

PAPER 1: MOTION COURT PROCEEDINGS AND INFORMATION AND COMMUNICATION TECHNOLOGY

NORMS AND STANDARDS	READING LIST
<p>Published in Government Gazette 43981 on 2 December 2020 under section 3 (g)(i) read with section 6 (1)(b)(i) and section 95(1)(n) of the Legal Practice Act 28 of 2014)</p>	<p>PRINCIPAL WORKS:</p> <ul style="list-style-type: none"> • Erasmus: Superior Court Practice Vol 2 (“Erasmus”) <p>ADDITIONAL REFERENCE WORKS:</p> <ul style="list-style-type: none"> • Jones & Buckle: Civil Practice of the Magistrates’ Court in South Africa Vol 1 and 2 (“Jones”)
NORMS AND STANDARDS	READING LIST
<p>5 <u>Civil Procedure and Trial Advocacy</u></p> <p>Regulation 7(9)(b) reads as follows:</p> <p>(b) advocacy skills, including trial and motion court proceedings and attendance of court proceedings;</p> <p><u>Content:</u> There is a substantial overlap in the Uniform Rules of Court and Magistrates’ Courts Rules.</p> <p>Candidates must have knowledge of the rules in both courts. The differences must be highlighted. In particular the difference in powers and functions regarding the Magistrate’s Court.</p> <p>Candidates must be made familiar with Practice Directives in both the High Court and Magistrate’s Court.</p>	<p>COMPULSORY READING MATERIAL</p> <p>“The ethics of the hopeless case”, by Owen Rogers, in the Advocate magazine, December 2017 especially the summary at pages 50 and 51.</p> <p>1. GENERAL</p> <p>1.1. <i>Character of application proceedings</i> Rule 6; Form of notice of motion: <i>Mynhardt v Mynhardt</i> 1986 (1) SA 456 (T) at 458H – I.</p> <p>1.2 <i>Ex parte</i> applications See the section under the corresponding heading in ethics: Herbstein & Van Winsen p290 <i>Mynhardt v Mynhardt</i> 1986 (1) SA 456 (T) at 458H–I <i>Mahomed NO & others v NDPP</i> 2002 (4) SA 366 (W) at 373B-374B. Rules <i>nisi</i></p>

<p>Candidates must know where to find the directives and how they are applied.</p> <p>The following must be dealt with:</p> <p><u>Mediation</u> The impact of and compliance with Rule 41A of the Uniform Rules of Court</p> <p><u>Contingency Litigation:</u> What is contingency litigation and how to decide whether to take a matter on contingency? What are the rules and how to charge contingency fees? What do courts say about contingency litigation?</p> <p><u>Case management:</u> What is Case Management, and how to apply it in your practice and in court proceedings. Candidates must learn that modern day litigation is less adversarial and more cooperative with the object being to resolve disputes quickly and at a reasonable cost. Candidates must know how to refer a matter to case management, the process and procedures in case management.</p> <p><u>Certification:</u> Candidates must understand how the trial certification process works. In particular that a judge will require the parties to agree and record the triable issue/s.</p> <p><u>Trial Preparation:</u> Candidates must understand that there is a duty on a practitioner to settle a matter at any stage. The earlier the matter gets settled, the better.</p> <p>Candidates must acquire the following skills: * How to analyse pleadings. * How to determine triable issues. * How to limit the issues for trial.</p>	<p>1.3 <i>Disputes of fact in application proceedings</i> The distinction between motion proceedings and actions: <i>Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd</i> 1949 (3) SA 1155 (T); <i>Soffiantini v Mould</i> 1956 (4) SA 150 (E); <i>Metallurgical and Commercial Consultants v Metal Sales Co</i> 1971 (2) SA 388 (W). Referral to oral evidence: <i>Metallurgical and Commercial Consultants v Metal Sales Co supra</i>; <i>Kalil v Decotex (Pty) Ltd and Another</i> 1988 (1) SA 943 (A) at 981D-E; <i>Hotz v University of Cape Town</i> 2017 (2) SA 485 (SCA) at para [29]. <i>Director-General, Department of Rural Development and Land Reform, and Another v Mwelase and Others</i> 2019 (2) SA 81 (SCA) at para [64].</p> <p>1.4 <i>Approach to disputes of fact in applications for final relief:</i> <i>Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd</i> 1984 (3) SA 623 (A) at 634E-635D. <i>Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd</i> 1957 (4) SA 234</p> <p>2. INSTITUTING APPLICATIONS <i>General provisions</i></p> <p>2.1 <i>Notice of motion and founding affidavit</i> Rule 6 and commentary thereon on Erasmus and Harms - Annexures to affidavits (numbering and reference to content) - Applications that raise constitutional issues o Rule 16A ▪ <i>Shaik v Minister of Justice and Constitutional Development</i> 2004 (3) SA 599 (CC) at para [24].</p> <p>2.2 <i>Joinder under rule 10A and Joinder of respondents</i> o Who must be joined? o Joint and several liability</p> <p>2.3 <i>Service generally Rule 4</i> Pupils should know the essential requirements and procedure involved in applications for substituted service Rule 4(2) Proceedings against firms, etc. Rule 14 Change of parties Rule 15 Substituted service Edictal citation (rules 5 and 63) Attachment to found or confirm jurisdiction</p>
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- * How to initiate case conferences for certification and for trial readiness.
- * How to do pre-trial conferences, and how to draft the agenda.
- * How to carry out a proof analysis. Candidates must understand what is meant by “proof of a fact” and how to discharge the onus.
- * How to carry out witness and documentation analysis.
- * How to prepare chronology documents.

Discovery:

- * Candidates must understand latest Developments on how to obtain, preserve and present relevant documentation including **Electronic Documents**.
- * Candidates must understand the concept of narrow discovery and proportionality.
- * Candidates must know how to prepare trial bundles. This must include the importance of sequencing.

