

# CIVIL PROCEDURE IN SOUTH AFRICA

THIRD EDITION

ROSHANA KELBRICK



Wolters Kluwer  
Law & Business

# **Civil Procedure in South Africa**

**Third Edition**

**Roshana Kelbrick**

This book was originally published as a monograph in the International  
Encyclopaedia of Laws/Civil Law.

General Editors: Roger Blanpain, Frank Hendrickx  
Volume Editor: Piet Taelman



**Wolters Kluwer**

Law & Business

*Published by:*  
Kluwer Law International  
PO Box 316  
2400 AH Alphen aan den Rijn  
The Netherlands  
Website: [www.wklawbusiness.com](http://www.wklawbusiness.com)

*Sold and distributed in North, Central and South America by:*  
Aspen Publishers, Inc.  
7201 McKinney Circle  
Frederick, MD 21704  
United States of America  
Email: [customer.service@aspenpublishers.com](mailto:customer.service@aspenpublishers.com)

*Sold and distributed in all other countries by:*  
Turpin Distribution Services Ltd.  
Stratton Business Park  
Pegasus Drive, Biggleswade  
Bedfordshire SG18 8TQ  
United Kingdom  
Email: [kluwerlaw@turpin-distribution.com](mailto:kluwerlaw@turpin-distribution.com)

**DISCLAIMER:** The material in this volume is in the nature of general comment only. It is not offered as advice on any particular matter and should not be taken as such. The editor and the contributing authors expressly disclaim all liability to any person with regard to anything done or omitted to be done, and with respect to the consequences of anything done or omitted to be done wholly or partly in reliance upon the whole or any part of the contents of this volume. No reader should act or refrain from acting on the basis of any matter contained in this volume without first obtaining professional advice regarding the particular facts and circumstances at issue. Any and all opinions expressed herein are those of the particular author and are not necessarily those of the editor or publisher of this volume.

*Printed on acid-free paper*

ISBN 978-90-411-6152-9

This title is available on [www.kluwerlawonline.com](http://www.kluwerlawonline.com)

© 2015, Kluwer Law International BV, The Netherlands

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without written permission from the publisher.

Permission to use this content must be obtained from the copyright owner. Please apply to: Permissions Department, Wolters Kluwer Legal, 76 Ninth Avenue, 7th Floor, New York, NY 10011-5201, USA. Email: [permissions@kluwerlaw.com](mailto:permissions@kluwerlaw.com)

Printed and Bound by CPI Group (UK) Ltd, Croydon, CR0 4YY.

## The Author



Roshana Kelbrick is Professor of Law at the University of South Africa. Before entering academic life, she practised as an attorney specializing in civil litigation. She has been admitted as attorney of the then Supreme Court of South Africa, Transvaal High Division, and of the High Court of Lesotho. She is also a qualified Trade Mark Practitioner.

Kelbrick is the author of various books and articles on South African civil procedure and intellectual property enforcement.

# Table of Contents

|  |    |
|--|----|
| The Author   | 3  |
| General Introduction   | 13 |
| Chapter 1. General Background  | 13 |
| §1. THE POLITICAL SYSTEM   | 13 |
| §2. THE LEGAL SYSTEM   | 14 |
| Chapter 2. Delimitation of the Subject-Matter                                    | 15 |
| §1. DEFINITION OF THE TERM 'CIVIL PROCEDURE'                                     | 15 |
| §2. DISTINCTION WITH OTHER TYPES OF PROCEDURE                                    | 15 |
| Chapter 3. Sources of Civil Procedure Law  | 16 |
| §1. SUPERIOR COURTS  | 16 |
| §2. LOWER COURTS   | 16 |
| Chapter 4. General Features of the Administration of Justice<br>in Civil Matters | 18 |
| §1. CHARACTERISTICS OF THE PROCEDURE   | 18 |
| I. Adversary Procedure   | 18 |
| II. Role of the Judge and the Parties  | 18 |
| III. Written and Oral Procedure  | 19 |
| §2. FUNDAMENTAL GUARANTEES   | 19 |
| I. Overview  | 19 |
| II. Establishment of Courts by Law   | 20 |
| III. Independence and Impartiality   | 20 |
| IV. Reasons  | 21 |

