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Drafting pleadings, notices and applications

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10.1 Introduction

The drafting of pleadings and other court documents is probably one of the most difficult skills that legal practitioners must acquire. The art of drafting pleadings has been described as follows:

> The drawing of pleadings is an important part of the art of the advocate and the attorney and is an ability which is acquired and perfected only after years of experience. To set down in clear, concise and lucid form the distilled essence of a plaintiff's cause of action or of a defendant's defence is of the essence of the art. It requires a clear conception not only of the client's case but also constitutes a searching test of the pleader's knowledge of the law involved.[1]

When setting out to draft a pleading, it is important to bear in mind the three basic reasons for pleading, namely:[2]

- ☐ to inform the parties of the legal and factual issues;
- ☐ to inform the court of the issues and the scope of the dispute; and
- ☐ to place the issues on record.

This chapter aims to develop applied competence in drafting skills.[3] Not only is

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1 The late Mr Harry Snitcher, as quoted in the prolegomenon to the fifth edition of Harms (1999) *Amler's precedents of pleadings*.

2 See *King v King* 1971 (2) SA 630 (O).

3 In this chapter, the author refers to the Supreme Court Act and Uniform Rules 59 of 1959 as "the High Court Act and Rules", and to the Magistrates' Courts Act and Rules 32 of 1944 as "the Magistrates' Court Act and Rules". The following sources could be used for further referencing purposes: Eckard (1990) *Principles of civil procedure in the Magistrates' Courts*; Jones and Buckle *The civil practice of the Magistrates' Courts in South Africa Vol I, The Act* 9 ed (revised Jones and again Erasmus and van Loggerenberg 1996); Jones and Buckle *The civil practice of the Magistrates' Courts in South Africa Vol II, The Rules* 9 ed (revised Jones and again Erasmus and van Loggerenberg 1996); Pretorius (1985) *Burgerlike prosesreg in die Landdroshowe* vol 1 and 2; Rose (1992) *Pleadings without tears – A guide to legal drafting*; Sime (1994) *A practical approach to civil procedure*; Van Blerk (1998) *Legal Drafting: Civil Proceedings*; Van Winsen, Eksteen, Cilliers, Herbstein and van Winsen (1979) *The civil practice of the superior courts in South Africa*.

foundational knowledge about the subject of paramount importance, but alsc practical and reflective competence in order to attain applied competence. This chapter provides practical assistance in the drafting of pleadings, notices anc applications. It draws attention to the relevant court rules and refers to some important case law dealing with these provisions. Most importantly, the chapter provides the basic rules and principles that must be considered when approaching the task of drafting.

10.2 Important terms and concepts

10.2.1 *Pleadings*

A pleading is a court document used in action proceedings.

Only certain court papers are called "pleadings". A pleading is a court document used in action proceedings.[4] It contains the material facts pertaining to a party's claim or defence to a claim. The pleading itself does not constitute proof or evidence of the allegations it contains, but merely lists the statements that a litigant intends to prove at the hearing of the matter, or which a litigant places in dispute. Rule 18 sets out the basic rules relating to all pleadings in the High Court. The following documents are considered to be pleadings:

- ☐ the summons (including the particulars of claim in the case of the combinec summons);
- ☐ the plea;
- ☐ the counterclaim;
- ☐ the reply/replication;
- ☐ the plea to the counterclaim; and
- ☐ any amendments to any of these documents.

10.2.2 *Notices*

Notices feature in both action and application proceedings. Whether a cour document is a notice and not a pleading is usually indicated in the relevant rule itself. For example, Rule 19 of the High Court Rules deals with a "Notice of Intention to Defend" which clearly is a notice. Rule 21, which deals with "Further Particulars", provides that a party may "deliver a notice" calling upon the other party to furnish certain further particulars. Often, the rules of court prescribe standarc forms for use for various notices, which should be followed as closely as possible If no prescribed form exists for a particular notice, drafters should use the basic format of any notice and adapt it as may be required, by following the actua wording of the relevant rule as closely as possible.

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4 See para 10.4.4 below on a description of action proceedings and how it differs from motion proceedings.

10.2.3 *Applications*

Applications (or motions) typically consists of a Notice of Motion (in the prescribed form[5]) supported by an affidavit. The Notice of Motion is similar to a summons, in that it sets out the details of the parties, the court in which the matter will be heard and the relief sought. Unlike a summons, the Notice of Motion does not contain a list of statements on which the case is based. Instead, supporting affidavits are attached to the Notice of Motion which serves as the motivation for the relief sought. Affidavits contain evidentiary matter placed before the court on oath, and as such are admitted as evidence. Applications are usually decided on the papers only, after hearing oral argument from the parties. It therefore differs materially from the action procedure, which entails the presentation of *viva voce* evidence before the court.

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10.3 General approach to drafting

10.3.1 *Know the facts*

As the drafter, you should familiarise yourself with the all the relevant facts of the case by conducting proper consultations, interviewing witnesses and scrutinising all affidavits, statements, plans, photographs, expert opinions, or other available material. You should critically analyse all the facts, identify improbabilities, gaps or inconsistencies, and canvass these fully with clients. Never embark on drafting court documents unless you are absolutely clear on the facts.