How to Attend Pre-Trial Conferences and Case Conferences.

- * Candidates must understand the purpose of these conferences and how that purpose can be achieved.

Trial Procedure

Requirement of practice notes for the court. When are these notes expected to be filed and what are the contents?

The content

- Before proceeding with this programme, candidates must be made aware of their Case Concept, how they intend to proceed with the hearing and discharge the onus.
- * Witness briefing. Candidates must know how to prepare a witness for court appearances.
 - * Opening Statement.
 - * Leading a witness in chief.
 - * Cross examination.
 - * Re-examination.
 - * Presenting argument.
- Note: this is part of the trial advocacy programme. These skills will be split up as separate modules which will be

3. URGENT APPLICATIONS

Rule 6(12):

Luna Meubel Vervaardigers (Edms) Bpk v Makin 1977 (4) SA 135 (W);
Cape Killarney Property Investments (Pty) Ltd v Mahamba 2000 (2) SA 67 (C) paras [6] and [20].

4. ANSWERING AND REPLYING AFFIDAVITS

Content and form

Points *in limine*

Late filing, barring and condonation

o Rule 26

o Rule 27

5. ADDITIONAL AFFIDAVITS

Leave required

Form and content

6. DISCOVERY IN MOTION PROCEEDINGS

Obligation to put up evidence on which party intends to rely

Rules 35(12) and (14)

Non-application of Promotion of Access to Information Act 2 of 2000

Authentication of documents Rule 63

7. OBJECTIONS TO PROCESS OR PLEADINGS

Failure to deliver pleadings - barring Rule 26

Extension of time periods Rule 27

Amendments Rule 28

Irregular proceedings Rule 30

Non-compliance with Rules Rule 30A

Vexatious proceedings and abuse of process

Applications to strike out

Security for costs

8. PARTICIPATION BY OTHER PARTIES

Intervention applications

o Rule 12

Joinder and consolidation

o Rule 10

Third party procedures

o Rule 13

Interpleaders

incorporated into and presented as part of the civil procedure programme. Different instructors can be used.

Heads of Argument.

- * When are heads required.
- * What is meant by “main heads of argument”.
- * What are Short heads and Comprehensive heads.
- * How to draft heads of argument

- o Rule 58 and commentary thereon in Erasmus Curators
- o Rule 57

9. AFTER PLEADINGS CLOSE

- Heads and practice note
- Set down
- Hearing
- Settlement and/or withdrawal Rule 41

10. ORDERS

- Interim and final orders
- The *functus officio* doctrine
- Rescission Rule 42, Rule 31(2)(b), Common law requirements

Pupils are particularly required to understand the differences between applications in terms of Rule 31, Rule 42 and the common law.

- o Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA) at para [12] at page 9F

Claims for interest Sections 1, 2, 2A and 4 of the Prescribed Rate of Interest Act 55 of 1975

11. COSTS

- Ordinary rule of costs
- Costs in interlocutory applications
- Punitive costs
- The *Biowatch* rule

12. PARTICULAR KINDS OF APPLICATIONS

12.1. *Default judgment / Judgment by confession*

- Rule 31 and commentary thereon in Erasmus
- Rule 26; and see paras 15 and 20 below.
- Havenga v Parker* 1993 (3) SA 724 (T).

Relevance of the National Credit Act, 2005

Special requirements for declaring property specially executable

- o Form of notice of motion
- o Content of affidavits
- o Service requirements
- o Sale in execution values (Rule 43A)
- o Jaftha v Schoeman & Others; van Rooyen v Stoltz & Others 2005 (2) SA 140 (CC)

- o Standard Bank of South Africa Ltd v Saunderson & Others 2006 (2) SA 264 (SCA)
- o Gundwana v Steko Development & Others 2011 (3) SA 608 (CC)
- o Nkata v FRB 2016 (4) SA 257 (CC)

12.2. *Eviction applications*

Difference between commercial and residential evictions

Requirements under PIE

- o Municipal joinder
- o Service
- o Risk of homelessness

Process

12.3. *Summary judgment*

Rule 32 (as amended)

FirstRand Bank Ltd t/a First National Bank v Moonsammy t/a Synka Liquors 2021 (1) SA 225 (GJ)

FirstRand Bank Ltd v Shabangu 2020 (1) SA 155 (GJ)

12.4. *Interdicts* (LAWSA, vol 11, paras 389 to 428 and 429 to 435)

Interdicts and mandamenten van spolie

Interim interdicts:

Pupils are particularly required to understand the distinctions between:

- (a) applications for final relief;
- (b) applications for interim relief;
- (c) rules *nisi*; and
- (d) orders operating as interim interdicts,

and to be able to draft appropriate prayers and draft orders illustrating same.

Saharawi Arab Democratic Republic v Owners & Charterers of The Cherry Blossom 2017 (5) SA 105 at paras [49] – [50].

Camps Bay Residents and Ratepayers Association v Augoustides 2009 (6) SA 190 (WCC) at paras [7] – [8].

12.5. *Insolvency* (LAWSA Volume 11 paras 199 to 365)

Pupils are required to know:

- (a) The essential requirements and differences between; and
- (b) The procedures and requirements involved in the following applications:

Sequestration;

Friendly sequestration;

Surrender;

Rehabilitation;

Liquidation;

