the Security Council that can take a decision which involves the application of aggression against a state or states that threaten world peace. The Security Council consists of fifteen members, five of which are permanent, while the remaining ten, referred to as the non-permanent members, are elected for a term of two years.

It is important to note that, according to the Charter of the United Nations, the members of the United Nations agree to accept and execute the decisions of the Security Council.

22.4.3 The International Court of Justice

The Charter of the United Nations provided for the establishment of the International Court of Justice (ICJ). Consequently, this gave rise to the formulation of the Statute of the International Court of Justice. This is a treaty to which many states (all the states which are party to the United Nations Charter) are member parties. The Statute of the International Court of Justice contains all the rules and regulations regarding the structure, composition, jurisdiction and functioning of the International Court of Justice.

Generally speaking, the ICJ deals with all matters related to only disputes pertaining to states related to public international law. For example, if State A tested its nuclear weapons near to the territory of State B, then State B could approach the ICJ to determine whether State A had violated public international law. Note that the court will deal with international legal matters between states only if the relevant states agree to appear before the court. The International Court of Justice may also advise on any question of public international law at the request of an international body (or organisation), such as the General Assembly. This is referred to as an advisory opinion. For example, the General Assembly could approach the International Court of Justice and request it to provide an advisory opinion on the legality of the manufacturing, testing and storage of nuclear weapons. The court's opinion, however, is not binding on any state.

22.5 Is public international law effective?

The critical question is whether public international law is effective. In other words, do states in fact adhere to public international law? If public international law forms an important part of law in general, why are there still wars between and within states? Why do some states not adhere to the agreement to limit the pollution emitted from their industries, which has such an adverse effect on the rest of the world? Why do the most powerful states still do as they please? Keeping in mind the presence of a weak sanction value and realism in international law, there are doubts about how effective the application of public international law is.

However, there is a positive side too: public international law has undoubtedly been applied and been relevant in some areas of international affairs. From a South African perspective, our Constitution acknowledges the importance and relevance of public international law, which contributed to placing South Africa under pressure during the apartheid era. For example, the United Nations applied numerous measures to isolate South Africa from trading with other states, so as to punish it for discriminatory and repressive laws and practices and for its acts of aggression against neighbouring states.

Further examples of the positive, or effective, aspects to public international law include the following:

- Over 190 states are members of the United Nations General Assembly.

- World leaders and politicians publicly acknowledge the importance of various public international law norms.
- The establishment and functioning of international courts like the International Court of Justice (ICJ) and the International Criminal Court (ICC) receive a great deal of support from most states around the world.
- Recent global efforts to protect the **environment** and the importance of international trade also emphasise the relevance of public international law.
- Public international law has a number of sanctions, or punishments, for the breach of international law. These sanctions aim to secure compliance with the law. For example, Chapter VII of the United Nations Charter empowers the Security Council to direct its members to use collective force against an aggressive state. States may also be excluded from membership of certain organs of international organisations like the United Nations.
- **War crimes** and **crimes against humanity**, which are in contravention of customary international law, do receive attention. In 1993 and 1994, criminal law tribunals were established in both the former Yugoslavia and in Rwanda to try people charged with international crimes arising out of ethnic conflicts in those regions. We can see that despite the fact that public international law is not always effectively applied, it has played and will continue to play a positive role among states.

Greenhouse gas emissions pose a serious threat to the **environment**.

War crimes include the torturing or inhuman treatment of civilians or military personnel. **Crimes against humanity** include the forcible movement of populations and the persecution of people based on politics, race, nationality, ethnicity, culture, religion and gender.

22.6 What is private international law?

This chapter deals mainly with public international law, but it is also important for us to deal briefly with private international law (a field in the law which is also referred to as 'conflict of laws'). When a legal dispute that is a private law issue applies to the legal systems of various countries, private international law comes into play. Private international law is a set of principles or laws that determine which of the various possible private legal systems will apply in any particular private legal dispute.

22.6.1 What is the difference between public and private international law?

Private international law is based on the private law systems of various states, and must be seen as a separate field from that of public international law. In essence, public international law governs the relations between states, as well as between states and international organisations like the United Nations. Private international law, by contrast, concerns individuals whose legal relationships are governed by the private law systems of different states. In order to understand private international law, it is important to understand what is meant by private law.

22.6.2 A brief reminder on private law

Private law deals with norms that apply to an individual or to a private entity and to such a person's relationships with other individuals or private entities.

22.6.3 Private law problems across borders

Let's consider the following example to see how the field of private international law operates. Mr Jones is a British citizen married to Mrs Jones, an Australian citizen. Mr and Mrs Jones were married in South Africa. They moved to Brazil, where they lived for one year before deciding to divorce. Under which state's legal system should the divorce take place? Is it England, Australia, South Africa or Brazil? The answer to this question involves the application of private international law, because the private law system of each of the states potentially applies to the marriage and divorce.

Consider another example. A Boeing aircraft, manufactured in the United States of America, was bought by Canadian Air, the national airline of Canada. Two years later, the Boeing crashed in the mountains of Lesotho, killing all 324 people on board. The passengers and crew members were citizens

of the United Kingdom, the Netherlands, Germany, Canada and Nigeria. According to the voice-recording of the communication between the pilots and the control tower situated at Bloemfontein Airport, it became clear that a fire had started in the left wing of the Boeing while it was in South African airspace. It was also clear that the fire in the wing was the cause of the accident. Which state's legal system should be applied to determine the private law consequences for the passengers? Which legal system will determine how the estates of the deceased are to be distributed among family members? The private law systems of the following countries could all be involved in settling legal disputes arising out of the air crash:

- Lesotho, because the crash took place there
- the United Kingdom, the Netherlands, Germany, Canada and Nigeria, because inheritance issues will be resolved according to the citizenship of the people who died in the crash.

What do you think?

Currently, there are serious threats concerning the manufacture and use of nuclear weapons. There is also an ever-increasing degradation of the environment and a greater gap between wealthy and powerful states on the one hand, and poor and weak states on the other. Do you think the United Nations can rid the world of these ailments? Reflect critically on the role of law in general in solving the problems of the world.

Chapter summary

In this chapter, we learned the following about public and private international law:

- Public international law primarily deals with the relationships between states, as well as the relationships between states and international organisations.
- Public international law has developed over the past 70 years to maintain and protect human rights.
- Treaties and customary international law constitute important sources of international law.
- In public international law, there is no central legislative body as may be found within states.
- In public international law, rules are not imposed from above by a central law-making body as may be found within states. Rather they are, to a large extent, agreed upon by states themselves.
- In public international law, there is no central executive authority with a police force at its disposal to enforce the law.
- There is no international central court and the decisions by the various international courts and tribunals are not necessarily adhered to by some states.
- Realism is a foundational attribute of international relations amongst states and which has implications for international law. According to realists, states act in their own interests and international law is formulated in accordance with such interests. Realism supports the view that power, and not the law, is the primary means of solving conflict.
- In contrast, idealism believes that states do not necessarily solve conflict through the application of power, and that compromise, self-restraint, peace and moderation constitute essential attributes in relationships between states. Idealism overlaps with the view that there are certain universal moral norms that states feel obligated to respect and that it is not always about states prioritising their own interests.

- As a result of the above, public international law is difficult to enforce.
- The closest structure of centrality and authority found in public international law is that of the United Nations and its related bodies, or organs.
- Public international developed during the 16th century in Western Europe.
- The United Nations Charter, which led to the establishment of the United Nations, was developed because of the human rights abuses of the Second World War.
- The United Nations, as the most prominent international organisation, plays an important role in regulating, establishing, developing and maintaining public international law.
- The General Assembly forms an important part of the United Nations and deals with issues like the budgetary and membership concerns of the United Nations. The General Assembly may give advice on issues relating to international peace and security, although it may not make decisions regarding the use of force by states.
- The Security Council may make decisions allowing for the use of aggression against states when circumstances merit such action – for example, when Iraq invaded Kuwait in the 1990s the Security Council agreed that the United States and its allied forces could provide aggression against Iraq.
- The International Court of Justice deals with any international legal dispute that may arise between states. The states involved in a specific dispute must give their consent before the court will hear the case.
- The International Criminal Court prosecutes only the most serious crimes perpetrated against persons such as genocide and crimes against humanity.
- Treaties form an important part of public international law. A treaty is a written agreement between two or more states, or between states belonging to an international organisation like the United Nations.
- Section 231 of the Constitution empowers the South African government to conclude international agreements. In most cases, treaties need to be ratified by the two Houses of Parliament to become effective against other states. To apply within South Africa, treaties need to be enacted into national legislation.
- Customary international law refers to international law that arises from the customs of states, and declarations and resolutions may assist in the establishment of specific norms.
- The South African Constitution also confirms the importance of public international law in ss 39(1), 232 and 233.
- Public international law must be distinguished from private international law.
- Private international law concerns issues that apply to the legal systems of two or more states regarding a private law dispute.

Review your understanding

1. What is public international law?
2. Is public international law effective? Discuss critically.
3. Compare the role of power and wealth in public international law to the role of power and wealth in domestic legal systems. Discuss whether you think less powerful states, which are dependent on a more powerful state for trade, are able to punish the more powerful state for polluting the atmosphere if it refuses to limit its pollution emissions from its factories. What possible punishments could they use and what would the consequences be?
4. What view do the 'realists' take with regard to the nature of the international community and consequently to international law?
5. What new developments have taken place in international law over the past 70 years?
6. Discuss the role of the United Nations as one of the most important organisations in public international law.

7. Briefly explain the aims of the ICJ and the ICC.
8. How much value does the South African Constitution attach to public international law? Discuss.
9. Refer to s 231 of the Constitution. Explain the procedures that must be followed before the provisions of a treaty become law in South Africa.
10. What is the main difference between public and private international law?

Further reading

Dugard, J. 2006. *International Law: A South African Perspective.* 3rd edn. Cape Town: Juta and Co. (Pty) Ltd
(This book incorporates recent international developments into the body of established international law, from a South African perspective.)

Strydom, H. 2016. *International Law.* Oxford: Oxford University Press

Convention on the Rights of the Child, www. unhchr.ch/html/menu3/b/k2crc.htm
(This will give the text of this important convention and gives you an excellent idea of what international agreements are all about.)

International Court of Justice website, www.icj-cij.org
(This website will help you become familiar with this international court.)

International Criminal Court website, www.icc-cpiint/home.html
(You will find documents and information on the principles, objectives and activities of this court on this website.)

United Nations website, www.un.org
(Consult this website as a starting point for information on the United Nations.)

Section 5

A changing tree

Chapters in this section

- **Chapter 23** AIDS and the law
- **Chapter 24** Thinking about the law: jurisprudence

You will learn about

- The challenges posed by HIV/AIDS
- The areas of the law affected by HIV/AIDS
- Different schools of thought in legal theory
- The relationship between law and justice

Law into the 21st century

Think about our tree of law. Trees grow and shed leaves and branches. In this way, the law is like a tree: some of its parts may die and disappear while others may grow and develop.
In this section of the book, we are interested in two particular areas of the law in which growth and change are evident, namely HIV/AIDS and jurisprudence.

Aids and the law

In the space of the few short years since the HI virus was first identified, we have seen how the law has had to make provision for the devastating consequences of this illness. It is estimated that prevalence amongst the general population could be as high as 18%, with prevalence among pregnant women being estimated at 29,3%. As medical science develops, it is also likely that the law will change further to accommodate new insights and new situations. In Chapter 23, we look at the various areas of human life and law that are challenged by this disease. These include health care, criminal law, insurance, employment and prisoners.

Jurisprudence

Jurisprudence refers to the way we think about and see the law and is much concerned with the nature and existence of a relationship between morality and law, or justice and law. Legal theory has developed through history. It is obvious that people in the Middle Ages thought very differently about the nature of law, crime and punishment from the way we do in South Africa today. In the final chapter of this book, Chapter 23, we will be looking at what past thinkers have had to say about the theory of law and what new directions modern legal philosophers are taking.

AIDS and the law

Chapter 23

The main ideas

- HIV/AIDS as a human rights issue
- Health care, HIV/AIDS and the law
- The workplace, HIV/AIDS and the law
- Insurance, HIV/AIDS and the law
- Prisoners, HIV/AIDS and the law
- Criminal law and HIV/AIDS

The main skills

- Critically analyse the rights afforded to people living with HIV/AIDS.
- Discuss adequacy of such rights as protection from discrimination.
- Evaluate need for new laws to ensure adequate protection of people living with HIV/AIDS.
- Discuss the impact of HIV/AIDS in the workplace and what steps employers should take.
- Discuss the role of the courts in the HIV/AIDS pandemic.
- Understand the legal implications of knowingly infecting someone with HIV/AIDS.