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10.3.2 *Know the applicable law*

Next, you should research the applicable law bearing in mind the specific problem at hand. Research must be conducted on the substantive law relating to the matter, as well as relevant aspects of the law of evidence and the law of civil procedure. You should establish the legal nexus, consider the available defences and consult the opinions of academic writers where necessary.

10.3.3 *Apply law to facts*

Your research should be followed by an analysis and application of the law to the facts at hand. At this point you should be able to advise your client on the appropriate legal strategy. Only after having completed this process should you embark on the drafting task. Always ensure that whatever you are drafting is in accordance with your client's instructions.

10.3.4 *Precision*

It is important to set out the issues in pleadings with such particularity so that the dispute will be clear to all parties concerned. Bear in mind the three rules of

5 See Form 2 and 2A of the High Court Rules and Form 1 of the Magistrates' Court Rules.

written communication, namely clarity, organisation and presentation. Pleadings, notices and applications must be absolutely precise and correct. If not, you and your client may later have to amend your papers and may suffer embarrassment and adverse cost orders. The law consists of various fields of speciality which are often very technical. This may require the use of *sui generis* legal terminology. You must, however, carefully consider each statement that you make in a court document. You should question the purpose of each statement, its formulation and whether it supports the results you wish to attain. Each statement should be unambiguous, clear and concise.

10.3.5 *Proof*

There must be a reasonable possibility to prove all statements made in court documents. This does not mean that you have to believe in the truth of the evidence available to prove the allegations. It is sufficient that you do not know the evidence to be false. It is also sufficient that you believe in the possibility of favourable inferences being drawn by the court, based on the available evidence.

10.3.6 *Relevancy*

One of the basic rules of drafting pleadings is that you should include only facts which are strictly relevant.

One of the basic rules of drafting pleadings is that you should include only facts which are strictly relevant. In drafting pleadings, "relevant facts" are generally considered to be only those that constitute the cause of action (the *facta probanda*) and not those that tend to prove the relevant facts (the *facta probantia*). Over the years, some important rules were developed in this regard.[6] These include the following: do not plead the law or evidence (*facta probantia*); only plead evidence when an inference is sought to be drawn by the court; and only mention the history of the matter by way of introduction, not to strengthen the cause of action.

In general, a pleading must contain two principal concepts: first, the allegations of facts which constitute the party's case and second, the conclusions of law which flow from those facts. A conclusion may be very simple, for example "Thus the Defendant is obliged to pay the said sum to the Plaintiff". You should plead the facts and conclusions separately. Although you should not plead the law, you may in the heading of the pleading refer to the relevant rule of court.

In application proceedings, relevancy is also very important. Although affidavits should (contrary to pleadings) contain all evidentiary matter needed to prove the case, litigants must never burden the court with unnecessary material or information. Similar to drafting pleadings, you should not include legal arguments in affidavits, as it will not serve to promote your case. Legal argument is formulated in heads of argument and presented in court at the hearing of the application.

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6 *Ahlers v Snoeck* 1946 TPD 590, *Du Toit v Du Toit* 1958 (2) SA 354 (D) and *Union Free State Mining and Finance Corporation v Union Free State Gold and Diamond Corporation* 1960 (4) SA 547 (W).

10.3.7 *Duty to disclose*

Litigants (and their legal representatives) must disclose all relevant facts, even facts that may prove to be fatal to their cases. As a legal practitioner, this duty to disclose (subject to legal professional privilege) overrides your obligations to your client.[7] In motion proceedings, this duty is even more important, as affidavits are not subject to cross-examination and the court relies heavily on the oral arguments presented by the legal representatives of the parties. In *ex parte* applications, the court only hears argument on behalf of one party, and for this reason the utmost good faith is required.

10.4 Prior considerations

10.4.1 *Cause of action*

Prior to putting pen to paper, you have to establish the cause of action.

Prior to putting pen to paper, you have to establish the cause of action or the nexus. This means you must identify the cause of action (*causa*) that supports your case. For example, you should be absolutely clear on whether your client's case is based in contract, delict or the law of negotiable instruments. Sometimes there may be overlaps, for example where you can sue either on contract or on delict. In this event, you should either make a choice as to which cause of action is the most likely to succeed; or, where appropriate, you should plead both causes in the alternative. You should also establish if principles of other legal categories may apply.

10.4.2 Locus standi

You have to distinguish between natural and juristic persons.

The legal capacity of the parties must be apparent from the court papers. You have to distinguish between natural and juristic persons and in either event determine the extent of their capacity in your particular matter. For example, consider whether your client is acting in a personal capacity, as an executor of a deceased estate, or as an agent on behalf of a principal. Once you are clear on the client's capacity, make sure if and to what extent your client has *locus standi* in that capacity, for example, a minor child may not sue unless assisted by his/her parent or guardian. Likewise, persons married in community of property must obtain their spouse's written consent to institute legal action in certain circumstances.[8]

10.4.3 *Jurisdiction*

The plaintiff or applicant must allege and prove the facts necessary to establish that the court has jurisdiction in the matter and over the person of the defendant/

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7 See eg *Barlow Rand t/a Barlow Noordelike Masjinerie Maatskappy v Lebos and Another* 1985 (4) SA 341 (T) where an attorney made an admission of certain allegations, whilst knowing them to be false.