	<p>Business rescue; o Purpose o Requirements o Process, service and publication o Ending business rescue</p> <p>12.6. <i>Applications for Anton Piller (search & seizure) orders</i> Erasmus, Anton Piller Type Orders</p> <p>12.7. <i>De lunatico inquirendo, curators ad litem, ad personam and bonis</i> Rule 57.</p> <p>12.8. <i>Rule 43 procedures</i> Rule 43; <i>Du Preez v Du Preez</i> 2009 (6) SA 28 (T) paras [3] to [6]</p> <p>12.9. <i>Reviews</i> Rule 53. Sections 3, 5, 6, 7 and 8 of the Promotion of Administrative Justice Act 3 of 2000.</p> <p>12.10. <i>Interpleaders</i> Rule 58.</p> <p>12.11. <i>National Credit Act</i> National Credit Act sections 65, 86, 88, 129 and 130; <i>Collett v First Rand Bank</i> 2011 (3) SA 585 (SCA); <i>Nedbank v National Credit Regulator</i> 2011 [4] All SA 131 (SCA); <i>Rossouw v First Rand Bank</i> [2011 All SA 56 (SCA); <i>Sebola v Standard Bank</i> 2012 (5) SA 142 (CC); <i>Kubyana v Standard Bank</i> 2014 (3) SA 56 (CC).</p>
NORMS AND STANDARDS	READING LIST
<p>19 Introduction to Cyber law (Online)</p> <p><u>Content:</u></p> <p>Awareness of cyberattacks. Protective risk management strategy.</p>	<p>International Bar Association’s Cybersecurity Guidelines published in October 2018. See https://www.ibanet.org/LPRU/cybersecurity-guidelines.aspx</p> <p>The Guidelines cover the required <i>information and communication technology for practice, and associated aspects of cyber law</i> in detail. However, the Guidelines are for general information for practitioners. The Guidelines are not being examined.</p>

<p>Data response plan. Chapter 1: Technology Chapter 2: Organisational processes Chapter 3: Staff training Responsibility for personal / commercial information. Specific cyber security tips. The future of artificial intelligence as a boon and a threat to legal practitioners.</p>	<p>Electronic Communications and Transactions Act 25 of 2002, Chapter III, Part 1, sections 11 to 20. Spring Forest Trading CC v Wilberry (Pty) Ltd t/a Ecowash 2015 (2) SA 118 (SCA)</p>
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PAPER 2: TRIAL COURT PROCEEDINGS AND ALTERNATIVE DISPUTE RESOLUTION

NORMS AND STANDARDS	READING LIST
<p>Published in Government Gazette 43981 on 2 December 2020 under section 3 (g)(i) read with section 6 (1)(b)(i) and section 95(1)(n) of the Legal Practice Act 28 of 2014)</p>	<p>PRINCIPAL WORKS:</p> <ul style="list-style-type: none"> • Erasmus: Superior Court Practice Vol 2 • Jones & Buckle: Civil Practice of the Magistrates’ Court in South Africa Vol 1 and 2
NORMS AND STANDARDS	READING LIST
<p><u>5 Civil Procedure and Trial Advocacy</u></p> <p><u>Content:</u> There is a substantial overlap in the Uniform Rules of Court and Magistrates’ Courts Rules.</p> <p>Candidates must have knowledge of the rules in both courts. The differences must be highlighted. In particular the difference in powers and functions regarding the Magistrate’s Court.</p> <p>Candidates must be made familiar with Practice Directives in both the High Court and Magistrate’s Court.</p> <p>Candidates must know where to find the directives and</p>	<p>COMPULSORY READING MATERIAL “The ethics of the hopeless case”, by Owen Rogers, in the Advocate magazine, December 2017 especially the summary at pages 50 and 51.</p> <p>1. GENERAL</p> <p>1.1. <i>Character of Action Proceedings</i></p> <ul style="list-style-type: none"> - When to bring an action - Difference from application proceedings - Matters that must be brought by way of action - Requirements of pleadings <ul style="list-style-type: none"> o Rule 18 <p>1.2 <i>Onus</i></p> <p>1.3 <i>Jurisdiction</i></p> <p>High Court</p> <ul style="list-style-type: none"> - Superior Courts Act 10 of 2013 § 21