Apply your mind

Imagine that you go to visit your doctor for a routine medical checkup. A few days later your medical results come back and you find out that you are HIV-positive. Do you think that the framework of laws explored in this chapter is adequate enough to protect your interests as an HIV-infected person?

In this chapter, we look at how, in recent years, the law has had to deal with the difficult problem of the HIV/AIDS epidemic in South Africa. Fear and ignorance have often led to victimisation of people living with HIV/AIDS. What protection does the law offer people living with HIV/AIDS who have been discriminated against in their personal lives and their places of work?

Most experts believe that South Africa has one of the highest rates of **HIV/AIDS** infection in the world, with UNAIDS estimating in 2015 that up to 7 million people live with HIV in this country and there are approximately 380 000 new infections each year. Despite having such a high rate of infection in our country HIV/AIDS organisations estimate that only half of the people who should be on anti-retroviral treatment are receiving the required treatment. In addition there are approximately 180 000 AIDS related deaths occurring each year. HIV/AIDS affects rich and poor, black and white alike. Nobody is spared. People like the son of Kenneth Kaunda, the ex-president of Zambia, and the children of ex-president Nelson Mandela and politician Mangosuthu Buthelezi have been infected with the disease. However, as such people courageously come forward with their stories, they are helping to break down the **stigma** and the discrimination surrounding the disease.

Our Constitution is the founding document of South Africa and is based on freedom from **discrimination**. It aims to protect the dignity and equality of all people. And yet, people living with HIV/AIDS have often found that their human rights are trampled on by others. Because we do not have much legislation that deals specifically with HIV/AIDS, the courts have tried to adapt the current law to prevent discrimination against people living with HIV/AIDS.

HIV refers to the human immuno-deficiency virus. **AIDS** refers to the 'acquired immune deficiency syndrome'.

Stigma is a strong feeling in society that being in a particular situation or having a particular illness is something to be ashamed of.

Discrimination means treating people unfairly by excluding them for some reason.

Before you start

Before we start, we must clear up some common misunderstandings about the disease. First, we need to distinguish between HIV and AIDS. HIV is what we call a **retrovirus** that attacks the human immune system by taking over a human cell's own genetic material and creating new retroviruses. It destroys the body's immune system and leads in the end to AIDS, which is recognisable when the sufferer develops a number of diseases, such as tuberculosis. AIDS is usually fatal – that is, will result in death – if it is not treated. There is as yet no cure for AIDS, but treatment can prolong a person's life and may even ensure a normal lifespan. With advances in medication and treatment, HIV/AIDS is now a manageable chronic condition. However, many people in South Africa and across the world do not have access to treatment for this disease.

The medication for the disease is called antiretroviral, meaning against the **retrovirus**.

HIV/AIDS spreads through people coming into contact with the bodily fluids of an infected person. Most commonly, infection occurs through sexual intercourse, but it may also occur in other circumstances – for example, where drug users share needles to inject themselves with drugs or where infected blood is used in a blood transfusion. The disease is not spread through casual contact with infected people, but there is still a great deal of ignorance, prejudice and fear surrounding the disease.

The law has a very important role to play in resolving the problems that come with HIV/AIDS. It must ensure that people living with HIV/AIDS are not discriminated against and that their inherent human dignity and human rights are equally protected and can be enjoyed.

Look at the article below. After reading this article can you think of the impact that being HIV-positive will have on her future?

"I never had sex, so how could I be HIV-positive?"

A 22-year-old girl learned that she inherited her HIV status from her parents, who died when she was very young.

Saidy Brown was 14 when she discovered that she was HIV-positive. Now 22, she has spoken openly about the day that changed her life at the 8th National AIDS Conference this week.

"It was June 16, Youth Day. An NGO came to my school to educate us about HIV. Someone asked me if I wanted to take a HIV test. Being young and innocent, I agreed. My result came back positive. I could not understand it because I had never had sex.

Painful knowledge

"That's when I found out what killed my parents: they both died from HIV-related diseases. Because they both passed away when I was so young, I didn't know what killed them. I was born HIV-positive.

"I was living with my aunt but I was too afraid to tell her that I was HIV-positive because I was scared that she would judge me. I was confused and emotional. It was too much for a 14-year-old girl. I recall asking myself if my life was a curse or a punishment. I eventually told my maths teacher and we both told my aunt. She confirmed that my parents had died from AIDS.

"Although it is painful knowing that I am the only one in the family living with HIV, my mind is at ease just knowing that my siblings are HIV negative. And I am glad that I am still alive because some babies who were born with the virus don't survive. That just goes to show that I was born on this earth for a greater purpose than being HIV-positive. Two lines on an HIV test will not bring me down.

"With positive living and my ART, I can still live a long and awesome life. My advice to young people who are living with HIV is that they need to understand that it is not the end of the world." – Health-e News.

Source: http://www.health24.com/Medical/HIV-AIDS/News/i-have-never-had-sex-so-how-could-i-be-hiv-positive-20170615

South African AIDS activists are using the constitutional rights that belong to everyone as weapons in the fight for equal treatment for all people living with HIV/AIDS. This chapter considers some of the ways in which the law is being used to protect the rights of people living with HIV/AIDS.

23.1 HIV/AIDS as a human rights issue

Many of you might be asking how AIDS, which is a disease, can be a human rights issue. The following account makes it clear that it is such an issue.

Justice Edwin Cameron, judge of the Constitutional Court, has always been very open about the fact that he is a **homosexual** and is deeply committed to the fight for equal rights for homosexual people.

If someone is **homosexual**, he is sexually attracted to people of the same sex.

He is also an activist in the field of HIV/AIDS. His disclosure of his HIV-positive status while being interviewed for a position on the Constitutional Court ensured that this disclosure carried maximum impact. In an article entitled 'Human rights, racism and AIDS: the new discrimination', published in the 1993 volume of the *South African Journal of Human Rights* at page 22, he writes:

> "Human rights abuse against persons affected by AIDS and HIV can take three forms:
> (i) The first is the enactment by the state of repressive laws aimed at inhibiting the **civil liberties** or **civic status** of persons with AIDS or HIV.
> (ii) The second is the violation by health-care workers, employers and others of what lawyers call 'first generation' rights – the rights to dignity, privacy and autonomy.
> (iii) The third is denying persons with AIDS or HIV access to a fair share of national resources and wealth, in both the public and private sectors ('second generation' rights')."

Civil liberties are the freedoms that are part of everybody's constitutional rights. **Civic status** refers to people's legal status as citizens.

Cameron said that the first form of abuse did not seem common in South Africa, but the second was extremely widespread. In his opinion, however, the greatest threat to HIV-positive people was that they were denied their fair share of national resources and wealth in the form of adequate health care and other financial sources. He suggested that, in the next decade, discrimination against people living with HIV/AIDS would replace racism as the most important factor preventing people from fairly exercising their rights.

23.1.1 Discrimination against people with HIV/AIDS

During the 1980s, doctors in Europe and America associated the occurrence of strange new symptoms, that we now know are typical of AIDS, with the gay community. Society thought of it as a 'gay plague', and the result was discrimination against homosexuals. When the disease spread to two other marginalised groups, **intravenous** drug users and prostitutes, most countries ignored the problem or tried to isolate those affected.

Intravenous means that drugs are injected into the veins.

It is now realised that HIV/AIDS is not confined to homosexual people, intravenous drug users or sex workers. Now we know that all sections of society are affected, regardless of age, gender, race, social or financial background. In fact, statistics show that the greatest rate of infection is now among **heterosexuals** and that in South Africa up to 85% of new infections occur through heterosexual intercourse.

Heterosexuals are sexually attracted to people of the opposite sex.

Activists are people who speak out and take action against discrimination and ill-treatment.

Professor says — Going public

Discrimination against HIV-positive people can be extreme. **Activists** like Gugu Dhlamini who have gone public about their HIV status have even been killed.

Gugu was a 36-year-old HIV-positive woman. She was saddened by the unfair discrimination faced by people with HIV and wanted to inform and sensitise people to this, so she told of her HIV status on radio and television. She received threats of violence, because some people thought she had embarrassed her community. Within a month of the public announcement of her status on 24 December 1998, Gugu Dhlamini had been murdered.

Almost 20 years after Gugu Dhlamini's death, people living with HIV/AIDS are still unwilling to reveal their status for fear of stigmatisation by their communities. So, they often hide their status and live in

fear that people will find out. Many of them are also reluctant to test for their HIV status because of the way they may be treated and making it difficult for them to seek medical treatment. The delay in diagnosing the disease often means that they reach a **terminal** stage of the disease very quickly.

Terminal means that the patient will die of the disease.

Discrimination can take many forms, such as testing someone for HIV before employing them or denying people with HIV insurance cover. Even the government's attempt to deny people living with HIV/AIDS full treatment for their illness can be thought of as discrimination – a way of denying them a fair share of national resources.

23.1.2 Can the Constitution protect people with HIV/AIDS?

In the article cited above, Cameron refers to South Africans' first generation rights of privacy and dignity being violated. The **right to privacy** is protected to some extent, in that people who have HIV/AIDS have the right to decide who to inform of their HIV/AIDS status. But many people only discover that they face discrimination once they reveal that they are HIV-positive. The right to dignity cannot be fully enjoyed by people living with HIV/AIDS on account of discrimination and stigmatisation in our communities. The poor suffer further, as they cannot afford the expensive treatment that keeps AIDS itself at bay.

The **right to privacy** is illustrated in the article given below. If someone breaches your right to privacy about your HIV status you may sue them for damages.

Case study HIV-positive man fails to disclose status

Let us consider the following newspaper article.

Mounties warn of HIV-positive man who may have failed to disclose his status

Mission (NEWS 1130) – RCMP are taking the unusual step of publicizing the name and releasing a picture of an Abbotsford man connected to an aggravated sexual assault investigation.

Brian Carlisle is HIV-positive and Mounties believe he may be spreading the virus to unsuspecting partners, by failing to disclose his virus.

"The purpose of this release is to make public the potential health risk to anyone who may have been in sexual contact with Mr. Carlisle, so that they can take the appropriate measures to protect themselves," explains Mission RCMP's Cst. James Mason. "We are also seeking out anyone who has had further information in relation to this investigation."

Mason adds police are disclosing Carlisle's HIV status because the public interest clearly outweighs the man's privacy. He also believed to be active on a number of social media and dating sites, and police are urging anyone who may have been intimate with Carlisle to see their doctor immediately for testing.

The 47-year old appeared in Abbotsford Provincial Court today and has been charged with three counts of aggravated sexual assault. He's been released under a number of conditions.

They include not accessing or utilizing any social networking or online dating websites, advising any person he is intending to have sexual intercourse with of his HIV status, and wearing a condom during sexual intercourse.

Mason says several women have either come forward or have been identified by investigators, but that number could rise.

"The information was given to us from the women who came forward, who had been in a relationship with him who were made aware of his current status," says Mason.

Carlisle is accused of offences in Mission, Abbotsford, Coquitlam and Burnaby, but he has also lived around the Lower Mainland, Ontario, Manitoba and New Brunswick and the States.

The RCMP say they are disclosing Carlisle's HIV status because the public interest clearly outweighs the man's privacy.

Case study (continued) HIV-positive man fails to disclose status

He's described as a Caucasian man, who weighs about 220 lbs, is 6'2" tall with blue eyes and short brown hair.

His next court appearance is September 11, 2017.

If you have any information related to this investigation, you're asked to call a dedicated tip line at 604-814-1644, or Crime Stoppers at 1-888-222-8477 if you want to remain anonymous.

Source: http://www.news1130.com/2017/08/03/mounties-warn-hiv-positive-man-may-failed-disclose-status/

The article above was also accompanied by Carlisle's photograph. His HIV-positive status was made public without his consent and this is an invasion of his right to privacy. It may also lead to Carlisle suffering discrimination because of his status. The police claim that they are breaching his right to privacy as this is in the public interest and outweighs Carlisle's right to privacy.

1. Do you agree with the police's reasoning?
2. Would your answer change if Carlisle was not posing a risk to others?

The South African Constitution gives people the right to be treated equally and to enjoy equal protection before the law. This means that those with HIV/AIDS cannot simply be confined together in camps, with their basic rights denied for example. Some countries have also placed immigration controls on people with HIV/AIDS, refusing them immigrant status. In South Africa, while the government has allowed for HIV-positive immigrants, we can see from Gugu's story that communities still punish those with AIDS.

Everyone also has the right to personal dignity, which means that a person's self-respect should be considered at all times. To regard people living with HIV/AIDS as sub-standard members of our society denies them that right.

Most importantly, in s 27, the Constitution guarantees a right to health care services. The financial burden that HIV/AIDS places on our already struggling health system has meant that many have been denied treatment for HIV, despite this right.

In s 23 of the Constitution, there is also the right to fair labour practices, which prevents employers from discriminating against their HIV-positive employees.