8 See s 17(1) of Act 88 of 1984.

respondent. A court's jurisdiction may be based on substantive jurisdiction (jurisdic tion in respect of the cause of action), monetary jurisdiction (jurisdiction in respec of the amount of money involved), or geographical jurisdiction (jurisdiction i respect of the location of the defendant).

There are various principles that may have a bearing on jurisdiction, for exam ple: the principle of effectiveness; the principle of consent; the principle of *acto sequitur forum rei*, and the unique position of the *peregrinus* defendant in our law In specific cases, particular rules may apply in respect of jurisdiction. In divorc matters, for example, the court in the area where the plaintiff is domiciled wi have jurisdiction. When dealing with a company or close corporation as a defen dant, a court may have jurisdiction by virtue of the fact that the company's regis tered head office is situated within the area of jurisdiction of the court.

Section 19 of the High Court Act sets out the persons over whom and matter in relation to which provincial and local divisions have jurisdiction. It is acceptabl in the ordinary course of events for one not to make any specific allegation con cerning jurisdiction, provided that the underlying facts establishing jurisdiction ar set out.

In the Magistrates' Courts, the summons must set out the facts establishing tha the specific court has jurisdiction over the defendant and the cause of action. Ir this regard, you should consult sections 28, 29 and 46 of the Magistrates' Courts Act.

10.4.4 *Choice of procedure (action or motion)*

Once you have decided which court to approach, you must consider the type of proceedings to institute, meaning either the action or the motion/application procedure. Choosing the appropriate procedure is very important, as the wrong decision may result in your client's claim to be dismissed and adverse cost orders made.

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The table below sets out the most important differences between the action anc the motion/application proceedings:

Action	Motion/Application
1. Parties are called plaintiff and defendant	1. Parties are called applicant and respondent
2. Deals with substantial factual dispute	2. Deals with a factual dispute that is of such a nature that it can be dealt with "on the papers" before the court[9]
3. Commences with the issuing of a summons by the plaintiff	3. Commences with the issuing of a notice of motion and supporting founding affidavit by the applicant

continuec

9 *Room Hire v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T).

Action	Motion/Application
4. Further pleadings are exchanged by the parties, namely: – defendant's plea and counterclaim; – plaintiff's reply to defendant's plea; and – plaintiff's plea to defendant's counterclaim	4. Further affidavits are exchanged, namely: – opposing affidavit; and – replying affidavit (if applicable)
5. After the exchange of pleadings, a stage called "preparation for trial" follows. Certain preparatory steps are then taken, such as discovery of documents and expert notices	5. There is no procedural "preparation for trial" stage
6. The action procedure ends in the trial court where mainly oral evidence by the parties and their witnesses is presented	6. The motion procedure ends in the motion court. In principle, no oral evidence is presented and the parties do not testify. The case is argued by their legal representatives on the "papers before the court"

The *locus classicus* with regard to the choice between the action or motion proceedings is *Room Hire v Jeppe Street Mansions (Pty) Ltd.*[10] This case also deals with the consequences of choosing the incorrect procedure. A key consideration in making the choice is determining whether or not a dispute of fact will arise in the proceedings. If such a dispute is likely to arise, it will mean that oral evidence may be required, meaning that the action procedure will be appropriate. The *Room Hire* case indicates that a dispute of fact is likely to arise in one of the following four instances:

A key consideration in making the choice is determining whether or not a dispute of fact will arise in the proceedings.

- ☐ where the respondent denies all the substantial allegations made by the various deponents on behalf of the applicant and furnishes positive evidence to the contrary by deponents or witnesses who testify on behalf of the respondent;
- ☐ where the respondent admits the allegations, or the accuracy of the evidence, in the applicant's affidavit, but raises other facts which in turn are denied by the applicant;
- ☐ where the respondent concedes that he has no knowledge of the main facts alleged by the applicant, but denies it altogether and orders the applicant to prove the allegations. The respondent will then take it on himself to furnish evidence to indicate that the applicant and his/her deponents or the facts they have presented are prejudiced or are not credible or reliable;
- ☐ where the respondent indicates that he can present no evidence by himself or by other persons to dispute the truth of the applicant's allegations which are peculiarly within the applicant's knowledge, the respondent may insist on the proof thereof by requesting the submission of oral evidence subject to cross-examination.

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10 *Supra* fn 9.

The combined summons in the High Court is a more detailed summons which, from the outset, contains complete particulars of claim. It is used in cases such as divorce actions, damages claims or other claims that are not easily quantified.

The summons in the Magistrates' Court is called an ordinary summons. Rules 5 and 6 of the Magistrates' Courts Rules prescribe the form and contents of a summons commencing action. The distinction between a simple and a combined summons does not apply in the Magistrates' Court. The ordinary summons is drafted by the plaintiff or his attorney and is signed and issued by the clerk of the court. Thereafter the plaintiff hands it to the sheriff for service.