<p>how they are applied.</p> <p>The following must be dealt with:</p> <p><u>Mediation</u> The impact of and compliance with Rule 41A of the Uniform Rules of Court</p> <p><u>Contingency Litigation:</u> What is contingency litigation and how to decide whether to take a matter on contingency? What are the rules and how to charge contingency fees? What do courts say about contingency litigation?</p> <p><u>Case management:</u> What is Case Management, and how to apply it in your practice and in court proceedings. Candidates must learn that modern day litigation is less adversarial and more cooperative with the object being to resolve disputes quickly and at a reasonable cost. Candidates must know how to refer a matter to case management, the process and procedures in case management.</p> <p><u>Certification:</u> Candidates must understand how the trial certification process works. In particular that a judge will require the parties to agree and record the triable issue/s.</p> <p><u>Trial Preparation:</u> Candidates must understand that there is a duty on a practitioner to settle a matter at any stage. The earlier the matter gets settled, the better.</p> <p>Candidates must acquire the following skills: * How to analyse pleadings. * How to determine triable issues. * How to limit the issues for trial.</p>	<ul style="list-style-type: none"> - Supreme Court Act 59 of 1959 § 19 - Commentary on § 19 in <i>Erasmus</i>, A1-21 to 38B <p>Magistrates' Courts</p> <ul style="list-style-type: none"> - Sections 26, 28, 29, 30, 45, 46(2) and 110 of the Magistrates' Courts Act 32 of 1944 <p>2. THE PLEADING PHASE OF ACTIONS</p> <p><i>2.1. Instituting Actions</i></p> <ul style="list-style-type: none"> - Rule 17 - Summons - Rule 18 - Pleadings: Commentary on Rule in <i>Erasmus</i> - Rule 20 - Declaration: Commentary in <i>Erasmus</i> - Documents that must be put up <p><i>2.2. Parties</i></p> <p><i>2.2.1. Joinder of parties and causes of action</i></p> <ul style="list-style-type: none"> - Rule 10 - Commentary on Rule 10 in <i>Erasmus</i>. <p><i>2.2.2. Consolidation of actions</i></p> <ul style="list-style-type: none"> - Rule 11 - Commentary on Rule 11 in <i>Erasmus</i>. <p><i>2.2.3. Intervention of persons as plaintiffs or defendants</i></p> <ul style="list-style-type: none"> - Rule 12 - Commentary on Rule 12 in <i>Erasmus</i>. <p><i>2.2.4. Third party procedure</i></p> <ul style="list-style-type: none"> - Rule 13 - Commentary on Rule 13 in <i>Erasmus</i>. <p><i>2.2.5. Proceedings by and against partnerships</i></p> <ul style="list-style-type: none"> - Rule 14 - Commentary on Rule 14 in <i>Erasmus</i>. <p><i>2.2.6. Change of parties</i></p> <ul style="list-style-type: none"> - Rule 15 - Commentary on Rule 15 in <i>Erasmus</i>. <p><i>2.2.7. Representation of parties</i></p> <ul style="list-style-type: none"> - Rule 16 - Commentary on Rule 16 in <i>Erasmus</i>. <p><i>2.3. Competent Responses to Particulars of Claim</i></p> <ul style="list-style-type: none"> - Notice of intention to defend - Calling for pre-pleading discovery - Objections that pleadings are irregular: Rule 30 <ul style="list-style-type: none"> - Exceptions: Rule 23 <ul style="list-style-type: none"> o <i>Ocean Echo Properties 327 CC and Another v Old Mutual Life Assurance Company (SA) Ltd 2018 (3) SA 405 (SCA)</i> at paras [9] and [10]. - Pleas and special pleas: Rule 22
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<p>* How to initiate case conferences for certification and for trial readiness.</p> <p>* How to do pre-trial conferences, and how to draft the agenda.</p> <p>* How to carry out a proof analysis. Candidates must understand what is meant by “proof of a fact” and how to discharge the onus.</p> <p>* How to carry out witness and documentation analysis.</p> <p>* How to prepare chronology documents.</p> <p><u>Discovery:</u></p> <p>* Candidates must understand latest Developments on how to obtain, preserve and present relevant documentation including Electronic Documents.</p> <p>* Candidates must understand the concept of narrow discovery and proportionality.</p> <p>* Candidates must know how to prepare trial bundles. This must include the importance of sequencing.</p> <p><u>How to Attend Pre-Trial Conferences and Case Conferences.</u></p> <p>* Candidates must understand the purpose of these conferences and how that purpose can be achieved.</p> <p><u>Trial Procedure</u></p> <p>Requirement of practice notes for the court. When are these notes expected to be filed and what are the contents?</p> <p><u>The content</u></p> <p>Before proceeding with this programme, candidates must be made aware of their Case Concept, how they intend to proceed with the hearing and discharge the onus.</p> <p>* Witness briefing. Candidates must know how to prepare a witness for court appearances.</p> <p>* Opening Statement.</p> <p>* Leading a witness in chief.</p> <p>* Cross examination.</p>	<p>o Commentary on Rule 22 in <i>Erasmus</i></p> <ul style="list-style-type: none"> - Claims-in-reconvention: Rule 24 - Commentary on Rules 24 and 25 in <i>Erasmus</i> - Failure to respond, barring and default judgment: Rule 26 - Commentary on Rule 26 in <i>Erasmus</i> <p>2.4. <i>Further Pleadings</i></p> <ul style="list-style-type: none"> - replication and plea-in-reconvention: Rules 24 and 25 <p>o Commentary on Rules 24 and 25 in <i>Erasmus</i></p> <p>2.5. <i>Close of Pleadings and Set Down</i></p> <ul style="list-style-type: none"> o Rule 29 and commentary thereto o Commentary on Rule 29 in <i>Erasmus</i> o Practice Directions on Set Down <p>2.6. <i>Changes to Pleadings</i></p> <ul style="list-style-type: none"> - Amendments: Rule 28 - Consolidation of actions: Rule 11 - Change of parties, joinder of parties and causes of action, intervention, third party procedures (covered in motion proceedings course) <p>3. PREPARATION FOR TRIAL</p> <p>3.1. <i>Further particulars for trial</i></p> <ul style="list-style-type: none"> - Rule 21 - Commentary on Rule 21 in <i>Erasmus</i> <p>3.2. <i>Discovery</i></p> <ul style="list-style-type: none"> - Notice to discover and discovery affidavits: Rule 35 - Rule 35 - Commentary on Rule 35 in <i>Erasmus</i> - Different kinds of discovery - Consequences of a failure to discover - Applications to compel <p>3.3. <i>Inspection, Examination and Experts</i></p> <ul style="list-style-type: none"> - Rule 36 - Commentary on Rule 36 in <i>Erasmus</i> <p>3.4. <i>Procuring Evidence for Trial</i></p> <ul style="list-style-type: none"> - Rule 38 - Commentary on Rule 38 in <i>Erasmus</i> - Section 36 of Superior Courts Act 10 of 2013 <p>4. SPECIAL PRE-TRIAL PROCEDURES</p> <p>4.1. <i>Pre-Trial Conference, Case Management & Certification</i></p>
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* Re-examination.
 * Presenting argument.
 Note: this is part of the trial advocacy programme. These skills will be split up as separate modules which will be incorporated into and presented as part of the civil procedure programme. Different instructors can be used.