However, the Constitution places upon the government the duty to take reasonable legislative and other steps with available money to make sure that each of these rights is achieved.

The denial of second generation rights to people living with HIV/AIDS means that they are denied access to a fair share of national resources and wealth. This situation is going to be extremely difficult to overcome in both the public and private sectors.

Communities tend to reject those who suffer from the disease. Discrimination against HIV/AIDS sufferers may take various forms. The rights afforded to everyone in the Constitution can be used to protect people living with HIV/AIDS from abuses.

We are going to discuss some of these issues in greater detail and see how all these rights are protected and balanced.

23.2 Health care, HIV/AIDS and the law

We have asked the question whether and how the law should be used to protect HIV-positive people and you have read the views of Justice Cameron, who now serves at the Constitutional Court. Now you will see what the law actually says about HIV/AIDS in the context of a person's constitutional rights to health-care services. South Africa runs the world's largest ARV (antiretroviral) programme. In recent years mother to child transmission rates have plummeted due to treatment provided to infected mothers

and their babies during prenatal and antenatal care. The numbers of people who are receiving ARVs has also increased. Despite these positive developments much more needs to be done to address the HIV/AIDS epidemic in our country.

23.2.1 HIV/AIDS testing and the law

In 2015, the Department of Health published the national policy on testing for HIV. In terms of this policy, testing for HIV may be carried out only in the following circumstances:

- Someone has personally asked for the test and given informed consent to the test. Informed consent means that the individual has been told about the test, understands what it means to have the test and agrees to the test.
- A doctor has indicated that a test is **clinically necessary** and the patient has given his informed consent.
- HIV testing is done for research purposes, with the person's informed consent.
- The testing is part of the screening, or inspection, of blood donations, with the informed consent of the persons involved.

Clinically necessary means that the test should be done for medical reasons, such as when the patient's HIV status must be known, so that he can be given the proper treatment.

The Department's policy allows for testing without the informed consent of the individual under the following circumstances:

- The testing is unlinked and anonymous and is for epidemiological purposes undertaken by local health authorities. Epidemiological purposes are purposes to do with collecting information on the **distribution of infection** rates in the country.
- An emergency situation arises where a blood sample is available. The policy gives the example of a health-care worker being accidentally pricked by an injection needle. In this case, the testing may be carried out without the informed consent of the person under treatment. However, it may be done only after the individual has been informed that her sample will be tested. The privacy of the individual must also be protected and her HIV status must be kept **confidential**. Only the health-care worker who has been injured may be given the result.

The **distribution of infection** shows the extent to which the disease has spread in areas and groups of people.

Confidential means that information must be kept absolutely private and nobody else must be informed of it.

The policy also provides for pre-test counselling to be done. Pre-test counselling takes the form of a confidential talk with a qualified person like a doctor, nurse or trained HIV counsellor before the test. This is usually done in a group setting to shorten the period of time that patients are kept waiting prior to seeing a health practitioner. Currently, pre-test counselling implies that the individual should be given an opportunity to make a decision on whether he wishes to undergo the HIV test. Pre-test counselling should include discussions on:

- what an HIV test is and the purpose of the test
- the meaning of both a positive and a negative result, including the practical implications such as medical treatment and care, sexual relations and psycho-social implications
- an assessment of personal risk of HIV infection
- safer sex and strategies to reduce risk
- coping with a positive test result, including whom to tell and identifying needs and support services
- an opportunity for decision-making about taking the HIV test.

The group education session should ideally be followed up by a short individual consultation in which questions can be asked to determine if the patient understands the process of HIV testing and is willing to undertake the test. The informed consent, preferably written consent, is also obtained at this stage.

Post-test counselling must also be done when the person receives the HIV test result, regardless of whether the result is positive or negative. Post-test counselling involves one or more sessions and should

include discussions on understanding the results. If the result is negative, strategies for risk reduction and the possibility of infection in the **window period** should be discussed.

If the result is positive, counselling discussions should include

- the person's immediate emotional reaction and concerns
- personal, family and social implications
- difficulties a patient may foresee and possible coping strategies
- with whom the client wants to share the results
- responsibilities to sexual partners
- immediate needs and social support identification
- follow-up supportive counselling
- follow-up medical care.

For an initial period after a person has been infected with HIV, an HIV test will not accurately reflect the person's HIV-positive status. This is the **window period**.

In terms of the National Health Act 61 of 2003:

1. all information concerning a **user** is confidential – that is, information relating to his health status, treatment or stay in a health establishment, such as a hospital or clinic
2. no information on a user's HIV status may be **disclosed** unless:
   - the user consents to that disclosure,
   - a court order or any law requires that disclosure
   - non-disclosure of the information represents a serious threat to public health.

In terms of the Act, the **user** is the person receiving treatment. If this person is under age, the term 'user' will also refer to the patient's parents or guardians.

Disclosed means information is revealed, or made known to others.

23.2.2 Health-care professionals, HIV/AIDS and the law

The Health Professions Council of South Africa (the Council) controls the training, registration and conduct of health professionals like doctors, dentists and psychologists. The Council has set out guidelines for the management of patients with HIV/AIDS. The guidelines are clear on the way in which health professionals should behave towards HIV-positive patients. We have set out some of the important details below.

Refusal to treat a patient

In terms of the guidelines, doctors will not be acting **ethically** if they refuse to treat any patient or refuse to give normal treatment simply on the ground that the patient may be HIV-positive. It is not in fact against the law to refuse to act, but, it would be unethical, and the doctor could face professional action from **the Council**.

Ethics are related to the moral aspects of the situation.

The Council, or other professional medical bodies to which the doctor belongs, could punish her in some way. She would not face legal sanctions, unless the patient decides to sue in a personal capacity.

Confidentiality

The Council also states that the patient's HIV status must be treated with the highest possible levels of confidentiality – that is, that the information is completely private and may not be disclosed to anyone without the person's agreement. Doctors or health-care workers may not inform their colleagues and other health-care workers of the patient's HIV status without the patient's consent.

As far as other people who may be affected by the patient's HIV status are concerned, such as the person's sexual partner, the guidelines advise the health-care worker to disclose the patient's HIV status without his consent only if they are certain that the third party is definitely in danger. Further, they may disclose this information without the patient's consent only after they have counselled him on the importance of disclosing his status to his sexual partner and on taking measures to prevent the virus from spreading to the partner. If the patient refuses to do so, the doctor must inform the patient that the health-care worker has an ethical responsibility for this and must ask for the patient's consent. If the patient still refuses consent and the health-care worker is still absolutely sure that there is a clear danger to a third party, then he is allowed to disclose the HIV status without permission.

These guidelines were formulated in the light of the case of *Jansen van Vuuren and Another v Kruger* and were influenced greatly by the case.

Case study The chatty doctor

In *Jansen Van Vuuren and Another v Kruger* 1993 (4) SA 842 (A), a Mr McGeary wanted to apply for an insurance policy. The insurance company instructed him to have an HIV test. The test results were positive. The doctor who carried out the test agreed to keep the results confidential. However, soon after that, while playing golf, he told another doctor and a dentist about McGeary's status. The news spread quickly. McGeary sued the doctor, claiming that, as the doctor had breached confidentiality regarding his HIV status, he had suffered an infringement of his right to privacy. The Appellate Division held that the legal duty to respect confidentiality is not an absolute one. The doctor could breach this duty when his duty to society was greater than his duty to his client. However, the court held that society was not in danger when the doctor gave the information on the golf course, so he was in the wrong. Because he had breached the legal duty without a legal justification, he had to pay damages to McGeary.

23.3 HIV/AIDS treatment, the government and the law

Many South Africans feel that the government is moving too slowly in providing treatment to people who have HIV/AIDS. Many of the basic services provided to people living with HIV/AIDS today are owing to litigation against the government by public action groups. An example of this is the provision of the drug Nevirapine to HIV-positive mothers to prevent mother-to-child **transmission**.

Transmission is the passing of something, such as an infection, from one person to another.

Case study Mother to child transmission

In *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) 2002 (5) SA 721 (CC), the Treatment Action Campaign instituted action against the government to force it to provide Nevirapine to HIV-positive mothers at all state hospitals. This drug prevents HIV-positive mothers from transmitting the disease to their children. The drug was available at a few state hospitals that were used as training and research stations. The court held that giving the medication could not wait until medical research had been completed. It held also that a programme for achieving **socio-economic rights** had to be balanced and flexible and one that excluded a large part of society could not be regarded as reasonable.

The court held further that the provision of a single dose of Nevirapine to mother and child for the purpose of protecting the child against the transmission of HIV was, as far as the children were concerned, essential. Their needs were most urgent and being denied access to Nevirapine was an infringement of their rights. The Constitutional Court therefore ordered the government to work out a programme and put it into action within its available resources. This would bring about progressively the rights of pregnant women and their newborn children to fight against mother-to-child transmission of HIV. The programme included the provision of voluntary counselling and testing and, where appropriate, Nevirapine.

The judgment in the case study above has had a significant impact on the mother to child HIV transmission rates. Due to this judgment the government implemented a widespread programme to provide medication to newborn babies whose mothers are HIV-positive. This has led to mother to child transmission rates plummeting drastically and it is estimated that this programme has prevented HIV transmission to approximately 80 000 babies each year.

Socio-economic rights are based on a combination of social and economic conditions.

23.4 The workplace, HIV/AIDS and the law

People who have HIV/AIDS often experience discrimination and other difficulties in the workplace. A person's HIV-positive status may lead him to lose his job or to suffer harassment from co-workers or employers.

Dawn Mokhobo, in her article 'AIDS: Balancing individual rights with business imperatives', writes that all workers have the following fundamental rights:

1. the right of equality of opportunity to work
2. the right to fair pay and conditions of service
3. the right to have training and retraining
4. the right to organise and belong (or not belong) to an employee organisation
5. the right to choose to negotiate and **bargain collectively** or individually if the employee does not belong to an employee organisation
6. the right to occupational safety and industrial health
7. the right to social security
8. the right to protection against unfair labour practices.

Mokhobo, D. 1993. 'AIDS: Balancing individual rights with business imperatives.' *SAJHR* 105

Collective bargaining in labour relations refers to attempts to achieve a satisfactory outcome to labour problems between a group of employees and their employer/s.

The rights listed here are also enjoyed by workers who are HIV-positive. According to the Constitution, all employees (regardless of their HIV status) have the right to fair labour practices. These are practices, or ways of treating people, that recognise that employees should be treated equally and should not be discriminated against in a haphazard or unsystematic way. In other words, employers must base their treatment of workers on reasonable grounds and not on irrational grounds. An example of an irrational ground would be a policy that workers with blonde hair receive an extra half hour lunch break each day.

Unfortunately, employees' rights are not always respected as the following article reveals.

Nothing serious about HIV, senior manager tells staffer

Cape Town – A Groote Schuur employee who appeared before the Commission for Conciliation, Mediation and Arbitration (CCMA) this week testified that her employer had shown little regard for her situation after a senior manager disclosed her HIV status without her consent.

The arbitration case, brought to the CCMA by the National, Health and Education Workers' Union on her behalf, challenges the efficacy of policies on the treatment of people living with HIV/AIDS and the disclosure of their status at work.

The woman alleged that the disclosure of her HIV status without her consent violated her dignity and her constitutional right to privacy and confidentiality.

Among other things, she told the CCMA hearing that:

- A senior manager refused to deal with the matter saying he had no time to discuss it and there was nothing serious about HIV as his wife also lived with the virus
- Another senior manager said his domestic worker was also living with the virus and was on anti-retroviral treatment and that she could do the same.
- The most senior official at the hospital alleged that it appeared she was in denial about her status, but recommended that she be referred for professional support.

The woman said she shared her HIV status with the senior manager in confidence and in an attempt to explain her absenteeism from work, which had allegedly been a matter of concern.

In addition, she had an asthmatic child who would take ill and needed to be hospitalised.

She said she also submitted evidence in the form of sick notes.

She also alleged that although the implicated senior manager had been given a final written warning, she had not been given an opportunity to state her side of the story, including the grave effect of the disclosure on her mental and psychological health.

She also testified that she only heard of the news of the outcome when she enquired from the most senior official after being kept in the dark for – too long".

– I was hospitalised at the time due to depression. The case was dragging on and I was kept in the dark on developments and this had taken its toll on me. I called the most senior

official only to be told that an outcome had been reached," she said.

She had tried to commit suicide and was prevented by a colleague from physically assaulting the manager who had disclosed her HIV status .

She also told the hearing that she received different treatment as a result of her HIV status.

When restructuring took place which affected the placement of staff, the manager allegedly told her where she would be placed while others were given an opportunity to choose for themselves.