Morris[13] advises that, before you set out the claim, you should make an analysis of the issues of law and the essential elements involved as well as an analysis of the facts. After an analysis of the facts and determination of the issues of law, you should isolate the essential elements involved in your case by listing them on paper. You should then proceed to set out an allegation covering each element.

The general rule is that the plaintiff bears the onus of proving his/her claim. All the necessary averments needed to sustain the plaintiff's claim must therefore be set out in the particulars of claim. For example, if the plaintiff sues the defendant as a result of breach of contract, the plaintiff must allege the existence of a valid contract, a breach thereof and the damages sustained as a result of the breach.

The particulars of claim must follow an orderly and chronological course.

The particulars of claim must follow an orderly and chronological course. Typically, it will start with a description of the parties, followed by statements of facts to establish the plaintiff's cause of action. Thereafter, the conclusion in law, followed by the desired relief, must be set out. The particulars provided must amount to a clear and concise explanation of the material facts and must justify the legal conclusion drawn and the relief sought.[14]

There are countless different causes of action, each with its own peculiar requirements. It is beyond the scope of this book to provide guidelines as to the pleading of various causes of action.[15]

10.5.4 *The plea: General guidelines*

The plea is essentially the defendant's reply to the plaintiff's particulars of claim. We suggest the following approach:

- ☐ make a copy of the particulars of claim to work on as a draft;
- ☐ mark which paragraphs of the plaintiff's claim you intend to admit, deny, admit with avoidance or make non-admissions to;

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13 (1993) *Technique in litigation* at 77 83.

14 You should not plead unnecessary or immaterial facts in the particulars of claim. Eg it is not allowed to quote a section of an Act in full. You may, however, refer to a relevant provision in an Act where appropriate, eg referring to s 9 of the Divorce Act 70 of 1979 when pleading forfeiture.

15 There are a few essential publications that will assist you in drafting pleadings, eg *Amler's precedents of pleadings* by Harms and *Litigation skills for South African Lawyers* by Marnewick.

- ☐ deal with each of the plaintiff's allegations in separate paragraphs;
- ☐ deal with all admissions in a specifically allocated paragraph, applying the concept to denials and non-admissions as well. For example:

> **Ad paragraphs 1, 4, 5 and 7**
>
> The Defendant admits the contents of these paragraphs.
>
> **Ad paragraphs 2, 3, 6 and 8**
>
> The Defendant denies the contents of these paragraphs and puts the Plaintiff to the proof thereof.

- ☐ never admit an allegation unless you are sure that it is in accordance with your instructions;
- ☐ acquaint yourself with the substantive law applicable to the specific case, as certain defences must be pleaded specifically, for example a lack of authority (a mere denial would be insufficient);
- ☐ establish whether the allegations of fact justify the conclusion of law set out in the particulars of claim;
- ☐ take exception if the allegations of fact do not justify the conclusion of law set out in the particulars of claim;
- ☐ inform the opponent in the plea of the case that they have to meet; this means that you should state your defence clearly and concisely as discussed below;
- ☐ at the end of the plea, include a prayer in the plea wherein you request the court to dismiss the plaintiff's claim with costs;
- ☐ do not make bare denials, for example:

> **Ad paragraphs 1–21**
>
> The Defendant denies the contents of these paragraphs and puts the Plaintiff to the proof thereof.

- ☐ do not plead the law. In the event of pleading a conclusion in law, state the factual basis thereof, for example:

> 6. The marital relationship between the parties has broken down irretrievably and has reached such a state of disintegration that there is no reasonable prospect of restoring a normal marital relationship between the parties, more particularly as: *[para 6 is the conclusion]*
>
> 6.1 The Defendant abuses alcohol which is unacceptable to the Plaintiff.
>
> 6.2 The Defendant does not maintain the Plaintiff or the children or the joint estate.
>
> 6.3 The Defendant commits adultery on a regular basis with one Claudia Naidoo which is irreconcilable to the Plaintiff with a continued marital relationship.
>
> 6.4 The Plaintiff does not love the Defendant any longer and wants a divorce. *[para 6.1–6.4 form the factual basis]*

10.4.5 *Prescription*[11]

Prescription refers to the time period which a plaintiff has to institute his/her legal claim, failing which the claim shall lapse, meaning the plaintiff will be prohibited from doing so. A plaintiff has a certain period, normally three years from the time the cause of action arose, in which to issue and serve summons in a civil claim. If this is not done, the claim will prescribe and the plaintiff will have no further recourse.

It is thus very important to advise clients of their rights and to assist them in instituting their claims timeously, or in the case of defendants, in objecting to a claim which has become prescribed by filing a special plea. Legal practitioners who allow a client's claim to prescribe are generally considered to have acted unprofessionally and negligently and may be liable to the client for damages.

Instituting a claim in this context means drawing up a summons (which is a formal legal document), issuing the summons (which is done at the clerk/ Registrar of the relevant court), and serving the summons on the counter-party (which is done by the sheriff). The date of service by the sheriff is the date that determines whether prescription was prevented.

