

CHAPTER 1

-Not really relevant in the grand scheme of things, but some intro stuff should be mentioned.
NOTE: numbering in here is not always the same as in the textbook!

1.1 What is the law of civil procedure?

Civil procedure falls under "procedural law", which indicates how rights, remedies and duties may be enforced.

1.2 Principles underlying the law of civil procedure (x8)

- (a) All persons must have equal and effective access to an independent and impartial judiciary, with reasonable costs to litigation.
- (b) Throughout the proceedings both parties must be afforded an equal opportunity to present their respective cases to the court (*audi et alteram partem* principle). This includes:
 - a. That the defendant must be notified of the proceedings.
 - b. That both parties must be informed of the nature of the opposing party's case and the grounds on which it is based.
- (c) "Party control" – the decision to institute or defend an action and to determine the scope of the dispute rests with the parties. The parties also decide on the evidentiary material to be presented as proof of their respective cases.
- (d) Provisions must be made for direct oral *viva voce* communication between the parties and the court during presentation of their respective cases. This does not exclude written evidentiary material.
- (e) The main proceeding (trial or argument of an application) must, in principle, take place in public.
- (f) The court must consider the evidentiary material on objective and rational grounds.
- (g) The court must give a reasoned and legally motivated judgement.
- (h) The decision of the court is final and binding, but provisions exist for appeal or review.

1.3 Sources of the law of civil procedure

The most NB sources in SA are:

- (1) The final Constitution of the Republic of South Africa of 1996.
- (2) The Constitutional Court Complimentary Act 13 of 1995.
- (3) The Rules of the Constitutional Court (CCR).
- (4) The Supreme Court Act 59 of 1959.
- (5) The Rules of the Supreme Court of Appeal.
- (6) The Uniform Rules of Court applicable in all High Courts (HCR).
- (7) The Magistrates' Courts Act 32 of 1944.
- (8) The Magistrates Court Rules (MCR).
- (9) The Small Claims Court Act 61 of 1984.
- (10) The common law underlying the rules of procedure and jurisdiction in the High Court.
- (11) Other legislation and regulations relevant to specialised courts.
- (12) Practice arrangements and directions applicable in the respective divisions of the High Court.
- (13) Case law.

1.4 Mechanisms to solve civil disputes

- Disputes can be solved either through the civil court structures or through alternative dispute resolution (ADR) structures.
- A number of forms of ADR exist such as negotiation, mediation and arbitration.
 - o Negotiation involves a structured form of bargaining and debate.
 - o Mediation involves the assistance of an impartial third party.
 - o Arbitration involves an impartial third party adjudicating the dispute between the parties after taking evidence and hearing the parties' arguments. This may be agreed to in a contract (if written, the Arbitration Act 42 of 1965 regulates the agreement). A formal national or international arbitration body usually conducts arbitration.
- When taking instructions a legal representative must consider the various alternative modes available to deal with the dispute at hand and select an appropriate method.
- Note that ADR is not suitable for all types of disputes.

Civil Procedure

Sabine Zange



Civil Procedure:

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