## Table of Contents

|   |    |
|---|----|
| V. Publicity                                      | 21 |
| VI. Fair Trial                                    | 22 |
| VII. Reasonable Time                              | 23 |
| VIII. Appeal                                      | 23 |
| Part I. Judicial Organization                     | 25 |
| Chapter 1. The Courts and Their Members           | 25 |
| §1. COURTS  | 25 |
| I. Structure of the Court System                  | 25 |
| A. Superior Courts                                | 25 |
| B. Lower Courts                                   | 27 |
| C. The Precedent System (Stare Decisis)           | 27 |
| II. Administration of the Court                   | 28 |
| A. Superior Courts                                | 28 |
| B. Lower Courts                                   | 29 |
| III. Bench  | 29 |
| A. Superior Courts                                | 29 |
| B. Lower Courts                                   | 30 |
| §2. MEMBERS OF THE JUDICIARY                      | 31 |
| I. Superior Courts                                | 31 |
| II. End of Functions and Discipline               | 32 |
| III. Judicial Officers in Lower Courts            | 32 |
| A. Magistrates' Courts                            | 32 |
| B. Other Courts                                   | 33 |
| Chapter 2. The Bar                                | 34 |
| §1. EXERCISE OF THE LEGAL PROFESSION              | 34 |
| I. Conditions for Admission                       | 34 |
| II. Rights and Duties                             | 35 |
| III. Discipline                                   | 36 |
| §2. PUBLIC INSTITUTIONS AND PRIVATE ORGANIZATIONS | 36 |
| I. Professional Bodies                            | 36 |
| II. Public Institutions                           | 36 |
| Chapter 3. The Sheriffs (Bailiffs)                | 38 |
| Part II. Jurisdiction                             | 39 |
| Chapter 1. Domestic Jurisdiction                  | 39 |

## Table of Contents

|   |    |
|---|----|
| §1. SUBJECT-MATTER JURISDICTION                 | 39 |
| I. Constitutional Court                         | 39 |
| II. Supreme Court of Appeal                     | 39 |
| III. High Courts                                | 40 |
| IV. Lower Courts                                | 40 |
| §2. VENUE (TERRITORIAL JURISDICTION)            | 41 |
| I. High Court                                   | 41 |
| II. Lower Courts                                | 45 |
| §3. RESOLUTION OF JURISDICTION CONFLICTS        | 46 |
| Chapter 2. International Jurisdiction           | 47 |
| §1. RULES APPLICABLE IN THE ABSENCE OF A TREATY | 47 |
| §2. INTERNATIONAL TREATIES                      | 48 |
| Part III. Actions and Claims                    | 49 |
| Chapter 1. Actions                              | 49 |
| §1. DEFINITION                                  | 49 |
| §2. ADMISSIBILITY                               | 49 |
| I. Legal Subjects and Status                    | 50 |
| II. Nature of the Right                         | 50 |
| §3. VEXATIOUS LITIGATION                        | 52 |
| Chapter 2. Claims and Defences                  | 53 |
| §1. DEFINITION                                  | 53 |
| §2. DISTINCTIONS                                | 53 |
| I. Main Claim                                   | 54 |
| A. Action Procedure                             | 54 |
| B. Motion Procedure                             | 54 |
| II. Alternative Claims                          | 54 |
| III. Counterclaims                              | 55 |
| IV. Defence                                     | 55 |
| A. Action Procedure                             | 55 |
| B. Motion Procedure                             | 56 |

## Table of Contents

|   |    |
|---|----|
| Chapter 3. Sanctions on Procedural Irregularities               | 57 |
| §1. FORMAL REQUIREMENTS   | 57 |
| §2. TIME LIMITS   | 58 |
| Part IV. Proceedings  | 61 |
| Chapter 1. Pre-trial Proceedings                                | 61 |
| Chapter 2. Proceedings in First Instance                        | 62 |
| §1. ADVERSARY PROCEEDINGS                                       | 62 |
| I. Ordinary Proceedings   | 62 |
| A. Introduction of the Claim                                    | 62 |
| 1. Notice   | 62 |
| 2. Registration by the Court                                    | 63 |
| 3. Summary Judgment   | 63 |
| B. Progress of Proceedings                                      | 65 |
| 1. Exchange of Pleadings: Illiquid Summons Procedure            | 65 |
| 2. Other Preparatory Measures                                   | 67 |
| 3. Further Particulars  | 67 |
| 4. Discovery  | 68 |
| 5. Medical Examinations   | 70 |
| 6. Examination of Objects                                       | 71 |
| 7. Expert Witnesses   | 71 |
| 8. Pre-trial Conference   | 72 |
| 9. Purely Written Procedure                                     | 73 |
| 10. Determination of the Trial Date                             | 74 |
| 11. Trial   | 77 |
| C. Judgment   | 80 |
| 1. Judgments of the Constitutional Court                        | 80 |
| 2. Judgments of the Supreme Court of Appeal and the High Courts | 80 |
| II. Provisional Proceedings                                     | 82 |
| §2. DEFAULT PROCEEDINGS   | 84 |
| I. High Court   | 84 |
| II. Magistrates' Courts   | 85 |
| §3. EX PARTE PROCEEDINGS  | 86 |
| Chapter 3. Review Proceedings                                   | 87 |
| §1. APPEAL  | 87 |