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The time periods of prescription (whether it is acquisitive or extinctive prescription) are determined for example by:

- ☐ the common law, for example if someone has a claim for defamation, a shorter period may apply;
- ☐ the Prescription Acts 18 of 1943 and 68 of 1969, which deal in general with prescription concerning possession of property and servitudes (30 years) and debts (different time limits for different kinds of debts, like six years for cheques and 30 years for a civil judgment); or
- ☐ several other acts, for example those concerning actions against State departments like the police, prisons, education and defence, often prescribe shorter prescription periods and other procedural requirements.

10.5 Drafting pleadings[12]

10.5.1 *Introduction*

As mentioned above, the essence of drafting requires you to follow certain steps. First, you should analyse the facts and the law that applies to those facts. Then you should identify the essential/material elements (*facta probanda*) as well as the non-essential elements (*facta probantia*). Decide on the order of the paragraphs and only then formulate the allegations or statements. Finally, state

First, you should analyse the facts and the law that applies to those facts.

11 See Saner (1996) *Prescription in South African law* (revised Adams).
12 Van Heerden (2002) *Notes on Pleadings: Law of Civil Procedure.*

the conclusion in law. The drafting process involves drafting, reading, redrafting, amending and only then finalising the document.

10.5.2 *The heading*

The heading of a pleading contains important basic information relating to the pleading in question. This information must be set out in a standard manner, as has become the norm. The following information must appear:

- *The court*: The specific court in which the action is brought, including the relevant division (in the case of the High Court) or the district (in the case of the Magistrates' Court) must appear at the top of the document.
- *The case number*: This number is allocated by the clerk of the court or Registrar (in the High Court). It usually consists of a reference number followed by the year in which the number was allocated, for example 0097389/2006. An incorrect case number may result in the pleading being misfiled, resulting in incomplete records and the need to reconstruct court files.
- *The parties*: The name and surname of the plaintiff and defendant must be indicated or, in the case of a juristic person, the full name of that entity.
- *The type of document*: Between the parallel lines below the names of the parties, the type of document must be stated, for example "Defendant's Plea".

10.5.3 *The summons and particulars of claim*

The summons and particulars of claim (or declaration in the High Court) are the first documents to be filed in action proceedings and serve to institute the action.

The summons and particulars of claim (or declaration in the High Court) are the first documents to be filed in action proceedings and serve to institute the action. Both the High Court and Magistrates' Courts Rules contain prescribed forms in this respect. A summons is a process of court, addressed to the sheriff, drafted and signed by the plaintiff or his attorney and issued by the Registrar or clerk of the court, as the case may be. In the summons the plaintiff's claim is set out. The defendant is called upon to defend the action within a specified time. The summons also indicates the consequences should the defendant fail to enter an appearance to defend within the prescribed time. After it is issued, the summons is given to the sheriff for service on the defendant.

In the High Court, a distinction is drawn between the simple summons and the combined summons. The simple summons is typically used in claims for debts or liquidated amounts. The simple summons does not contain separate, detailed particulars of claim. It merely contains a brief description of the cause of action and the relief that is claimed. It thus merely "labels" the claim. The claim only has to be set out with sufficient particularity to enable the court to grant default judgment, should the matter be undefended. If the defendant decides to defend an action instituted by way of a simple summons, the situation becomes more complicated. After delivery of a notice of intention to defend, the plaintiff must, in accordance with High Court Rule 20, deliver a declaration to the defendant. The declaration must set the plaintiff's claim out in full, to enable the defendant to respond thereto.

☐ always ensure that you have pleaded the defendant's defence, for example:

> **Ad paragraph 6.3**
>
> The Defendant denies the content of this paragraph and puts the Plaintiff the proof thereof. The Defendant pleads that is the Plaintiff who commits adultery on a regular basis with one Mike Naidoo which is irreconcilable to the Defendant with a continued marital relationship.
>
> *or*
>
> **Ad paragraph 6.3**
>
> The Defendant denies the content of this paragraph and puts the Plaintiff to the proof thereof. The Defendant refers to his defence and reasons for the breakdown of the marriage as set out in his counterclaim below which he begs the honourable court to read in here as if specifically inserted here.

10.5.5 *The plea: Stating the defence*

Stating the defence consists of two parts. The first is the answer to all the material facts (*facta probanda*) by making:

☐ admissions;
☐ denials;
☐ confessions and avoidance;
☐ non-admissions; and
☐ stating multiple and/or alternative defences.

The second part is to formulate the defence clearly and precisely by stating the nature of the defence and all the essential/material facts (*facta probanda*) one relies on.

In most instances, the two parts should occur concurrently, but you must ensure that you deal with both parts independently from one another. Morris[16] advises that a drafter needs to make an analysis of the particulars of claim, the law on the issues for both plaintiff and defendant, and the defendant's set of facts, before pleading the defence.

10.5.6 *The plea: Admissions*

You should make admissions in respect of the facts the defendant admits and those which are common cause. You can only admit to something if you acknowledge and accept the allegation. Your admission must be clear and unambiguous.

If you neglect to plead to an allegation, it shall be deemed to be admitted in terms of High Court Rule 22(3). If you neglect to plead to an allegation in the Magistrates' Court, it shall be deemed to be admitted, unless it is clearly in contradiction with your plea. Once an admission is made, it stands. If you wish to withdraw an admission later, you will have to file a notice of amendment with a supporting affidavit in most instances. The court does not easily grant these kinds of amendments.