Heads of Argument

- * When are heads required.
- * What is meant by “main heads of argument”.
- * What are Short heads and Comprehensive heads.
- * How to draft heads of argument

- Rule 37 - Commentary on Rule 37 in *Erasmus*
- 4.2. *Special Cases and Adjudication upon Points Of Law*
- Rule 33 - Commentary on Rule 33 in *Erasmus*
- 4.3. *Offers to Settle*
- Rule 34 - Commentary on Rule 34 in *Erasmus*
- 4.4. *Interim Payments*
- Rule 34A - Commentary on Rule 34A in *Erasmus*

5. CONDUCT OF CIVIL TRIALS

5.1. *Trial Procedure*

- Leading and cross-examining evidence: Rule 39
- Rule 39 - Commentary on Rule 39 in *Erasmus*
- o Sections 36-37 of the Superior Courts Act
- Objections

5.2. *Discontinuing a Trial*

- Withdrawal, settlement and abandonment: Rule 41
- Rule 41 - Commentary on Rule 41 in *Erasmus*.
- Postponements and other mid-trial applications

5.3. *Costs*

- Fundamental rules and exceptions (covered in motion practice)

5.4. *Interest*

- Sections 1, 1, 2A and 4 of the Prescribed Rate of Interest Act No 55 of 1975

5.5. *Judgments and orders*

6. AFTER JUDGMENT

6.1. *Variation and Rescission Of Judgment*

- Rule 31(2)(b) - Commentary on Rule 31(2)(b) in *Erasmus*
- Rule 42 - Commentary on Rule 42 in *Erasmus*.

6.2. *Appeals*

High Court

- Superior Courts Act § 16-19 - Supreme Court Act § 20-22
- Rule 49 - Commentary on § 20-22 and Rule 49 in *Erasmus*
- Magistrates Court

Magistrates' Courts

- Sections 83 and 84 of the Magistrates' Courts Act
 - *Caterham Car Sales & Coachworks Ltd v Birkin Cars (Pty) Ltd* 1998 (3) SA 938 (SCA) at paras [36] to [38].
 Harms, *LTC Heads of argument in courts of appeal*, Advocate 2009

7. LAW OF EVIDENCE

7.1. *The burden of proof and duty to begin (in civil cases only)*

- Zeffertt & Paizes chapters 3 and 5.1-5.3

7.2. *The assessment/weight of evidence*

- Zeffertt & Paizes chapter 5

7.3. *Real evidence and documentary evidence*

- Zeffertt & Paizes chapters 19, 20 and 21

7.4. *Oral evidence*

- Zeffertt & Paizes chapter

7.5. *Relevance and admissibility*

- Zeffertt & Paizes chapter 7

7.6. *Hearsay evidence*

- The Law of Evidence Amendment Act 45 of 1988, § 3 - Zeffertt & Paizes chapter 13

7.7. *Admissions (civil cases only)*

- Zeffertt & Paizes pp. 475-499

7.8. *Opinion evidence*

- Zeffertt & Paizes chapter 10

7.9. *Similar fact evidence (civil cases only)*

- Zeffertt & Paizes chapter 9

7.10. *Character evidence (civil cases only)*

- Zeffertt & Paizes chapter 8 parts C and D

7.11. *Privilege*

- Zeffertt & Paizes chapter 17

7.12. *Parol evidence*

- Zeffertt & Paizes chapter 11

	<p>7.13. <i>The leading of witnesses</i> - Zeffertt & Paizes chapter 24</p> <p>7.14. <i>Cross-examination</i> - Zeffertt & Paizes chapter 24</p> <p>7.15. <i>Re-examination</i> - Zeffertt & Paizes chapter 24</p> <p>7.16. <i>Examination by the court</i> - Zeffertt & Paizes chapter 24</p>
NORMS AND STANDARDS	READING LIST
<p>13 <u>Alternative Dispute Resolution</u></p> <p><u>Content:</u></p> <p>The impact of Rule 41A of the Uniform Rules of Court Defining and understanding: - what is a conflict. Negotiation. Mediation. Protection of Investment Act 22 of 2015, section 13. Arbitration. Arbitration Act 42 of 1965 and the International Arbitration Act 15 of 2017. The role of ADR in litigation.</p>	<p>PRINCIPAL WORKS:</p> <ul style="list-style-type: none"> • Grogan, <i>Workplace Law</i> Juta (2015) chapter 20 • Ramsden McKenzie's <i>Law of Building and Engineering Contracts and Arbitration</i> Juta (2014) <p>1. INTRODUCTION</p> <p>1.1. Distinction between adversarial proceedings and facilitative / consensus-building processes</p> <p>1.2. Conflict management and dispute resolution</p> <ul style="list-style-type: none"> - LSSA Manual on Alternative Dispute Resolution - Access to justice and social justice - Rights vs interest disputes - Rights vs position-based negotiation - Ethics involved in conciliation (conflicts of interest, confidentiality, mediator liability) - Drafting certificates, outcome reports, settlement agreements <p>2. COURT-ANNEXED MEDIATION PROCESSES</p> <p>2.1. Rule 41A, Uniform Rules of Court</p> <p>2.2. Magistrates court</p> <ul style="list-style-type: none"> - Rules of Voluntary Court-Annexed Mediation, 2014 - Rules: Conduct of proceedings of Magistrate's Courts of South Africa, 2019 <p>2.3. Divorce Mediation</p> <ul style="list-style-type: none"> - Function of the mediator - Children's Act, Brownlee v Brownlee (unreported judgment, 2008/25274)

	<p>- Best interests of the child, parenting plan, maintenance, division of assets, Memorandum of Understanding</p> <p>3. ARBITRATION</p> <p>3.1. Arbitration Agreements</p> <ul style="list-style-type: none"> - Competence-competence principle - Enforcement of arbitral awards: <ul style="list-style-type: none"> o Domestic - Arbitration Act 42 of 1965 o International - International Arbitration Act 15 of 2017 - Section 13 of the Protection of Investment Act 22 of 2015 <p>3.2. Role of chairperson (presiding officer) and participant</p> <p>3.3. Employment arbitration</p> <ul style="list-style-type: none"> - CCMA or bargaining council <ul style="list-style-type: none"> o Issues for mediation/ conciliation o Issues for arbitration - Private arbitration <p>3.4. <i>Construction Arbitration</i></p> <ul style="list-style-type: none"> - Charter of Disputes - ICC recommendations - FIDIC & JBCC contracts
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PAPER 3: CRIMINAL PROCEDURE