– He told me that I would be placed at a certain ward and when I asked what that particular section dealt with he told me that it was for people living with HIV/AIDS.

"And he said I was better placed to work there as I would understand the patients better. And this was said openly in front of other staff."

Another employee, who worked in the hospital's labour relations department, testified that it was the first time the hospital had had to deal with a complaint of this nature and after preliminary investigations it referred the matter to the head office.

She also testified that another colleague had told her the complainant's senior manager had shared her HIV status with a colleague but – in good faith". The hearing was also told the matter was brought to the attention of the Health MEC by the complainant after numerous attempts to get feedback from Groote Schuur Hospital failed.

The department, through its lawyers, had previously argued that no discrimination took place against the woman employee and that action was taken against the manager in the form of a transfer to another department.

The hearing was postponed to August 10.

– *Weekend Argus*

Source: https://www.iol.co.za/news/south-africa/western-cape/nothing-serious-about-hiv-senior-manager-tells-staffer-10095340

A number of labour laws and other measures exist to try to ensure that people with HIV are not discriminated against. We will look at these now.

23.4.1 Employment Equity Act

The Employment Equity Act 55 of 1998 states that an employer may not discriminate against an employee or job applicant in any employment policy or practice on the grounds of HIV status. This means that an employer may not refuse to employ someone because he is HIV-positive. It also means that if an employer discovers that someone has HIV after he has already been employed, that person may not be demoted or denied promotion. The employer may also not prevent the employee from undergoing training and development.

A total inability to earn money because he cannot find employment would be **economic death** for a person.

Case study The cabin attendant

In the case of *Hoffmann v South African Airways* 2001 (1) SA 1 (CC), Hoffmann applied for employment with SAA as a cabin attendant. He was refused employment because he was HIV-positive. The Constitutional Court held that 'people who are living with HIV must be treated with compassion and understanding. We must show ubuntu towards them. They must not be condemned to **economic death** by the denial of equal opportunity in employment.' The court held that SAA's non-employment of Hoffmann on the grounds of his HIV status discriminated against his right to dignity and equality, as he was not unsuitable for employment as a cabin attendant. The court therefore ordered SAA to employ Hoffmann as a cabin attendant.

23.4.2 Code of Good Practice

The Minister of Labour has published a Code of Good Practice on Key Aspects of HIV/AIDS and Employment (the Code), which functions as a guide to all employers and employees. While it is not legally binding on employers and they can choose whether or not to follow it, the Labour Relations

Act 66 of 1995 and the Employment Equity Act already include portions of the Code. This makes a great portion of the Code binding on all employers and workers.

The Code recognises that all people have the right to privacy and this means that an HIV-positive person is under no obligation to disclose her HIV status to her employer or potential employer. If an employee has told her employer about her HIV status, nobody else can be told without the written consent of the employee.

An employer is not allowed to ask a potential employee to undergo an HIV test before she is employed. Testing someone's HIV status prior to employment can be carried out only if the Labour Court has stated that this is **justifiable**.

If something is **justifiable**, there are good reasons for it.

Case study The soldier

In *N v Minister of Defence* (2000) 21 ILJ 999 (LC), the Namibian Labour Court was asked to decide whether the pre-employment testing of the HIV status of applicants to the Namibian Defence Force (NDF) was justifiable. Namibian legislation is very similar to South African legislation, as it also does not allow unjustifiable pre-employment HIV testing or discrimination against HIV-positive workers. At the time N applied to the Namibian Defence Force, he was in good health and was able to perform all the usual functions and duties required of him. This was confirmed by a medical report issued by the district surgeon. The applicant was then found to be HIV-positive in a test conducted by a medical doctor from the NDF, and was refused employment because of his HIV status. This was the only reason for the refusal.

The court found that the exclusion of the applicant from the military solely because he had been found HIV-positive constituted unfair discrimination in breach of the Namibian Labour Act, because at the time of the exclusion he was fit and healthy enough to work. However, the court ordered N to undergo further tests to find out whether he was still healthy enough to join the NDF. Four years had elapsed between his first application and the court's judgment. Further, he had not disclosed to the court when he had first contracted the virus. Regarding further applicants to the NDF, the court ordered that the NDF may not refuse employment to applicants only on the basis of their HIV status as long as they were fit and healthy enough to perform their tasks. However, an applicant who had a **CD4 count** of less than 200 and a viral load of more than 100 000 would not be fit for military duty and it would be justifiable not to employ him.

The courts in South Africa were also asked to rule on a similar matter in the case of *Dwenga v Surgeon-General of the South African Military Health Service* 2014 JDR 1974 GP. In a case prior to Dwenga's the court had ruled that it was unconstitutional for the Defence Force to discriminate against people who were HIV-positive and they were ordered to redraft their employment policies. Dwenga had been employed as a clerk with the SANDF until her contract failed to be renewed. She then wished to retrain so that she could obtain employment with the Navy. She was informed that she would not be employed as she was HIV-positive. No attempt had been made to determine whether she was medically fit to perform her job functions. The court held that this was a breach of her constitutional right to equality. They ordered the SANDF to assess each applicant for employment on an individual basis to determine if they were medically fit for the employment the individual had applied for.

A **CD4 count** allows the doctor to see how strong someone's immune system is and helps predict possible health problems. The test usually goes together with the viral load test, which shows how far the disease has progressed and predicts its future development.

In South Africa, the debate on employment testing has focused mainly on post-employment testing. This is testing after a person has been appointed to an employment position. Our courts have held that post-employment testing of employees is allowed, as long as it is completely voluntary and anonymous, so that individual workers' HIV status is not revealed. It is useful to give employers an idea of the number of HIV-positive people in their workforce.

The Code also encourages all workplaces to develop an HIV/AIDS policy to ensure that employees with HIV/AIDS are not unfairly discriminated against. Workplaces should also introduce an HIV/AIDS programme aimed at preventing further infection and providing support to employees who are already infected.

23.4.3 Labour Relations Act

The Labour Relations Act states that an employer may not dismiss an employee because of his HIV/AIDS status. However, if he suffers from ill health that affects his ability to do his job properly, then the employer may dismiss him as long as fair procedures have been followed. This means that the employer has to find out how the disease has affected an employee's health and whether it is of short or long duration. The employer has to consider alternatives to dismissal – such as moving the person to another position that may be less tiring or demanding. The employer must also try to adapt duties or work circumstances to adjust to the disease. It is only after an employer has tried all these possibilities that it is allowed to dismiss the employee.

Case study Fired because of HIV-positive status

In the case of *Allpass v Mooikloof Equestrian Centre* 2011 (2) SA 638 (LC), the applicant had been employed in the physically demanding position of a stable yard manager. At his interview he had informed his potential employer that he was in a homosexual relationship and that he was in good health. Very soon after he was employed his employer discovered that he was HIV-positive when the applicant included this information in a form detailing illnesses and medication he was taking which his employer had asked him to complete. He was then dismissed from employment on the basis of his HIV status with the employer stating that he had been dishonest in his employment interview and that as he suffered from a severe illness he was unsuitable for such a physically demanding job. The applicant had been HIV-positive for 18 years and he was in good health with a very low viral count. The court held that his dismissal was automatically unfair in terms of the Labour Relations Act and that he was entitled to receive 12 months' salary as compensation for his unfair dismissal.

23.4.4 Safety legislation

The Occupational Health and Safety Act 85 of 1993 and the Mine Health and Safety Act 29 of 1996 state that the duty of the employer is to provide as safe a workplace as possible, so that there is less risk of other people being exposed to the disease at work. However, if an employee is infected with HIV because she was exposed to infected blood or bodily fluids in the workplace, then the employee can apply for benefits in terms of s 22(1) of the Compensation for Occupational Injuries and Diseases Act 130 of 1993.

23.4.5 Medical Schemes Act

Where an employer offers a medical aid scheme as a benefit in the workplace, then the Medical Schemes Act 131 of 1998 provides that the medical scheme may not discriminate against a person on the basis of her HIV status. In addition, the scheme must provide minimum benefits to all members. Currently medical schemes have to treat all **opportunistic diseases** caused by HIV/AIDS, and they have to provide minimal antiretroviral treatment dependent on your CD 4 Count.

Opportunistic diseases enter the body if the immune system is weakened. The immune system is the body's own mechanism for fighting infection.

23.4.6 Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

In 2017 the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 was amended to include a ban on discrimination of the grounds of HIV/AIDS status. This now means that

Equality Courts can hear cases in which people were discriminated against on the grounds of their HIV/AIDS status. The Equality Court has wide powers to redress such injustice and may make an order to stop the discrimination. It may also order the person who has discriminated against the complainant on the grounds of HIV/AIDS to apologise for their discriminatory behaviour

23.5 Insurance, HIV/AIDS and the law

Insurance is an agreement between an insurance company and a person to the effect that the insurance company will pay out a sum of money if a certain event takes place. Many types of insurance are available, such as insurance against theft, fire, accident, **disability** and life.

A **disability** is when someone is physically challenged in some way as a result of an injury or from birth.

Insurance that takes the form of long-term cover, such as life insurance, often discriminates against people with HIV/AIDS. If you have **life insurance** or life cover, when you die, the insurance company will pay a sum of money to your dependants or to the person you nominate to have the money. Most insurance companies require people who apply for life insurance to take an HIV test. It is often at this stage that many people discover for the first time that they are carriers of HIV.

Life insurance actually insures against the loss of life, that is, death.

If someone is HIV-positive or refuses to take an HIV test, the insurance company may refuse to give the person cover. If your test comes back positive, the insurance company will list your name on the Life Offices Association life register as a person who has been refused insurance. This information will be available to other insurance companies to which you apply for insurance and could negatively affect your chances of getting insurance. The information on the life register is listed in code so that unauthorised people cannot get information on someone's HIV status. When HIV/AIDS first emerged many insurance companies refused to provide people who were HIV-positive with insurance coverage. Read the article below to see the new stance of insurance companies.

When someone applies for insurance cover, the insurance company asks for the information it needs to assess its risk in insuring the person. If someone suffers from a **chronic disease**, such as diabetes, tuberculosis or HIV/AIDS, this information has to be given to the insurance company, as this is a material factor, or vitally important, in working out the risk of insuring the person's life. The insurance company must know what material factors there are so that it can adequately assess the risk to which it is exposed when it insures someone. For example, it would be important and material for the insurance company to know that the person was employed as a **stunt pilot**, and that in their spare time they liked wrestling crocodiles or bungee jumping off cliffs. Such activities pose a greater risk than those of a librarian whose hobbies are reading and knitting. Because the first person is more risky – that is, the company would more probably have to pay out in terms of such a policy – they could refuse the policy or charge the applicant a higher payment, or monthly premium. The insurance company would consider HIV status a material factor, as it affects how long someone is likely to live. Since the lives of most people with HIV/AIDS are shorter than those of people who do not have HIV, the former category poses a higher risk to the insurance company.

When a person has a disease permanently or for a long time and it can be controlled with medication, it is referred to as **chronic disease**

A **stunt pilot** performs tricks in the air with the plane. Of course, this is risky and could end in accident or death.

If someone does not disclose his HIV status, while knowing that he is HIV-positive, he can be charged with fraud, because he tried to deceive the company. In addition, the insurer may declare the contract **null and void** and will then not pay out the benefit. So even if an insurance company does not ask for a blood test before insuring someone, HIV status, if known, must always be declared to prevent something like that from occurring.

Something that is **null and void** is worthless or non-existent.

Let's suppose you test HIV-negative and take out insurance. What would happen if you subsequently contracted HIV/AIDS? Once you have received your life insurance policy document, you should read your policy carefully to make sure that it does not contain exclusion clauses that exclude the payment of the benefit in certain circumstances. For example, it may state that the company will not pay out the policy if you have HIV or AIDS at the time of your death or if you die from an HIV- or AIDS-related illness.

HIV, CD4 counts and life insurance

People who are HIV-positive can get life insurance for up to R5m in SA – but who qualifies, and will it cost a fortune?

Life insurance is a policy that pays out a predetermined amount of money to the dependents of a policyholder who dies. During the policyholder's life, he/she usually pays a monthly or annual premium.

Failure to do so would result in the cancellation of the policy. Life insurance payouts do not become part of someone's estate when they die, and are usually paid out much sooner than the estate itself.

Before being granted life insurance, applicants usually have to undergo medical tests to determine their state of health. An insurer is within its rights to refuse a policy application (or load the premium) from someone with serious health issues that might cause them to die in the foreseeable future.

For years, a positive HIV test result, among other health issues, meant that life insurance was refused to that particular applicant.

Criteria for life insurance

As life insurance pays out when someone dies, various factors are taken into account to determine someone's supposed lifespan, such as age, state of health, occupation, education level and gender. Based on these criteria, a person could be given or refused life cover.