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16 (1993) *Technique in litigation* at 72.

10.5.7 *The plea: Denials*

You may make a denial only in the following instances:

- ☐ if the defendant disputes a factual allegation;
- ☐ if the defendant does not contemplate admitting an allegation; and
- ☐ if the defendant doubts the plaintiff's ability to prove an allegation.

A denial must relate to a specific allegation and to the essential part thereof. You do not need to set out facts in support of a denial. A denial is regarded as a sufficient reply to an allegation. However, if the denial includes a defence, you have to plead the facts in support thereof. If any qualification of any denial is necessary, you should plead it. Avoid making ambiguous denials. If the allegation you wish to deny consists of more than one constituent elements, make sure you deny all the elements; alternatively, state which elements you deny and which you admit. An example of a "pregnant" denial is as follows:

Allegation

The Defendant has stolen R500,00 from the Plaintiff.

Denial

The Defendant denies that he has stolen R500,00 from the Plaintiff.

In the above example, it is not clear whether the defendant denies only having stolen the amount of R500.00 from the plaintiff, as it could be that the defendant admits to having stolen some other amount. To avoid confusion, rather plead to the allegation as follows:

The Defendant denies that he has stolen R500,00 or any other amount from the Plaintiff.

or

The Defendant denies that he has stolen any amount of money at all from the Plaintiff.

Similarly, the defendant's plea would be ambiguous if you plead in the following manner:

Allegation

The parties concluded on 9 September 1997 at Johannesburg an oral contact for payment of R200 000,00.

Denial

The Defendant denies that he and the Plaintiff concluded an oral contract on 9 September 1997 at Johannesburg.

In this instance, the defendant did not answer to the essence of the allegation, namely the conclusion of the contract. It is also not clear whether the defendant contests the way in which the contract was concluded or the date or place as alleged. Rather plead to this allegation as follows:

The Defendant denies that he and the Plaintiff concluded any contract as alleged or otherwise.

or

The Defendant denies that he and the Plaintiff concluded any contract at all at any place.

The following is a suggested way of pleading, using the words "or" and "any" to avoid pleading in an unclear manner:

Allegation

The Defendant broke into the Plaintiff's home and removed all electrical appliances.

Denial

The Defendant denies that he broke into the Plaintiff's home *or* that he removed *any* electrical appliances.

In general, a bare denial of liability or a defence of total denial is not allowed. For example:

Denial

The Defendant denies all the allegations.

You may only plead a total or bare denial if, in the context of the pleadings, it will not cause uncertainty or if it indicates the nature and factual basis of the defence.[17]

10.5.8 *The plea: Confessions and avoidance*

If a defendant admits part of an allegation, but raises some other fact or facts to qualify the admission, it is known as a "confession and avoidance". For example, a defendant could admit the conclusion of a contract, but plead a waiver, fraud or payment. This means that the defendant admits some or all of the alleged facts, but in turn alleges other facts that destroy the normal legal consequences of the alleged facts.

A plea must clearly state the material facts of the avoidance, for example:

Denial

Save to admit that the lease period expired on 31 July 2006, the Defendant pleads in avoidance that the parties renewed the contract of lease for the period of 1 August 2006 until 31 December 2007.

10.5.9 *The plea: Non-admissions*

It is possible to include a "non-admission" in a plea. As Morris[18] points out, a fine line distinguishes a denial from a non-admission. If the plaintiff makes an allegation which is not within the personal knowledge of the defendant, the defendant may make a non-admission.

17 *Dhlamini v Jooste* 1925 OPD 223.
18 (1993) *Technique in litigation* at 83.

For example:

> The Defendant has no knowledge of the allegations contained in this paragraph and cannot admit to the knowledge of any allegations and puts the Plaintiff to the proof thereof.
>
> *or*
>
> The Defendant has no knowledge of the allegations contained herein and thus denies any knowledge of the allegations and puts the Plaintiff to the proof thereof.
>
> *or*
>
> The Defendant has no knowledge whether or not the Plaintiff is the lawful owner of the said shares and premises and cannot admit or deny the said allegation, but puts the Plaintiff to the proof thereof.

10.5.10 *The plea: Multiple and alternative defences*

A defendant may plead multiple defences to a plaintiff's claim, provided they are clearly distinguished from each other, for example:

> The Defendant pleads that the Plaintiff was negligent in causing the accident in one or more of the following respects:
>
> 1. The Plaintiff did not keep a safe following distance;
> 2. The Plaintiff did not brake timeously;
> 3. The Plaintiff did not stop at the red robot; and/or
> 4. The Plaintiff failed to keep a proper lookout.

If defences are contradictory, a defendant has to plead them in the alternative. For example:

> **Ad paragraph 6**
>
> The marriage has not broken down irretrievably for the following reasons:
>
> a) The Defendant still loves the Plaintiff; and
> b) The Defendant went for treatment and has not drunk and thus abused alcohol for the last six months.
>
> **Alternatively**
>
> If the court finds that the marriage has broken down irretrievably, the Defendant pleads that it is not due to the Defendant's behaviour, but due to the following reasons:
>
> a) The Plaintiff argues constantly with the Defendant; and
> b) The Plaintiff spends more time at her family than with the Defendant.