NORMS AND STANDARDS	READING LIST
<p>Published in Government Gazette 43981 on 2 December 2020 under section 3 (g)(i) read with section 6 (1)(b)(i) and section 95(1)(n) of the Legal Practice Act 28 of 2014)</p>	<p>PRINCIPAL REFERENCES:</p> <ul style="list-style-type: none"> • Criminal Procedure Act 51 of 1977 (CPA) • The Constitution of the Republic of South Africa, 1996 <p>ADDITIONAL REFERENCES:</p> <ul style="list-style-type: none"> • Du Toit, et al <i>Commentary on the Criminal Procedure Act</i>
NORMS AND STANDARDS	READING LIST
6 Criminal Court Practice and Trial	

<p><u>Advocacy</u></p> <p><u>Content:</u> Candidates must know the peculiar requirements in a criminal trial thus:</p> <p><u>Course Content</u></p> <ul style="list-style-type: none"> * How to obtain and analyse the charge sheet and docket. * How to take instructions and obtain your client's version. * How to obtain witness statements and ensure witness presence in court. * How to do plea bargaining. * How to do bail applications. * How to plead effectively, including when to make a Plea explanation. * How to attend trial and pre-trial conferences. * How to cross-examine state witnesses. * How to present your client's version to a state witness. * How to lead evidence in chief including the decision to call your client. * How to present argument * How to present sentencing options and evidence in mitigation. <p>Note: the court craft here will also be a module of Trial Advocacy.</p>	<p>1. GENERAL</p> <p><i>Right to legal representation</i></p> <ul style="list-style-type: none"> - Constitution Section 35(3)(f) and (g) - CPA Section 73 <p><i>Arrest</i></p> <ul style="list-style-type: none"> - Constitution Section 14, 35(1)(d), 35(2)(a) and 35(4) - CPA Sections 39–53 - <i>Mahlongwana v Kwatinidubu Town Committee</i> 1991 (1) SACR 669 (E) - <i>Minister of Safety and Security v Sekhoto and Another</i> 2010 (1) SACR 388 (FB) <p><i>Bail</i></p> <ul style="list-style-type: none"> - Constitution Section 35(1)(f) - Chapter 9 and 10 of the CPA - CPA Sections 307 and 309 - <i>S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat</i> 1999 (4) SA 623 (CC) (1999 (2) SACR 51; 1999 (7) BCLR 771; [1999] ZACC 8) - <i>S v Mabena and another</i> 2007 (1) SACR 482 (SA) paras [3] to [7] - <i>S v Viljoen</i> 2002 (2) SACR 550 (SCA) ([2002] 4 All SA 10; [2002] ZASCA 81) paras [10] to [15] - <i>S v Botha and another</i> 2002 (1) SACR 222 (SCA) (2002 (2) SA 680; [2002] 2 All SA 577; [2001] ZASCA 146) paras [2] to [21] - <i>S v Bruintjies</i> 2003 (2) SACR 575 (SCA) ([2003] ZASCA 4) paras [4], [5] and [8] to [10] <p>2. CRIMINAL TRIAL</p> <p><i>2.1. Indictments and charges</i></p> <ul style="list-style-type: none"> - General Sections 80 – 104 of the CPA - <i>S v Wannenburg</i> 2007 (1) SACR 27 (C) at 32J - 34C - <i>S v Whitehead and others</i> 2008 (1) SACR 431 (SCA) para [10] <ul style="list-style-type: none"> o CPA Chapter 14, particularly sections 54 & 55 & 144 o <i>Shabalala and Others v Attorney-General of Transvaal and Another</i> 1995 (2) SACR 761 (CC) (1996 (1) SA 725; 1995 (12) BCLR 1593; [1996] 1 All SA 64; [1995] ZACC 12) <ul style="list-style-type: none"> - Joinder of Persons and Counts o CPA Sections 81, 155, 156, 157 - Splitting of Charges o CPA Sections 336, 83
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	<ul style="list-style-type: none"> - Particulars of Offence <ul style="list-style-type: none"> o CPA Sections 84, 85, 86–92, 104 2.2. <i>Pleas</i> <ul style="list-style-type: none"> - Ordinary Pleas <ul style="list-style-type: none"> o Constitution Section 35(3)(h) o CPA Sections 105, 106, 112, 113, 114, 115, 116, 117 Inclusive of how pleas should be drafted (form and content) and plea and sentence agreements - section 105A <i>S v Esterhuizen and others</i> 2005 (1) SACR 490 (T) - Exceptional Pleas <ul style="list-style-type: none"> o CPA Sections 57, 77, 79, 109, 85 - Autrefois Acquit and Convict <ul style="list-style-type: none"> o Constitution Section 35(3)(m) o CPA Sections 106 and 324 - Unreasonable delay/ permanent stay <ul style="list-style-type: none"> o CPA Sections 168 and 342A o <i>Sanderson v Attorney-General, Eastern Cape</i> 1998 (1) SACR 227 (CC) o <i>Director of Public Prosecutions, Transvaal v Mtshweni</i> 2007 (2) SACR 217 (SCA) o <i>Magmoed v Janse Van Rensburg and Others</i> 1993 (1) SACR 67 (A) o <i>S v Basson</i> 2004 (1) SACR 285 (CC) o <i>S v Basson</i> 2007 (1) SACR 566 (CC) 2.3. <i>The conduct of the trial</i> <ul style="list-style-type: none"> - Conduct <ul style="list-style-type: none"> Sections 144 - 146 and Chapter 22 of the CPA - Discharge: CPA section 174 <ul style="list-style-type: none"> <i>Commentary on the Criminal Procedure Act</i> by Du Toit <i>et al</i> <i>S v Lubaxa</i> 2001 (2) SACR 703 (SCA) (2001 (4) SA 1251; [2002] 2 All SA 107) paras [8] to [23] - Specific issues around admissibility of evidence <ul style="list-style-type: none"> o Entrapment <ul style="list-style-type: none"> ▪ Section 252A of Act 51 of 1977 o Admissions and confessions <ul style="list-style-type: none"> ▪ Constitution Sections 35 and 36 ▪ CPA Sections 217 to 220 o Unlawfully obtained Evidence <ul style="list-style-type: none"> ▪ <i>Key v Attorney-General, Cape Provincial Division and Another</i> 1996 (4) SA 187 (CC)
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- *Director of Public Prosecutions, Western Cape v Killian* 2008 (1) SACR 247 (SCA)
- *S v Mthembu* 2008 (2) SACR 407 (SCA)
- *S v Tandwa and Others* 2008 (1) SACR 613 (SCA)
- *S v Shaik and Others* 2008 (1) SACR 1 (CC)
- Trial-within-a-trial