Premiums would, for instance, be much higher for someone who is 50 years of age, than someone who is 20. In the days before antiretrovirals, HIV was pretty much a death sentence, and no insurance company would give an HIV-positive person a life insurance policy.

There was an AIDS exclusion clause on most policies until the 1990s. Then there was a move to reduce the sum insured to 10 – 20% of the original sum if someone became HIV-positive after taking out life insurance.

But that started changing when it became apparent that people on ARVs had a life expectancy not unlike that of people who were HIV-negative. And as time went by, adherence to treatment also became easier, as people no longer had to take 10 tablets per day, but only one.

ARVs and a much longer life expectancy

In 2013, a study was released by UCT researchers, which stated that HIV patients who had started treatment before they became sick could expect to live about 80% as long as their contemporaries who were HIV-negative. These findings, among others, assisted insurance underwriters to assess the risk of HIV-positive life insurance applicants.

Sanlam was the first big insurance company to offer life insurance for those who were HIV-positive – something that was previously only available from insurers such as Altrisk and All life.

Most insurers who offer these policies insist on regular viral load tests (the amount of the virus in your blood) and CD4 cell counts (measures the health of your immune system), proof of levels of treatment adherence and the extent of disease control.

Which companies offer this?

Among the companies offering life insurance policies for those who are HIV-positive are Liberty, Sanlam, Old Mutual, Metropolitan, Altrisk and All Life (this company specialises in this product).

All Life requires a six-monthly test to check CD4-levels. If someone's CD4-count falls below 350–200 cells/mm3 antiretroviral therapy must be started immediately. After this, a six-monthly check-up is required. Should your CD4 count fall below 200, the cover is changed to Accidental Death cover if you have an All Life Policy.

A healthy person's CD4 count will be between 400 – 1 700 cells/mm^3. The government will start ARV treatment for those whose CD4 cell count has dropped to below 350.

All the different life insurers apply different criteria with regards to adherence tests, CD4 levels, and treatment protocols. Initially, life cover for HIV-positive persons was extremely expensive, putting it beyond the reach of many South Africans, but as the market has become more competitive, the price has dropped.

But it is still often up to 50% more expensive than life cover for people who are HIV-negative. The prices vary from company to company, and also are influenced by the individual health status of each applicant.

It must be remembered, though, that this is comparable to prices for life insurance premiums for people with chronic diseases such as diabetes. This "loading" of premiums often happens on a sliding scale, depending on the stage of the disease.

But the insurance industry has come a long way from showing everyone who was HIV-positive the door.

Source: http://www.health24.com/medical/hiv-AIDS/news/hiv-cd4-counts-and-life-insurance-20160126

23.6 Prisoners, HIV/AIDS and the law

In terms of our Constitution, everyone has basic rights. These rights are not lost when someone is sent to prison. However, some rights, like freedom of movement and freedom of trade and occupation, are limited while the sentence lasts. Section 35 of the Constitution deals with the rights of arrested, detained and accused persons.

In terms of s 35(2)*(e)* of the Constitution, everyone who is detained, including sentenced prisoners, has the right to be kept in conditions allowing for human dignity. This includes the provision of medical treatment at the state's expense.

Case study The prisoners

In the case of *Van Biljon and Others v Minister of Correctional Services* 1997 (4) SA 441 (C), four HIV-positive prisoners detained at Pollsmoor Prison applied to court for an order that the Department of Correctional Services be compelled to provide them with combination antiretroviral therapy (ART) based on their right to receive adequate medical treatment in terms of s 35 of the Constitution. All four prisoners had reached the stage of the disease where combination ART usually begins. The first two prisoners had been prescribed the ART by doctors, but the prison authorities were refusing to supply the medication, stating that, if the prisoners wished to acquire them, they must do so at their own cost.

At the time the application was launched, HIV-positive patients in state hospitals did not receive the ART that the prisoners sought as the government had not extended a general antiretroviral policy and it was only people who had full-blown AIDS who were generally granted therapy at state expense. The courts had to decide what would be 'adequate medical treatment' as envisaged by s 35(2) of the Constitution, especially as the prisoners were demanding treatment not available to state patients.

The state argued that the standard of what is 'adequate medical treatment' for prisoners must be determined according to what is provided for patients outside prison at state expense, which, in the present case, means at provincial hospitals. This would mean that, since state patients were not provided with the therapy, the prison would also not have to provide the prisoners with the treatment.

However, the court held that the state owed prisoners, especially those who were HIV-positive, a higher duty of care than people who were not imprisoned. It said:

- unlike free people, prisoners have no other ways of getting medical treatment
- the standard of medical treatment for any particular prisoner should not be based on what she could afford outside prison
- people living with HIV/AIDS in prison are more exposed to opportunistic viruses than HIV sufferers who are not in prison
- although it is accepted as a general principle that prisoners are not entitled to better medical treatment than that provided by the state for patients outside, this could not apply to HIV-infected prisoners, because prison conditions make them more vulnerable to opportunistic infections – prisoners must therefore have better medical treatment than that provided for HIV patients outside in order to improve their immune systems
- the failure to provide the prisoners in question with the treatment was a violation of their constitutional rights and the court ordered that the first and second applicants be provided with the ART that had already been prescribed for them on medical grounds, but only for as long as the prescription stated.

You can see that, while the two applicants whose therapy had been prescribed were allowed to receive it, this did not mean that all HIV-positive prisoners were entitled to the therapy. The third and fourth applicants were therefore not allowed to receive the therapy because they did not have a prescription.

Case study Prisoners demand ARVs

In another case, *N and Others v Government of the Republic of South Africa and Others* (No 1) 2006 (6) SA 543 (D) and (No 2) 2006 (6) SA 568 (D), the Durban High Court heard an application by HIV-positive prisoners from Westville Prison, demanding access to free antiretroviral treatment. This treatment had been provided for in a government scheme launched in 2003, and the state argued that prisoners already had access to HIV treatment without restriction. The plaintiffs, however, argued that prisoners could receive treatment only after they had attended four pre-treatment counselling sessions and that the Westville Prison's appointment schedule allowed only one prisoner a day to receive one pre-treatment counselling session. This led to lengthy delays in prisoners accessing antiretroviral drugs.

The High Court in the first case, (No 1), ordered the prison to remove all restrictions on prisoners accessing antiretroviral treatment. The Department of Correctional Services was granted leave to appeal the order. In the interim, they refused to provide the prisoners with antiretroviral treatment until the appeal was heard. This led to the prisoners launching an urgent application asking the court to compel the prison to provide them with the necessary treatment. In the second case, (No 2), the court ruled that, despite the pending appeal, the prison authorities had to carry out the court's initial ruling and provide the prisoners with treatment.

Look at the following article about this matter.

Almost all HIV-positive prisoners are on ARVs

2016-04-19 15:23

Naledi Shange, News24

Johannesburg – Almost all HIV-positive prisoners in the correctional services system were on ARVs, the department said on Tuesday.

"The percentage of inmates on anti-retroviral therapy stood at 97.95%," the department said.

Meanwhile, more than 91% of prisoners had been tested for the virus.

At a health partner's conference in Vanderbijlpark, the department revealed that it was also making strides in curing the TB virus among inmates. The cure rate stood at 85.80% in December 2015.

Borrowing a quote from the late former president Nelson Mandela, national commissioner of the correctional services department, Zach Modise, said they had a duty to take care of those in the system.

"As part of our mandate, let us never forget the words of the late president Nelson Mandela pertaining to those who are incarcerated, 'A nation should not be judged by how it treats its highest citizens, but its lowest'," Modise said.

The correctional services department had partnered with the department of health to offer health care services, nutritional services and hygiene services to all inmates.

Modise explained that the strategic objectives of the three programmes was to provide inmates with HIV, AIDS and TB treatments to improve life expectancy, to appropriate nutritional services and hygiene services during the period of incarceration.

He stressed that the DCS also had to ensure that it provided conditions that promoted the well-being of offenders and correctional officials.

The department provided 24-hour promotive, preventative, curative and rehabilitative services for acute and minor ailments, injuries, communicable diseases (TB, HIV and AIDS, sexually transmitted infections, Hepatitis A, B and C) and non-communicable diseases such as diabetes, epilepsy and hypertension.

"Secondary, and tertiary, levels of care are accessed at district and provincial health facilities, and, at times, at private health care providers (depending on the need for such services).

"There are a number of pharmacies established within the Department to ensure access to pharmaceutical services. In order to meet the nutritional needs of inmates, DCS provides meals as indicated in the prescribed ration scales and meal plans.

"Provision is also made for different dietary requirements by providing cultural, religious and therapeutic diets," Modise said.

Source: http://www.news24.com/SouthAfrica/News/almost-all-hiv-prisoners-are-on-arvs-20160419

23.6 Criminal law and HIV/AIDS

The HIV status of a suspect in a criminal act may be relevant in certain circumstances. For example,

- I have been raped. Do I have the right to know the HIV status of my rapist?
- I have slept with someone who is HIV-positive, but they did not tell me their status. Can I press charges against him or her?

The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 makes a significant contribution in protecting victims of sexual crimes – where the attacker is HIV-positive.

In terms of this Act, sexual penetration that is committed under false pretences or by fraudulent means is regarded as *prima facie* **unlawful**. If a person intentionally fails to disclose to the other person that he is infected by a life-threatening sexually transmissible infection, in which there is a significant risk of transmission of such infection to that person, then, in terms of the Act, he is acting under false pretences or by fraudulent means.

If a person wants to argue that the act was lawful, he will have to lead evidence to this effect and the court will presume that it was **unlawful** until he proves otherwise.

This means that if you have sexual intercourse with another person while you are aware that you are HIV-positive, then you could be charged with the criminal offence of rape if you did not inform the other person of your HIV-positive status.

The Act also provides that if the victim of a sexual offence has been exposed to the risk of being infected with HIV, then she may receive post-exposure **prophylaxis** at designated health establishments at state expense.

Prophylaxis is a treatment for preventing disease.

In addition, a victim of a sexual offence may apply to a magistrate for the compulsory HIV testing of an alleged sex offender. The results of this test will be disclosed to the victim and to the alleged offender.

The Criminal Law Amendment Act 105 of 1997 states that, if a rapist knows he is HIV-positive at the time of raping the victim, he will be sentenced to life imprisonment for the rape. An HIV-positive rapist will also find it more difficult to get bail if he is aware of his status at the time of the rape.

An **aggravating** factor makes the crime look even worse and will lead to the accused receiving a harsher sentence than if the aggravating factor had not been present.

Let's look at the following case studies.

Case study — The rapist

In *S v Nyalungu* [2005] JOL 13254 (T), the accused was convicted of rape and attempted murder. He had raped the complainant when already aware that he was HIV-positive. This offence resulted in the prescribed minimum sentence of life imprisonment.

In addition, where someone who knows she is HIV-positive commits a crime that exposes the victim to contracting HIV, this may be an **aggravating** factor in sentencing her.

Case study — Minimum sentence in terms of Act

In the case *of S v Kwanape* 2014 (1) SACR 405 (SCA), the court sentenced Kwanape to a minimum sentence of life imprisonment for the rape of a 12-year-old. One of the factors taken into account was his HIV-positive status at the time of the rape.

We have also had a successful civil claim for damages.

Case study The unlucky girlfriend

In *Venter v Nel* 1997 (4) SA 1014 (D), Venter claimed damages from Nel. She claimed that he had infected her with HIV. Nel did not choose to defend the matter and the court granted judgment against him in **default**.

The court granted Venter damages of R344 399,06 for past medical expenses, future medical expenses and general damages for reduction in life expectancy, psychological stress and pain and suffering.

Default means that Nel did nothing to defend the claim against him.

Read the article in the case study below and discuss the question that follows.

Case study Human rights violations contribute to spread of HIV

Human rights violations contribute to spread of HIV

By Amelia Vukeya Motsepe
Nov 23, 2016

The most prevalent view is that health is better addressed by medical practitioners and public health experts and, as such, health is not ordinarily seen as a legal matter.

The Global Commission on HIV and the Law, for instance, has documented the positive role that strong legal experts can play, specifically in addressing HIV.

There have been great advances in addressing HIV/AIDS in the past 21 years, however, despite all reported successes in the fight against the epidemic, HIV-related stigma and discrimination continue to undermine the efforts in prevention, treatment and care for people living with HIV all over the world.

Various studies show a link between HIV-related stigma and discrimination and delayed HIV testing, non-disclosure to partners and poor engagement with HIV services.

Good laws, fully resourced and rigorously enforced, can widen access to prevention and health-care services, improve the quality of treatment and enhance social support for people affected by the epidemic.

Strong civil society movements for social justice have played a significant role in ensuring that those infected have a right not to be discriminated against, a right to dignity and privacy, as well as access to healthcare.