In conclusion, when drafting a plea you should ensure that you have addressed each and every allegation of the plaintiff, that your defence/plea is stated clearly, unambiguously and contain relevant allegations, and that the plea informs the plaintiff of the case the plaintiff has to meet.

10.5.11 *The replication/reply*

Depending on the facts of the specific case, it may be necessary for you to reply to allegations contained in the defendant's plea, for example where the defendant pleads a specific defence, such as lack of authority, and the plaintiff wishes to

reply to that plea. The purpose of the replication (in the High Court) or reply (in the Magistrates' Court) is to answer to any new allegation raised in the plea. You will also reply when you want to limit the issues in dispute by making admissions, or to qualify averments/allegations made in the plea.

The purpose of the replication or reply is to answer any new allegation raised in the plea.

It is not a procedural requirement to reply to the plea, as the plaintiff's failure to do so is, in any event, deemed to constitute a denial.

In the reply, you may not introduce a new cause of action or deviate from the original particulars of claim or declaration.

In drafting the reply, it is important to use paragraphs when dealing with the allegations in the defendant's plea which the plaintiff wishes to reply to.

10.5.12 *The counterclaim*

A defendant may raise a counterclaim against the plaintiff's claim. The appropriate time to file a counterclaim is at the time of filing the defendant's plea. As the counterclaim is in principle a claim, it should comply with the same requirements as those applicable to the particulars of claim. The description of the parties in a counterclaim could become clumsy or create confusion. Terms like "plaintiff in reconvention" and "defendant in reconvention" are technical and unnecessary. Rather plead as follows:

Allegation

Brevitas causa.

or

For purposes of convenience, the Defendant refers to the parties as in convention.

The above allegation has the effect of referring to the plaintiff throughout the pleadings as "Plaintiff" and to the defendant as "Defendant", for purposes of convenience

10.5.13 *Exceptions*

It is practice not to except to a pleading which is vague and embarrassing without first giving the opponent an opportunity to rectify it. The party excepting to a pleading must state the basis for their contention. The extent of the detail that you must mention in the notice of exception will depend on the nature of the allegations you are excepting to.

As you are bound to the grounds of exception set out in your notice of exception, you should formulate these grounds as widely as possible, but guard against vagueness and ensure you clearly formulate the legal relief you require.

10.6 Drafting motions/applications

10.6.1 *Introduction*

In drafting motions, you must take care to use the correct form of the notice of motion. You will find the prescribed forms included in the respective rules of court. A few initial considerations are important:

- ☐ *Urgency*: If the motion is to be brought on an urgent basis, special procedures apply. The normal time limits prescribed by the rules of court may be disregarded and notice requirements may be adapted as may be determined by circumstance.
- ☐ *Interim or final relief*: this would determine the formulation of prayers and a request for an interim order (*rule nisi*).
- ☐ *Documents to attach*: All relevant documentation should be attached, but do not attach documents unless they are strictly needed or likely to be disputed. Matters that are common cause need not be zealously proved. Do not burden the papers unnecessarily.
- ☐ *Supporting affidavits*: when referring to facts which do not fall within the knowledge of the person deposing to the affidavit, it is imperative to obtain supporting affidavits.

10.6.2 *Notice of motion:* Ex parte *applications*

The *ex parte* application usually involves only an applicant. The applicant directs the application to the Registrar who gets prior notice of the proposed application. You can use the *ex parte* application where:

- ☐ the applicant is the only person with an interest in the case, for example where application is made to appoint a curator for a mentally ill patient;
- ☐ the application is merely a preliminary step in the matter, for example where application is made to sue by means of substituted service in a divorce action; or
- ☐ urgent relief is required and notice to the respondent or the delay which may be caused thereby will create the prejudice which the applicant seeks to avoid; for example, where the applicant applies to appoint a liquidator to divide the joint estate as the other spouse is threatening to squander the assets.

If the interests of other parties may be affected by an order granted *ex parte*, the court will usually not grant a final order immediately. Instead, the court will grant a provisional order with a return date (*rule nisi*). The sheriff then serves the provisional order on the respondent. The *rule nisi* calls upon a respondent to appear before the court on a certain date to furnish reasons why the provisional order should not be made final (confirmed). In this way, the *audi et alteram partem* rule is complied with.

The notice of motion should contain the following information:

- ☐ the heading;
- ☐ a notice to the Registrar or clerk of the court indicating the specific application, the day, the time, and the court when and where the application will be made;
- ☐ the legal relief your client is requesting;
- ☐ the attached founding affidavit(s); and
- ☐ request for enrolment.

10.6.3 *Notice of motion: Applications on notice*

If the application is affecting the interests of another party and there are no reasons for urgency, notice must be given to such party from the outset. You must

direct it to the Registrar/clerk of the court and the respondent, thus informing both of the proposed application.