2.4. Conclusion of the trial

- Competent Verdicts
 - o CPA Chapter 26
- Previous Convictions: CPA Chapter 27
- Procedure of Judgment
 - o CPA Sections 152, 274, 275–299
 - o *S v Lubaxa* 2001 (2) SACR 703 (SCA)

3. SENTENCING

3.1. Principles of sentencing

Chapter 28 and 29 of the CPA

Sections 51-53 of the Criminal Law Amendment Act 105 of 1997

S v Malgas 2001 (1) SAR 469 (SCA)

S v Karolia 2006 (2) SACR 75 (SCA)

S v Mthimkulu 2013 (2) SACR 89 (SCA)

3.2. Types of sentences

- Section 276
- Imprisonment
- Committal to a treatment centre
- Fine
- Correctional supervision
- Sentencing of juveniles
 - o Sections 290 and 297 of the Code
 - o Suspension of sentence of various conditions
 - o Conditional/unconditional postponement of sentence
 - o Caution and discharge

3.3. Sentencing discretion

- Mandatory minimum sentencing: Criminal Law Amendment Act 105 of 1997
- *S v Malgas* 2001 (1) SACR 469 (SCA)
- Mitigating and aggravating factors

4. APPEALS AND REVIEWS

4.1. REVIEW

- Constitution Section 35(3)(o)

- CPA Chapter 30

- (i) the difference between appeals and reviews

- (ii) powers of the court on appeal and review

R v Dhlumayo 1948 (2) SA 677 (A) at 705-706

S v Rabie 1975 (4) SA 855 (A)

S v Van Aswegen 2001 (2) SACR 97 (SCA) ([2001] ZASCA 61) – all evidence to be taken into account

S v S 1999 (1) SACR 608 (W) ([1999] 4 All SA 16) - review

S v Bogaards 2013 (1) SACR 1 (CC) (2012 (12) BCLR 1261; [2012] ZACC 23) – paras [37] and [41]

4.2. APPEAL

- Constitution Section 35(3)(o)

- CPA Chapters 30 and 31

- From Lower Courts

- o CPA Sections 309 and 310

- o Magistrates' Courts: Rule 67

- From the High Courts

- o CPA Sections 315–322

5. THE ADMISSIBILITY/ INADMISSIBILITY OF RELEVANT EVIDENCE

5.1. *Hearsay evidence*

- Common law exceptions

- The Law of Evidence Amendment Act 45 of 1988

5.2. *The parol evidence rule*

- Hoffmann & Zeffertt, chapter 14

5.3. *Similar fact evidence* (SFE) (SCH – CHP 7) (ZEF - CHP 9)

- Rationale for the exclusion of SFE

- Rule for the admissibility of SFE: the Makin formulation & the Boardman formulation

5.4. *Character evidence* (SCH – CHP 6) (ZEF – CHP 8)

- Introduction to character evidence

- Character in criminal cases

- o Sections 197, 211 of the CPA

- Character in civil cases

5.5. *Opinion evidence* (SCH – 8)(ZEF - CHP 10)

- The Hollington rule
- Opinion of a lay person
- Expert witness
- o *Menday v Protea Assurance Co Ltd* 1976 1 Sa 565 (E)
- o *Coopers (SA) Pty Ltd v Deutsche Gessellschaft Fur Schadlingsbekampfung Mbh* 1976 3 Sa 352 (A)

5.6. *Previous consistent statements* (PCS) (SCH – CHP 9) (ZEF - CHP 14)

- Reason for the exclusion of previous consistent statements
- Exceptions to the general rule
- o To rebut a suggestion of recent fabrication
- o Complainant in a sexual case
- o Identification

6. EVIDENCE

6.1. *Confirmation or cautionary rules in regard to:*

- (i) Single witnesses: Section 208 of the CPA;
- (ii) Evidence of identification: *S v Mthetwa* 1972 (3) SA 766 (A) at 768A—C
- (iii) Complaints in matters of a sexual nature: *S v Jackson* 1998 (1) SACR 470 (SCA);
- (iv) Children;
- (v) Confessions: Section 209 of the CPA;
- (vi) Accomplices;
- (vii) Traps

See, generally, the commentary on the cautionary rule dealt with in *Commentary on the Criminal Procedure Act* by Du Toit *et al* under Section 208 of the CPA

6.2. *Presumptions*

- (i) Onus (on criminal cases in respect of defences pleaded);
- (ii) Particular presumptions
 - (a) Drugs and Drug Trafficking Act 140 of 1992;
 - (b) The CPA;
 - (c) Sections 65(3) and (4) of the National Road Traffic Act 93 of 1996;
- (iii) The effect of Section 35 read with Section 36 of the Constitution, 108 of 1996, and statutory presumptions. *S v Coetzee and others* 1997 (3) SA 527 (CC).

6.3. *Admissions and confessions*

- (i) Sections 217—220 of the CPA;
- (ii) The effect of Section 35 read with Section 36 of the Constitution on admissions and confessions.