## Table of Contents

|   |     |
|---|-----|
| §2. REVIEW  | 88  |
| §3. APPEALS AND REFERRALS TO THE CONSTITUTIONAL COURT | 89  |
| I. Direct Appeals                                     | 89  |
| II. Appeals from the Supreme Court of Appeal          | 89  |
| III. Referrals to the Constitutional Court            | 90  |
| IV. Direct Access to the Constitutional Court         | 90  |
| Part V. Incidents                                     | 91  |
| Chapter 1. Interlocutory Applications                 | 91  |
| Chapter 2. Withdrawal and Discontinuance of Action    | 92  |
| §1. WITHDRAWAL  | 92  |
| §2. DISCONTINUANCE                                    | 92  |
| Chapter 3. Challenge of Judges                        | 94  |
| Part VI. Legal Aid and Legal Costs                    | 95  |
| Chapter 1. Legal Aid                                  | 95  |
| Chapter 2. Legal Costs                                | 97  |
| Part VII. Evidence                                    | 101 |
| Chapter 1. Burden of Proof                            | 102 |
| Chapter 2. Admissibility of Evidence                  | 103 |
| §1. COMPETENCE OF WITNESSES                           | 105 |
| Chapter 3. Administration of Evidence                 | 107 |
| §1. VIVA VOCE EVIDENCE                                | 107 |
| §2. AFFIDAVIT EVIDENCE                                | 107 |
| §3. REAL EVIDENCE AND INSPECTIONS                     | 108 |
| §4. DOCUMENTARY EVIDENCE                              | 108 |

## Table of Contents

|   |     |
|---|-----|
| §5. EVIDENCE IN SMALL CLAIMS COURTS                       | 109 |
| Part VIII. Particular Proceedings                         | 111 |
| Chapter 1. Interdicts                                     | 112 |
| Chapter 2. Cases Where No Pleadings Are Filed             | 113 |
| §1. SPECIAL CASES   | 113 |
| §2. QUESTIONS OF LAW ON APPEAL                            | 113 |
| Chapter 3. Other Proceedings                              | 114 |
| §1. INTERPLEADER PROCEEDINGS                              | 114 |
| §2. DECLARATION OF RIGHTS                                 | 114 |
| §3. <i>DE LUNATICO INQUIREND</i> O                        | 114 |
| §4. PERPETUAL SILENCE                                     | 114 |
| §5. VEXATIOUS PROCEEDINGS                                 | 115 |
| Part IX. Preliminary Seizure and Enforcement of Judgments | 117 |
| Chapter 1. Preliminary Seizure                            | 117 |
| §1. PROCEEDINGS   | 117 |
| I. Superior Courts  | 117 |
| II. Lower Courts  | 117 |
| §2. JUDICIAL REVIEW                                       | 118 |
| Chapter 2. Enforcement of Judgments                       | 119 |
| §1. ENFORCEMENT OF DOMESTIC JUDGMENTS                     | 119 |
| I. Proceedings  | 119 |
| A. Superior Courts  | 119 |
| B. Lower Courts   | 120 |
| II. Judicial Review                                       | 121 |
| §2. RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS      | 121 |
| I. Recognition  | 122 |
| II. Enforcement   | 122 |

## Table of Contents

|  |     |
|--|-----|
| III. Enforcement at Common Law                           | 122 |
| IV. Statutory Enforcement                                | 123 |
| Part X. Arbitration                                      | 125 |
| Chapter 1. Arbitrability                                 | 125 |
| Chapter 2. Arbitration Agreement and Party Autonomy      | 127 |
| Chapter 3. Composition of Arbitral Tribunal              | 128 |
| Chapter 4. Interim Measures and Preliminary Awards       | 129 |
| Chapter 5. Conduct of Arbitral Proceedings               | 130 |
| Chapter 6. Arbitral Award                                | 131 |
| Chapter 7. Recourse against Arbitral Award               | 132 |
| Chapter 8. Recognition and Enforcement of Awards         | 133 |
| Part XI. Mediation                                       | 135 |
| Chapter 1. Legislation/Definitions                       | 135 |
| Chapter 2. Rights That Can Be Subject to Mediation       | 136 |
| Chapter 3. Mediation Agreement                           | 137 |
| Chapter 4. Persons/Institutions That Can Act as Mediator | 138 |
| Chapter 5. Mediation Procedure                           | 139 |
| Chapter 6. Settlement Agreement                          | 140 |
| Chapter 7. Setting Aside a Settlement Agreement          | 141 |
| Chapter 8. International Mediation                       | 142 |
| Selected Bibliography                                    | 143 |
| Index  | 145 |