You should indicate the following:

- ☐ the points mentioned under "Notice of motion: *Ex parte* application";
- ☐ the time limit allocated to the respondent in which he/she must oppose;
- ☐ the addresses of the applicant and respondent for the serving; and
- ☐ the consequences of a failure to oppose.

10.6.4 *Notice of motion: Interim applications*

An interim application is brought during the course of an existing action or motion. Interim applications often concern discovery, the exchange of documents or exceptions. The notice of motion in an interim application should contain the points mentioned above with regard to *ex parte* applications and, where applicable, refer to supporting affidavits.

10.6.5 *Affidavits in support of applications*

Affidavits may contain primary and secondary facts. Primary facts are those factual averments or allegations capable of being used for drawing of inferences as to the existence or non-existence of other facts. Such other facts are the secondary facts. In the absence of primary facts, secondary facts are nothing more than the deponent's own conclusions and, accordingly, they will not constitute evidential material capable of supporting the cause of action.[19] In general, affidavits should contain the following information:

- ☐ the names and descriptions of the applicant and the respondent (if applicable);
- ☐ facts from which the *locus standi* of the applicant is apparent;
- ☐ facts from which the court's jurisdiction is apparent;
- ☐ the material facts upon which the application/defence is based on;
- ☐ documents used as evidence, which must be attached; and
- ☐ a prayer for the relief claimed.

Remember to include only factual allegations, as opinions, inferences or legal arguments are not allowed. Refer to the specific entitlement of the applicant or the respondent and include all necessary information to support the relief sought. The use of legal jargon in the affidavit should be avoided, for example "I am domiciled . . ." should be replaced with "I live permanently at . . .". Use plain and simple language. Remember that it is the client's affidavit and not your own, although you may be the one drafting and formulating it. It is the client, after all, that will have to swear under oath as to its contents. The client must therefore fully understand the contents of the affidavit and agree to the correctness thereof.

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19 *Die Dros (Pty) Ltd and Another v Telefon Beverages CC and Others* 2003 (4) SA 207 (C).

Applications usually consist of three sets of affidavits . . .

Applications usually consist of three sets of affidavits: the applicant's founding affidavit, the respondent's answering affidavit and the applicant's replying affidavit. These are discussed in turn below:

- *The founding affidavit*: An applicant's notice of motion is usually accompanied by an affidavit setting out the facts upon which the application is based. Apart from the general information above, a founding affidavit must contain certain further information. For example, it is important that the applicant's interest in the matter be clear from the affidavit. All relevant documentation serving as proof for the applicant's allegations must be referred to in the affidavit and copies thereof must be attached. Supporting affidavits of witnesses should also be attached. The founding affidavit usually concludes with a request that the court grant the relief as set out in the notice of motion.
- *The answering affidavit*: An answering affidavit (also called the opposing affidavit) should not only consist of admissions and/or denials of the applicant's allegations. It is not the same as a plea. It should set out the respondent's response to the applicant's version in a narrative fashion. Although it is important to deal with all the allegations made by the applicant, the answering affidavit does not have to deal with them *seriatim* (separately). The answering affidavit must respond to the founding affidavit in a logical and orderly manner, so that the respondent's defence is clear.
- *The replying affidavit*: The replying affidavit is the applicant's opportunity to reply to matters raised in the respondent's answering affidavit. It is not, however, an opportunity for the applicant to raise new matters, except in response to allegations raised by the respondent in the answering affidavit. The principle is that an applicant must, in the founding affidavit, set out the full basis for the claim. The reply should only deal with new matters or defences pleaded by the respondent and not be used to simply expand further on the founding affidavit.
- *Supporting affidavits*: Should the applicants or the respondents wish to present evidence by another party in support of their versions, they must obtain an affidavit from such person and attach it to the notice of motion together with the founding or answering/opposing affidavit. Replying affidavits may also have supporting affidavits.

10.7 Drafting heads of argument

A legal practitioner must prepare and present a proper argument on behalf of the client and should use every argument and observation that can legitimately, according to the principles and practice of law, be put before the court. Heads of argument serve a critical purpose in this regard.[20] They should focus on the best argument available to the client. In formulating heads, legal practitioners must

20 *S v Ntuli* 2003 (4) SA 258 (W) 260 265. The court may take various remedies where inadequate heads of arguments are filed, like deprivation of the right to charge a fee and the referral to the appropriate authority for institution of disciplinary proceedings (265E–F).

engage fairly with the record of evidence and advance submissions thereto, supported by case law.

We suggest the following approach:

- ☐ start by identifying the issues;
- ☐ provide a summary of the material facts;
- ☐ make provision for the proposition of law with reference to authority;
- ☐ apply the propositions to the facts; and then
- ☐ conclude with referral to the relief the litigant is entitled to.

10.8 Conclusion

If you follow all the guidelines as discussed above, you should succeed in drafting pleadings, notices and motions that will stand in court. You will gain sufficient experience in time, but only with diligent practice. CJ Innes presents the following thought:

The object of pleading is to define the issues.

The object of pleading is to define the issues; and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full enquiry. But within those limits the court has a wide discretion. For pleadings are made for the court, not the court for the pleadings.[21]

21 *Robinson v Randfontein Estates GMC Ltd* 1925 AD 173.