The South African constitution enacted legislation, and the common law and policy is clear that no one can be discriminated against on the basis of their HIV status.

The law cannot remain on paper - it has to be implemented.

HIV is a daily reality for more than six million South Africans, therefore law professionals can – and must – play an active role in the fight against the epidemic by advising those who are infected and affected with HIV/AIDS.

The human rights violations also contribute to the spread of HIV.

Certain groups are more vulnerable to HIV infection because they are unable to realise their civil, political, economic, social and cultural rights.

For example, women, and particularly young girls, are more vulnerable to HIV infection if they are disempowered or lack access to information, education and services necessary to ensure sexual and reproductive health and prevention of infection.

Social conditions such as violence against women and harmful cultural practices still exist in South Africa and exacerbate inequalities, which in turn fuel the epidemic.

Strategies to respond to the AIDS epidemic and to prevent new HIV infections are hampered in an environment where human rights are not respected.

Again, the failure to provide access to education and information about HIV/AIDS, or

Case study (continued) Human rights violations contribute to spread of HIV

treatment, care and support services to groups such as asylum seekers, migrants, refugees and prisoners may further fuel the AIDS epidemic.

The stigma and discrimination surrounding HIV/AIDS can be as destructive as the disease itself.

People with HIV or AIDS continue to be the most vulnerable groups in our society.

There is therefore a need to challenge the denial and violations of human rights to address the spread of HIV.

If implemented properly, human rights can play a significant role in protecting, promoting and fulfilling human dignity.

The realisation of gender equality should also be a key factor in strategies that aim to reduce vulnerability to HIV infection.

To inhibit the spread of the epidemic, HIV-related programmes should address stigma and discrimination against those infected as well as the socioeconomic realities and socio-cultural norms that affect women, children and other marginalised groups.

As we approach World AIDS Day, promoting human rights in the context of HIV/AIDS is not only an imperative of justice to overcome existing forms of discrimination and intolerance.

It is also a tool to prevent the further spread of the epidemic.

It is clear that HIV/AIDS impacts not only on the physical health of individuals, but also on their social identity and this is what makes HIV/AIDS different from other fatal diseases.

Source: http://www.sowetanlive.co.za/news/2016/11/23/human-rights-violations-contribute-to-spread-of-hiv

1. The writer states that human rights violations are a contributing factor to the spread of HIV. What more, do you think, can be done in South Africa to prevent discrimination and human rights violations of people living with HIV/AIDS?

What do you think?

In this chapter, we have attempted to explore the various areas of life in which an HIV-positive person may experience discrimination. Can you think of any other areas where this could happen?

Chapter summary

In this chapter, we learned the following about HIV/AIDS and the law:

- Discrimination against HIV-positive people may lead to an infringement of their human rights in many areas of their lives.
- Testing someone for HIV without their consent or providing HIV-positive people with inferior health care is a violation of their health rights.
- Disclosing the status of an HIV-positive person without his consent is an invasion of his right to privacy.
- Discrimination against HIV-positive people in the workplace is a violation of their right to fair labour practices.
- HIV-positive people may find it difficult to get life insurance because their illness materially increases the risk of their early death.
- HIV-positive prisoners also have human rights that must be protected by allowing them access to adequate health care.

Review your understanding

1. What is meant by informed consent?
2. Discuss the duty of a health-care professional not to disclose a patient's HIV status.
3. Do you think that if someone is HIV-positive, this is a material factor to an insurance company deciding to insure that person's life? Give reasons.
4. May a person simply not include the fact that he is HIV-positive when he applies for life insurance?
5. You have seen in this chapter that HIV/AIDS is one of the most pressing problems facing South Africa currently. Do you think that the law has developed sufficiently to protect the rights of HIV-positive people? Discuss, giving reasons for your views.

Further reading

AIDS Consortium, www.AIDSconsortium.org.za
(This is the official website of the AIDS Consortium which was established by Justice Edwin Cameron. It aims to promote non-discrimination against people living with HIV/AIDS and to ensure that their basic human rights are protected.)

Treatment Action Campaign, www.tac.org.za
(This is the website of the Treatment Action Campaign, an organisation that campaigns for the rights of people living with HIV/AIDS. It contains policy statements of the organisation and information relating to current activism programmes being run by the organisation. It also contains court documents and judgments of cases relating to HIV/AIDS pursued by the organisation as well as containing links to other relevant websites.)

UNAIDS, www.unAIDS.org
(This is the official United Nations website dealing with HIV/AIDS. It contains useful information on the worldwide progress of the fight to eradicate HIV/AIDS.)

Section 27, www.section27.org.za
(This is the official website of the Section 27 organisation. This is a legal interest group which promotes substantive equality and justice for all South Africans. This website contains useful information on the progress of initiatives to prevent discrimination of people living with HIV/AIDS.)

Thinking about the law: jurisprudence

Chapter 24

The main ideas

- What is jurisprudence?
- The South African legal system and legal theories
- Legal positivism
- Natural law
- Other jurisprudential perspectives
- Are law and justice the same thing?

The main skills

- Discuss whether it is ever morally and/or legally justifiable to kill someone.
- Discuss South Africa's legal system under apartheid.
- Discuss the basic viewpoints of positive law theorists.
- Understand natural law and its variations.
- Compare natural law theory and the positivist approach to law.
- Respond to complex situations as a natural law theorist and then as a positivist.
- Recognise other schools of legal thought.

Apply your mind

From the earliest times philosophers and lawyers have grappled with the question whether a rule can be legal, legally applied and yet not be justified. Read the case of *In re Dube* 1979 (3) SA 820 (N). Is there a difference between law and justice? What do you think?

At the beginning of this book, we looked briefly at the purpose of law and at the two main legal philosophies, namely natural law theory and legal positivism. In the different branches of the law that we have studied, we have often seen how questions about the meaning and purpose of law arise. In this chapter, we return in more depth to this interesting subject.

In each chapter of this book, we have presented you with issues that you had to think about that went beyond the law as it is. Often, you had to think and argue about what is right and wrong, what should or ought to be done under the circumstances, or what is morally correct. You will have realised that no society can properly be understood or explained without a good understanding of its law and legal doctrine. This chapter is going to look at some of the social, moral and cultural foundations of the law and the theories that both shape and attempt to explain them.

Before you start

In 1963, the famous Afrikaans poet, Adam Small, wrote a poem, "What abou' de lo", that registered a strong protest against Apartheid laws. In this poignant poem, written in the Cape Afrikaans vernacular, the love story of Martin and Diana is narrated. In terms of the Population Registration Act, Act No. 30 of 1950, Diana was registered as a 'Coloured person' and consequently the Immorality Amendment Act, Act No. 21 of 1950, amended in 1957 (Act 23), made their relationship illegal. According to the poem, they ended up in prison where they eventually committed suicide. In the poem both families affected by the situation harped on the fact that the laws of the land made their relationship impossible and implied that the laws should be obeyed. Martin and Diana, however, questioned the legitimacy of the race laws

and asked whether the law applicable in their case was 'God's **lo**', in other words, natural law that can be morally defended, or whether it was 'man's law' and therefore merely dictated by the wishes of the law-makers. Martin and Diana clearly indicate their view that the positivist application of the unjust Apartheid laws indeed constitutes the 'devil's law'.

Lô refers to 'the law'.

Do you think that man's law should always be obeyed? Are there laws that need not and should not be obeyed? What are your views on laws that are immoral, racist or sexist? These are some of the issues that we are going to discuss in this chapter.

24.1 What is jurisprudence?

From the earliest times, people have asked questions about the nature of law, and as long as we exist, will continue to do so.

The word 'jurisprudence' comes from the Latin term iuris prudentia, which means 'the study, knowledge or science of law'. Jurisprudence is also often referred to as legal theory or the philosophy of law. Although the concepts are interchangeable, to keep things clear and simple, we are going to use the term 'jurisprudence' in this chapter.

There are different approaches, or schools of thought, on jurisprudence. These include ones that:

- seek to analyse, explain, classify and criticise specific areas of law – this approach sets out to determine what the law is, and why law exists and what its consequences are
- focus on what the law ought to be or what the ideal law would be like
- try to reveal the historical, moral and cultural basis of a specific legal concept
- contrast law with other fields of knowledge, such as economics, religion and the social sciences
- analyse legal systems to determine what the law is or ought to be.

Professor say — Jurisprudence can be complex

The way in which legal theorists or philosophers look at the law cannot always be traced back to a single, neatly defined school of legal thought. The jurisprudence of a particular legal scholar or philosopher may consist of a combination from many schools of legal thought. It is impossible to introduce you to all aspects of jurisprudence in such a brief chapter, so you should treat this chapter as an introduction to jurisprudence. For those of you who are interested, this chapter is informed by the excellent exposition by Raymond Wacks in his book, *Understanding Jurisprudence: An Introduction to Legal Theory*.

Read the following imaginary case study and answer the questions that follow.

Case study — Is eating a human ever justifiable?

On a regular flight of Africa Airlines, a plane from Johannesburg to Nairobi was lost from the radar screen just north of Zimbabwe. Sixty passengers were on board. It was not clear whether the aeroplane went down over the Equator or in Tanzania. In fact, the plane crashed into one of the peaks of Mount Kilimanjaro and only eight passengers survived. Several search parties were sent out at great financial cost and in terrible weather. They were also unsure of where to search. On the twentieth day of their ordeal, the remaining passengers decided that they could avoid death by starvation, if they killed and ate one of their group. It was proposed by Sharon Nama, one of the passengers, that the oldest survivor should be eaten. After considerable hesitation, this was accepted by the majority. The oldest surviving passenger was Rama Pillay, who was duly killed and eaten. The survivors were eventually rescued, and charged with the murder of Rama.

Case study (continued) Is eating a human ever justifiable?

Without thinking too much, give your instinctive or gut reaction to the problems raised in this example. Discuss this among yourselves in class.

1. Is killing and eating a human being ever morally justifiable or excusable?
2. Is it legally justifiable to kill and eat a human being in order to save one's life? Alternatively, is necessity a defence to the charge of murder?
3. Is there any connection between questions 1 and 2?
4. What kind of reasons are admissible, valid and appropriate in reaching, and justifying a judicial decision in a case such as this?
5. Should public opinion be taken into account in reaching and justifying such decisions?
6. Look at your answers again once you have worked through this chapter.

Professor says We want to make you think

When you did this activity, did you notice how people had different responses to the same problems? This is how it has been through the ages, as legal scholars and philosophers have thought about the law and the consequences of the law. You only need to think about the majority and minority judgments that are often given in the Supreme Court of Appeal or the Constitutional Court, to be aware that jurists could have different views on what the law is or should be. You will also have noticed that there is often a difference between the laws of various countries. We hope that, by exposing you to the different schools of thought on law in this chapter, you will start forming your own ideas on what the law is and should be.

In this chapter, we will look more closely at a number of jurisprudential approaches to law, as well as how these have developed over time. These include:

- schools of positivism
- schools of natural law theory
- other theories of law such as Marxist theory, legal formalism, feminist theories, legal realism and critical legal studies.

24.2 The South African legal system and legal theories

To work through the important views of legal philosophers we are going to look at the South African legal system. Throughout this book we have looked at how the law was applied in apartheid South Africa. To explain the different schools of natural and positivist theories of law, we shall use the South African legal system before and after the Constitution, 1996 to explain some of the most fundamental principles of these two theories.

Let us first look at how the legal system functioned during the apartheid era. South Africa followed the doctrine of parliamentary supremacy, which is a system that applies in many democracies. The doctrine was, however, based on an invalid notion of democracy. Although Parliament was elected democratically by the white population, it was not democratic in the true sense of the word, as 80% of the population had no vote. It was accepted that laws could be enforced by the courts despite the fact that they were discriminatory. Apartheid laws literally determined where one could live (Group Areas Act 41of 1950; Aliens Control Act 40 of 1973); whom you could live with or marry (Prohibition of Mixed Marriages Act 55 of 1949; Immorality Amendment Act 21 1950; Prohibition of Mixed Marriages Amendment Act 21 of 1968); where one could go (Black (Native) Laws Amendment Act 54 of 1952); where one could be educated (Extension of University Education Act 45 of 1959); and who could own property (Group Areas Act 77 of 1957). People who were not classified as white were removed from the common voters' roll (Separate Representation of Voters Act 46 of 51) and civil disobedience could be punished by three years'

imprisonment. The Reservation of Separate Amenities Act 49 of 1953 imposed segregation among the races and determined which public amenities and transport could be used by the different racial groups.

To maintain this regime and quash opposition to it, certain draconian measures were expressed in numerous Acts. Legislation enabled indefinite preventive detention and indefinite detention in solitary confinement for the purposes of interrogation. The validity of a detention order was not subject to court challenge. Ministers and Attorneys-General were given broad discretionary powers.