# **Civil Procedure in South Africa**

**Third Edition**

**Roshana Kelbrick**

This book was originally published as a monograph in the International  
Encyclopaedia of Laws/Civil Law.

General Editors: Roger Blanpain, Frank Hendrickx

Volume Editor: Piet Taelman



**Wolters Kluwer**  
Law & Business



## The Author



Roshana Kelbrick is Professor of Law at the University of South Africa. Before entering academic life, she practised as an attorney specializing in civil litigation. She has been admitted as attorney of the then Supreme Court of South Africa, Transvaal High Division, and of the High Court of Lesotho. She is also a qualified Trade Mark Practitioner.

Kelbrick is the author of various books and articles on South African civil procedure and intellectual property enforcement.

## The Author

# Table of Contents

|  |    |
|--|----|
| The Author   | 3  |
| General Introduction   | 13 |
| Chapter 1. General Background  | 13 |
| §1. THE POLITICAL SYSTEM   | 13 |
| §2. THE LEGAL SYSTEM   | 14 |
| Chapter 2. Delimitation of the Subject-Matter                                    | 15 |
| §1. DEFINITION OF THE TERM 'CIVIL PROCEDURE'                                     | 15 |
| §2. DISTINCTION WITH OTHER TYPES OF PROCEDURE                                    | 15 |
| Chapter 3. Sources of Civil Procedure Law  | 16 |
| §1. SUPERIOR COURTS  | 16 |
| §2. LOWER COURTS   | 16 |
| Chapter 4. General Features of the Administration of Justice<br>in Civil Matters | 18 |
| §1. CHARACTERISTICS OF THE PROCEDURE   | 18 |
| I. Adversary Procedure   | 18 |
| II. Role of the Judge and the Parties  | 18 |
| III. Written and Oral Procedure  | 19 |
| §2. FUNDAMENTAL GUARANTEES   | 19 |
| I. Overview  | 19 |
| II. Establishment of Courts by Law   | 20 |
| III. Independence and Impartiality   | 20 |
| IV. Reasons  | 21 |



## Table of Contents

|   |    |
|---|----|
| V. Publicity                                      | 21 |
| VI. Fair Trial                                    | 22 |
| VII. Reasonable Time                              | 23 |
| VIII. Appeal                                      | 23 |
| Part I. Judicial Organization                     | 25 |
| Chapter 1. The Courts and Their Members           | 25 |
| §1. COURTS  | 25 |
| I. Structure of the Court System                  | 25 |
| A. Superior Courts                                | 25 |
| B. Lower Courts                                   | 27 |
| C. The Precedent System (Stare Decisis)           | 27 |
| II. Administration of the Court                   | 28 |
| A. Superior Courts                                | 28 |
| B. Lower Courts                                   | 29 |
| III. Bench  | 29 |
| A. Superior Courts                                | 29 |
| B. Lower Courts                                   | 30 |
| §2. MEMBERS OF THE JUDICIARY                      | 31 |
| I. Superior Courts                                | 31 |
| II. End of Functions and Discipline               | 32 |
| III. Judicial Officers in Lower Courts            | 32 |
| A. Magistrates' Courts                            | 32 |
| B. Other Courts                                   | 33 |
| Chapter 2. The Bar                                | 34 |
| §1. EXERCISE OF THE LEGAL PROFESSION              | 34 |
| I. Conditions for Admission                       | 34 |
| II. Rights and Duties                             | 35 |
| III. Discipline                                   | 36 |
| §2. PUBLIC INSTITUTIONS AND PRIVATE ORGANIZATIONS | 36 |
| I. Professional Bodies                            | 36 |
| II. Public Institutions                           | 36 |
| Chapter 3. The Sheriffs (Bailiffs)                | 38 |
| Part II. Jurisdiction                             | 39 |
| Chapter 1. Domestic Jurisdiction                  | 39 |