Attorneys-General could order that people who were arrested could be refused bail. Even a police officer could detain a person who was thought to be threatening public safety for a period of fourteen days. Only then was a magistrate's permission required to detain someone.

South African courts were frequently asked to enforce these laws. Many judges may have felt that these laws were not in accordance with their moral beliefs, but found justification in the notion of positivism, which means that when such a law is clear, it is the judges' duty to enforce it. They focused on what the law is (positivist approach) instead of what law is meant to be (a natural law approach).

Both judges and academics wrestled with the issue: What ought a judge to do where the law is morally indefensible? Certain views of legal theorists, such as Dworkin, played an important role in shaping arguments against the approach followed in the courts during the apartheid era.

Human rights are basic moral guarantees that are universally held, irrespective of whether these rights were recognised by Parliament and the courts. Based on the basic human rights (natural law) approach, it was argued that the black majority under apartheid had a human right to political participation, despite the fact that they had no legal right.

The Interim Constitution and the Final Constitution show how the new democracy of 1994 in South Africa made a clear break with the past. Section 1 of the Constitution, which contains the founding provisions, states:

> "The Republic of South Africa is one, sovereign, democratic state founded on the following values:
> (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
> (b) Non-racialism and non-sexism.
> (c) Supremacy of the constitution and the rule of law.
> (d) Universal adult suffrage, a national common voters' roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."

Throughout the Constitution the values of democracy, human dignity, equality and freedom are repeatedly asserted.

Section 7(1) states:

> "This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom."

It is against this background that we set forth and examine the different schools of legal thinking.

24.3 Legal positivism

In Chapter 1, we briefly dealt with the positivist approach to law. The word 'positivism' was probably first used to draw attention to the idea that law is 'positive' or 'posited', as opposed to being 'natural' in the sense of being derived from natural law or morality. Positivism developed in opposition to classical natural law theory according to which there are necessary moral constraints on the content of law.

If you look closely at the different schools of legal positivism, you will see that it is based on the following ideas:

- Laws are commands made by human beings.
- There does not have to be a connection between law and morals. Legislation need not be based on any moral norm. Where a law contains a moral norm, it is coincidental.

- In a legal system, correct decisions may be inferred or conclusions may be made from predetermined legal rules using logic alone. The judge should not allow his moral convictions to affect his legal decision-making.
- Moral judgments cannot be established by rational argument, evidence, or proof. Statements of fact can.
- One common factor among all those which are described as positivist is the belief that the law as laid down should be kept separate from the law as it morally ought to be. In other words, a clear distinction must be drawn between 'ought' (that which is morally desirable) and 'is' (that which actually exists).
- Positivists regard 'man's lô', as referred to in the poem at the beginning of this chapter, as important.

24.3.1 Early positivists

Jeremy Bentham's first book, published in 1776, was an attack on Blackstone's *Commentaries on the Laws of England*. Bentham (1748–1832) claimed that all laws, ancient and modern, should be evaluated according to the single ethical principle of utility or usefulness. He believed that a law was good or bad depending upon whether or not it increased the general happiness of the population.

According to Bentham, law is not based on natural law, but is simply a command that expresses the will of the authority or the **sovereign**.

A **sovereign** is the ruler of a country – usually a king or queen.

It follows that even a law that commands people to do morally evil actions, or that is not based on consent, is still law.

According to John Austin (1790–1859), positive law is a command by a sovereign and is backed up by punishment or sanction. Law need not be moral or ethical. Buckland summarised Austin's point of view as follows: "Law is law since it is made by the Sovereign. The Sovereign is Sovereign because he makes the law."

In his work *The Pure Theory of Law* (1968), Hans Kelsen (1881–1973) looked at the essential nature of law. Kelsen believed that the legal system is made up of a hierarchy of norms or 'what must be dones' rather than on any kind of morality. He proposed that there is a *Grundnorm* or **hypothetical** highest basic norm. This *Grundnorm* determines, or is the source of, all other norms and underlies all legal systems.

If something is **hypothetical**, it is based on a situation that is not real, but that might happen.

Wacks, on page 95 of *Understanding Jurisprudence: an Introduction to Legal Theory*, states that Kelsen's *Grundnorm*:

1. is enforceable through coercion or force,
2. is a logical presumption of society's legal awareness,
3. helps to give validity to a constitution and all norms in the system, and
4. enables lawyers to interpret all valid legal norms.

24.3.2 20th century positivism

One of the main philosophers of 20th century positivism was **H.L.A. Hart** (1907–1992), who believed in an absolute dividing line between law and morality. Although he agreed that throughout history, the law has been influenced by morals and that certain legal rules are indeed in accordance with specific moral or ethical principles, he argued it does not follow that for a legal rule or a legal system to be valid it has to comply with basic ethical standards.

Read **Hart's** article, 'Positivism and the Separation of Law and Morals'. 1958. *Harvard Law Review,* 593.

- If legal rules are morally wrong (such as the laws of the Nazi regime in Germany or the laws of apartheid South Africa, people cannot be expected to obey them. However, such rules are nevertheless part of positive law.
- Hart agrees that a legal system as a whole must comply with certain minimum standards. In the first place, this means that its laws should be related to the survival of citizens. So, for example, the laws must give people and property adequate protection. Secondly, there should be equality before the law and impartiality in the administration of justice.

- However, Hart concedes that it is true that a legal system may comply with these minimum requirements and, from an ethical viewpoint, still be completely offensive.

You can read Hart's article, 'Positivism and the Separation of Law and Morals', in the *Harvard Law Review* of 1958. In *The Concept of Law*, Hart expanded on the subject and outlined the following basic principles that underlie what he called the 'minimum content of natural law'.

- The reason for legal rules is to protect human life and the body. This is the minimum element of a legal system before its rules are worthy to be called 'law'.
- The individual differences between people are not so great that one person can dominate and suppress other persons for an indefinite time. This principle of 'approximate equality' means that both in the case of morality and law, there should be what he calls 'mutual tolerance and compromise'.
- Because human beings are not always **altruistic** when it comes to the survival and welfare of their fellow human beings, their selfishness has to be limited by legal rules.
- Because the necessities of life, such as food, clothing and housing, are quite scarce, the right of ownership in some form (not necessarily private ownership) has to be protected. When distribution of labour occurs, the exchange of goods has to be based on the principle that agreements must be honoured.
- As there are always people who want to have the benefits of an ordered society without subjecting themselves to the obligations required from them, it becomes necessary to use sanctions to force or compel those who don't want to accept authority in order to protect those who do. This is the principle of 'limited understanding and strength of will'.

If someone is **altruistic**, she puts the needs of others above her own needs.

Hart denied that the minimum conditions mentioned here imply that there is a connection between law and morals. He did, however, concede that moral content could be 'incorporated' into the law as a result of legislative or judicial adoption. His theoretical perspective, being different from positivism, is often referred to as 'soft' positivism.

24.4 Natural law

In the scenario of the **cannibals** on Kilimanjaro, which was discussed in the case study at the beginning of this chapter, some of you may have felt that it is morally wrong for a human being to eat another human being. Some of you may have argued that it was morally defensible to kill and eat the eldest member of the party in those circumstances. You should also have been asking yourself whether, if it is morally wrong, it is necessarily also legally wrong? What about racism or sexism: are these morally and legally wrong? What was morally or legally wrong with apartheid legislation? These are the kinds of questions that interest natural law theorists.

A **cannibal** is a person who eats human flesh.

According to natural law legal theory, the authority of legal standards is always supported by moral principles. Go back to Chapter 1 and revise your general understanding of the natural law theory. Once you have done this, you should be ready to look at what some of the leading natural law theorists have to say in more detail.

For our purposes here we shall focus on natural law that relates to the proper understanding of law and legal institutions. Natural law thinking has been around for thousands of years, but we shall focus on recent work on natural law theory as opposed to positive law. What most natural law theorists do have in common is that values are objective and accessible to human reason. In earlier ages many people associated natural law with religious belief. This is evident in the views of early natural law theorists. Therefore one can say that natural law refers to 'God's lô' in the poem about Martin and Diana at the beginning of the chapter. However, most important writers within this tradition no longer associate natural law with religion.

In modern times natural law theory became topical not only as a result of the atrocities committed in Germany during the Second World War, but also the debate between H.L.A. Hart (1907–1992) and Lon Fuller (1908–1978) conducted in the pages of the *Harvard Law Review* of 1958.

Professor says The Fuller-Hart debate

In our discussion on positive law we were introduced to H.L.A. Hart. The legal theorist, Lon Fuller, criticised legal positivism on the following grounds:

Legal positivism treats law as an object of study whereas the law can be understood better if it is seen as a process or function. To Fuller, law is a human project and its implied moral goal is to achieve coexistence and cooperation within society. Law as a process is contrasted against the positivist view that law is to achieve the objectives of the lawmakers.

Positivism assumes that the existence or non-existence of 'law' in society is a matter of moral indifference. Fuller argues that these assumptions are false. He contends that a sound legal system is a minimum requirement for a living a good life

Positivism regards laws as a 'one-way projection of authority' with the one party giving the orders and the other obeying them. This positivist view, according to Fuller, is a basic misunderstanding, as most legal systems depend on reciprocity of duties between citizens and lawmakers. According to Fuller, law can only work if citizens and officials cooperate, each fulfilling his or her own functions. Officials promise to enforce the rules as contained in legislation and to make reasonable and consistent demands on citizens. If these officials should breach these obligations, society will deteriorate.

Fuller also reflected on the connection between law and morality. He explained the connection, or overlap, between law and morality in terms of the story of King Rex, a fictional character. He uses this fable to show us that immoral laws are usually bad laws and *vice versa*. King Rex, by breaching inherent moral requirements of law, failed to make law in the following eight ways:

1. He decided every issue on the facts of the particular case. In other words, King Rex did not look at previous case law, and nor did he apply rules of precedent.
2. He did not publicise or at least make available the rules that his citizens were expected to obey.
3. He abused retroactive legislation, which means he passed legislation that made a person's past conduct criminal, even though the conduct was not an offence at the time it was committed.
4. He did not make understandable rules.
5. He made contradictory rules, so that the citizens did not know which law applied.
6. He made rules that couldn't be followed.
7. He changed the law so much that no one was certain what it was and nor could they obey it.
8. He did not enforce the law in the way he said he would. In other words, there was a difference between what the law said and how it was enforced.

According to Fuller, every one of King Rex's actions was not only illegal, but also immoral, because they ignored the fundamental moral qualities of law.

Activity 24.1

Look back to Chapter 1 and the factors that contribute to a proper functioning legal system. Are there any corresponding factors between the factors discussed there and Fuller's factors set out above.

Ronald Dworkin (1931–), with his theory of natural law, is the philosopher who has had the most influence on South Africa's legal system. He rejects a strict separation between law and morality and believes that a moral evaluation is a necessary part of determining the content of the law.

According to Dworkin, legal systems embody or consist of rules, principles and policies. The following is an example of a legal rule: 'Traffic rules must be obeyed'. Such rules are often contained in

legislation. According to Dworkin, law does not exclusively consist of rules. A principle is "a standard that is to be observed, not because it will advance or secure an economic, political or social situation, but because it is a requirement of justice and fairness or some other dimension of morality. One should not discriminate against anyone based on race" but because it is required by an objective normative value system, not found in precedents or legislation. A policy, on the other hand, is "that kind of standard that sets out a goal to be reached, generally an improvement in some economic, political or social feature of the community." An example is South Africa's land redistribution policy.

Dworkin is in favour of so-called landmark judicial decisions, where the outcome of a case may be contrary to precedent, but in the interests of justice. In his book, *Law's Empire*, Dworkin supports an interpretive approach to law (which is referred to as 'law of integrity'), which means that judges should look not only at the literal meaning of laws, but should also try to interpret the purpose of laws. According to Dworkin, when a judge makes a decision he or she should aim for that ruling that fits best with the entire body of legal materials. In a matter that involves speeding it is easy to determine that someone driving at 120 km/h in an 80km zone without justification or an excuse is guilty of an offence. When cases are 'hard' the judge should aspire to make the adjudication the best it can be. It is based on principle and recognizes only principles that satisfy some minimum threshold of moral appeal. Apartheid legislation was either arbitrary exercises of power or based on the view that black people were not equal to white people, a principle that could not be held to meet the moral threshold requirement.

Dworkin's 'equal concern' is a precondition for political legitimacy and without it 'government is only tyranny'. In the legal system of the pre-constitutional dispensation this was the case, but the Constitution has brought clear change in that one of the founding values is 'the achievement of equality'. The Constitutional Court judgment in *Carmichele v Minster of Safety and Security* 2001 (4) SALR 938 (CC) par 54) clearly reflects that the Constitution contains an objective normative value system.

Dworkin's work, with its emphasis on a moral reading of the Constitution, has been cited by judges of the Constitutional Court.

Activity 24.2

Read the following cases and look specifically at the paragraphs mentioned below. Indicate whether and to what extent the legal approach of Dworkin influenced these decisions.

- *Case v Minister of Safety and Security* 1996 (2) 617 (CC) para 23 fn 34, para 26 fn 37and para 45 fn 76
- *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SALR 6 (CC) para 133 fn 45
- *S v Makwanyane* 1995 (3) SALR 391 (CC) para 330
- *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) para 55.

24.5 Other jurisprudential perspectives

We will now briefly read of some other perspectives on law that you might come across in your legal studies. These include:

- Marxist theories of law
- legal formalism
- feminist legal theories
- legal realism
- critical legal studies.

24.5.1 Marxist theories of law

All Marxist theories of law are based on a reworking of a number of general themes present in **Karl Marx's** own writing and in subsequent Marxist approaches to law. According to the Marxist theories of law, law is nothing more than an ideology which is legitimised by class power.

Karl Marx was a philosopher, social scientist, historian and revolutionary. He lived from 1818 to 1883.

1. Law cannot be separated from the political. Law is a form of politics.
2. The law and the state are closely connected.
3. The law gives effect to the prevailing economic relations. In other words, if a system is based on free enterprise, for example, laws will support and reflect it.
4. Law always has the potential to be coercive.
5. The content and procedures of law directly or indirectly serve the interests of the dominant class or classes.

24.5.2 Legal formalism

Legal formalism as a school of thought looks at the way in which judges come to their decisions. According to legal formalists, the law should limit judges with regard to the interpretation of legal texts. They argue that judges must keep to what the law says, instead of what the law should be. Normative decision-making, proposed by the natural school tradition, violates the principle of a separation of powers.

24.5.3 Feminist legal theory

The 1960s saw the rise of feminist legal theory. According to this theory, the law has traditionally been used to subordinate women. Feminist legal theory entails that because men hold a socially and economically dominant position over women, the law, even if it appears to be neutral between men and women on the surface, may be biased in favour of men. The movement seeks to change women's status through reforming the law. In South Africa, the constitutional dispensation has brought about considerable change in this regard.

Activity 24.3

Refer to South African Law Commission projects that have specifically focused on improving the position of women in South African law.

24.5.4 Legal realism

In the course of your studies, you may also come across the school of legal realism. *Legal realism* refers to an intellectual movement in the United States that was formed around a group of law professors and lawyers in the 1920s and 1930s. They included **Karl Llewellyn**, **Roscoe Pound** and **Jerome Frank**. Legal realists claim to take a realistic look at how judges decide cases. What judges really do, according to the realists, is decide cases according to how the facts of the cases appear to them, and not because legal rules require particular results; judges are largely 'fact-responsive' rather than 'rule-responsive' in reaching decisions.

Karl Llewellyn was a professor of law at Yale Law School, USA. **Roscoe Pound** was a professor of law at Harvard Law School. **Jerome Frank** was a legal philosopher and judge of the United States Court of Appeal.

How a judge responds to the facts of a particular case is determined by various psychological and sociological factors, both conscious and unconscious. The final decision, then, is the product not so much of law (which generally permits more than one outcome to be justified) but of those various psycho-social factors, ranging from the political ideology to the personality of the judge.

24.5.5 Critical legal studies

Critical legal studies is a movement in legal scholarship associated with the Conference on Critical Legal Studies, an organisation that was started by a small conference at the University of Wisconsin in 1977.

By the early 1990s, the movement had come to influence the work of an enormous number of legal scholars, particularly in the fields of legal and constitutional theory. As an intellectual movement, critical legal studies combines the concerns of legal realism, critical Marxism, and **structuralist** or post-structuralist literary theory.

Structuralism assumes that there are structural relationships between concepts and that they can vary between different cultures or languages and that these relationships should be explored for gaining insights into certain fields.

24.6 Are law and justice the same thing?

Throughout the history of jurisprudence, thinkers have explored the connections between law and justice and have shown how the law has often been used unjustly. Despite this, most of us would agree that the law exists to ensure justice and that it should do so.

In the West, justice has been portrayed as the blind-folded, Roman goddess Justitia, holding the scales of justice in one hand and a sword in the other. She is blind-folded because her decisions should be impartial. Her sword symbolises that effective justice is supported either by punishment (in criminal disputes), or compensation (in civil matters). Her scales indicate that both sides to a dispute should be heard and balanced against one another. But what do philosophers suggest about the legal system and therefore also justice?

Read the case study on the balance between law and justice and answer the questions that follow.

Figure 24.1 The Roman goddess Justitia is Lady Justice.

Case study The difference between law and justice

In the case of In re Dube 1979 (3) SA 820 (N), Didcott J's judgment reads as follows: "Review of a decision of a commissioner of the Department of Plural Relations and Development. The facts appear from the reasons for judgment.

Judgment

DIDCOTT J: If you happen to be a male 'Bantu', to use the terminology still found in the legislation, you are governed by the Bantu (Urban Areas) Consolidation Act 25 of 1945 as amended from time to time. Your unemployment is not held against you if you are younger than 15, or as old as 65, or a pupil or student at an educational institution, or someone *bona fide* engaged in an officially approved business, trade, profession or 'other remunerative activity', or a registered workseeker who has had no offer of lawful employment for 122 days. Otherwise, however, it is, and your 'idleness' is beyond question. It does not matter whether you actually need work and its rewards. Perhaps your family supports you adequately and is content to carry on doing so. That does not count. The section says so in as many words. Nor apparently do any other lawful means you may be fortunate enough to have.

An official who has reason to believe that you belong to the class of 'idle persons' may arrest you at any time and in any place outside a special 'Bantu' area. You are then brought before a commissioner of the Department of Plural Relations and Development. He calls on you to give a 'good and satisfactory account' of yourself, whatever that may be. Unless you do manage to do so, he formally declares you to be an 'idle person'. Nobody is required to prove that you match the definition. You must prove you do not.

Once you are officially 'idle', all sorts of things can be done to you. Your removal to a host of places, and your detention in a variety of institutions, can be ordered. You can be banned forever from returning to the area where you were found, or from going anywhere else for that matter, although you may have lived there all your life. Whatever right to remain outside a special 'Bantu' area you gained by birth, lawful residence or erstwhile employment is automatically lost.

Perhaps you have never broken the law in your life, or harmed anyone, or made a nuisance of yourself by your activities or the lack of them. To complete our example, let us take that to be so. It makes no difference.

When the commissioner has finished with you, the papers in your case go on review to a Judge of the Supreme Court. He is expected, if everything is in order, to certify that what happened to you appears to him to have been 'in accordance with justice'.

Case study (continued) The difference between law and justice

The trouble is that it was not. It may have been in accordance with the legislation and, because what appears in legislation is the law, in accordance with that too. But it can hardly be said to have been 'in accordance with justice'. Parliament has the power to pass the statutes it likes, and there is nothing the Courts can do about that. The result is law. But that is not always the same as justice. The only way that Parliament can ever make legislation just is by making just legislation. (Meintjes vd Walt, 2017)

I have before me the case of Jabulani Sydney Dube, an 'idle person' by decree. The commissioner consigned him to a farm colony for two years, and suspended the order on condition that he either got employment within 30 days or left Durban of his own accord within 35 days.

Dube is 24. He lives in Lamontville with his mother. Welfare funds support him. He is not a registered workseeker. Nor has he worked for some years. He would like to, so it seems. He is, however, an epileptic who suffers from frequent fits. One has not only his word for it. The district surgeon, having examined him, says the same, and adds that he is fit for nothing but light duties. He needs constant medication. King Edward VIII Hospital gives him pills and injections regularly.

The question is whether Dube is capable of being employed. If he is not, he falls outside the section altogether. That, in my opinion, is indeed the case. In the ordinary sense, he is not capable of being employed. He can tackle only special work of a sheltered kind, and none seems to be available. This, at any rate, is what I infer. The commissioner specifically instructed an inspector to find such employment for him. There is nothing to suggest that the inspector succeeded, and it looks unlikely that he did.

The proceedings were therefore contrary not only to justice, but to the Act as well, with the result that, on this occasion at least, it is possible to apply the Act and to do justice simultaneously.

The declaration stamping Dube an 'idle person' is set aside. So is the consequent order for his removal to, and detention in, a farm colony.

MILNE J concurred."

1. Make a list of all the absurdities contained in the Bantu (Urban Areas) Consolidation Act 25 of 1945.
2. If this Act existed today, would it be constitutional?

Didcott J (as he then was) illustrates not only the 'absurdity' of the statute in question, but also makes the point that the content thereof may be a law of the land, but that that does not necessarily imply justice. The case also shows that most of the laws enforced by the courts during apartheid were done on the basis of legal positivism.

Therefore, justice is either the standard behind the law (natural law) or is found in the law itself (legal positivism) Several philosophers describe justice in terms of that which obliges a person to do or not do something that concerns another.

Supporters of natural law believe that there was law even before there were states, and that law is based on a natural right to render to each his due, that it can be known by pure reason and that that which is not right is not law.

The positive theorists suggest law is the product of the state, independent of justice and that conformity is obligatory because of the need for an orderly society. The command of the sovereign power is enforced by the sovereign power's ability to impose sanctions. If you were to revise all the different

points of view on law and justice that you have been exposed to, there are certain basic elements that are said to be the characteristics of law and justice. These are that:

- like persons should be treated alike without reference to race, ethnicity, economic status, gender or social status
- the judicial process should protect the needy and easily exploited classes of society,
- justice is established in terms of just rulers and judges and proper rules that society will follow
- applications under one interpretation of law may be just but under another interpretation of law may be unjust.

Activity 24.4

If you could design a logo or emblem that reflects your idea of justice, what would it look like?

What do you think?

Due to high crime and a rising number of violent contact crime in South Africa, many believe that the death penalty should be brought back. Others believe that there should, instead, be greater efficiency of law enforcement agencies so that the evidence against those accused of murder and other violent crime will stand up in court and more murderers would be convicted.

If the death penalty were to be brought back because citizens in South Africa voted in favour of it, how would that impact on the natural law theory put forward by Dworkin?

Chapter summary

In this chapter, we have explored the following about jurisprudence, which is the theory, or philosophy, of law:

- There are different schools of thought in jurisprudence and these have evolved over time.
- The two principal schools of thought in jurisprudence are natural law theory and legal positivism.
- According to natural law theory, the authority of legal standards is supported by moral principles.
- Early natural law theorists generally referred to God as the source of natural law.
- Others have argued that law is based on a social contract in terms of which people give up certain natural freedoms in exchange for an orderly society.
- According to natural law legal theory, the authority of legal standards is supported by moral principles.
- There are a number of different kinds of natural law theories of law. They differ from each other on the role that morality plays in determining the authority of legal norms.
- In earlier ages, natural law was associated for many with religious belief.
- Most modern natural theorists within this tradition no longer associate natural law with religion.
- Fuller's criticism of positivism is found in the so-called Fuller-Hart debate.
- Fuller and Dworkin are some of the modern natural law philosophers that have influenced the current legal dispensation in South Africa.
- According to positivist theories of law, there is no necessary connection between law and morals.
- Legal theory includes a number of other schools of thought, including Marxist theories of law, legal formalism, feminist legal theory, legal realism, and critical legal studies.

- Historically, law and justice are meant to mean the same. The basic elements of law and justice are as follows:
  - Unjust and immoral laws do not achieve justice.
  - Justice should be dispensed impartially.
  - All persons should be treated alike before the law.
  - Justice is achieved where the poor and the weak are protected by law.
  - Justice is achieved through fair government and fair judges.
  - Laws must be interpreted to achieve fairness and therefore justice.

Review your understanding

1. Which legal theoretical approach was followed by the South African government and judges during apartheid?
2. Briefly explain the basic principles of Dworkin's views of a unjust legal system.
3. Fuller uses the hypothetical character King Rex to demonstrate all the wrong ways to make laws. What are they?
4. Mention five characteristics of positivist law.
5. What is a Marxist approach to law?
6. Divide the class in two. One half argues in favour of a new bill that has been tabled in Parliament and the other half debates against the contents of the bill. The bill determines *inter alia* that:
   a) Any state agency, government department, even a parastatal and your local municipality, can classify public information as secret.
   b) Anything and everything can potentially be classified as secret at official discretion if it is in the 'national interest'. Even ordinary information relating to service delivery can become secret.
   c) Commercial information can be made secret.
   d) The disclosure of information that is not even formally classified can land citizens in jail.
   e) Whistleblowers and journalists could face more time in prison than officials who deliberately conceal public information.
   f) The Minister of Intelligence is to be the arbitrator of what information across all government departments must remain secret or may be disclosed to the public.

Further reading

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