6.4. *Documentary evidence*

	<p>Section 212, particularly ss 212(1), (4), (8), (9), (11) and (12); and Sections 213, 221, 233, 234 and 236 of the CPA.</p> <p><i>6.5. Mental capacity of accused persons</i> Chapter 13 of the CPA; Criminal Law Amendment Act 1 of 1988.</p> <p><i>6.6. Search and seizures</i> Sections 20-22 of the CPA</p> <p><i>6.7. Entrapment</i> Section 252A of the CPA. Case law references in the commentary (Du Toit <i>et al</i>), including:</p> <p><i>6.8. The status of evidence illegally obtained</i> (Having regard to Sections 35 and 36 of the Constitution and the commentary under Section 225 of the CPA in Du Toit <i>et al</i>)</p> <p><i>6.9. Unreasonable delay / Permanent stay</i> Sections 168 and 342A of the CPA</p> <p>7. LEGISLATION</p> <p>7.1. Constitution of the Republic of South Africa, 1996 Sections 35 and 36</p> <p>7.2. The Law of Evidence Amendment Act 45 of 1988 (Hearsay)</p> <p>7.3. Accused’s right of access to information contained in the State brief / Police docket (Having regard to the provisions of Sections 35 and 36 of the Constitution.) <i>Shabalala and others v Attorney General, Transvaal and another</i> 1996 (1) SA 725 (CC) (1995 (2) SACR 761 (CC))</p> <p>7.4. Preservation, confiscation, restraint and forfeiture orders Sections 34 and 35 of the CPA</p>
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PAPER 4: ETHICS AND CONSTITUTIONAL LAW AND CUSTOMARY LAW

NORMS AND STANDARDS	READING LIST
Published in Government Gazette 43981 on 2 December 2020 under	Legal Practice Act 28 of 2014: ss 33 - 35 (“LPA”) The South African Legal Practice Council Code of Conduct in terms of s 36(1) of the LPA: Parts I, II, IV and V

<p>section 3 (g)(i) read with section 6 (1)(b)(i) and section 95(1)(n) of the Legal Practice Act 28 of 2014)</p>	<p>Universal ethical principles:</p> <ul style="list-style-type: none"> o Honesty o Trustworthiness o Loyalty o Respect for others o Adherence to the law o Doing good and avoiding harm to others o Accountability
<p>NORMS AND STANDARDS</p>	<p>READING LIST</p>
<p><u>4 Ethics for legal Practitioners</u></p> <p><u>Content:</u> A single contact session as well as Ethics for Legal Practitioners needs to be incorporated into the introduction to each module recommended in this programme. Candidates must be aware of the ethical requirements for all types of practitioner.</p> <p>Details of course content The seven universal ethical principles The current Code of Conduct of 29 March 2019: Section 3 of the general provisions in the Code of Conduct requires attention. Section 56 The scope and limits of legitimate cross-examination are particularly important.</p> <p>Universal ethical principles honesty trustworthiness loyalty respect for others</p>	<p>Counsel's essential ethical duties enumerated</p> <p>1.1 Duty to act honestly and not to mislead the court Code of Conduct para 9.5; 5. 7. 1; 57.6; 57.9 Kekana v Society of Advocates of South Africa 1998 (4) SA 649 (SCA) ([1998] 3 All SA 577; [1998] ZASCA 54) at 6551</p> <p>1.2 Duty in <i>ex parte</i> applications to act with utmost good faith and to disclose material facts which might influence the court Code of Conduct 57.4 Recycling & Economic Dev Initiative of SA NPC v Minister of Environmental Affairs 2019 (3) SA 251 (SCA) ([2019] ZASCA 1) at paras [46] and [47]. Thint (Pty) Ltd v National Director of Public Prosecutions; Zuma v NDPP 2009 (1) SA 1 (CC) at paras [102] and [296]. Schlesinger v Schlesinger 1979 (4) SCA 342 (W) at 349A</p> <p>1.3 Duty to direct the court's attention to relevant and adverse authorities Code of Conduct 57.5 Ulde v Minister of Home Affairs & Another 2008 (6) SA 483 (W) para [37]</p> <p>1.4 Duty to draw the court's attention to deviation from standard forms and orders Code of Conduct 57.8</p> <p>1.5 Duty to present the best argument available to the litigant Feni v Gxothiwe and Another 2014 (1) SA 594 (ECG) para [6] and [7]</p> <p>1.6 Duty to preserve and uphold the dignity of the courts and officers of the court</p> <p>1.7 Duty not to abuse the process of court Code of Conduct 60</p> <p>1.8 Applications for recusal of presiding officers</p>

<p>adherence to the law doing good and avoiding harm to others accountability</p>	<p>President of the Republic of South Africa and Others v South African Rugby Football Union and Others 1999 (4) SA 147 (CC) (1999 (7) BCLR 725; [1999] ZACC 9) at paras [35] – [48]</p> <p>1.9 Principles governing the hopeless case “The ethics of the hopeless case”, Owen Rogers, Advocate December 2017 Motswai v Road Accident Fund 2013 (3) SA 8 (GSJ) at paras [26]-[37]</p> <p>2. <i>Counsel’s duty to clients</i></p> <p>2.1 The cab-rank rule Code of Conduct para 26</p> <p>2.2 Duty to further clients’ cases fearlessly to the best of counsel's ability Code of Conduct paras 3.3; 9. 10</p> <p>2.3 Maintaining confidentiality and legal professional privilege legal advice privilege and litigation privilege Code of Conduct 3.6; 57. 2; 57. 3; 57. 6; 57.7; 57. 10</p> <p>2.4 Conflict of interest between clients Code of Conduct 3.5; 58.4; 58.5; 58.6</p> <p>2.5 Conflict of interest between counsel and clients and presiding officer/opponents Code of Conduct 9.6; 26.6-26.9; 58. 1-58.3; 58.7-58. 12</p> <p>2.6 Counsel’s independence in conducting matters Code of Conduct 3. 9; 9. 9; 22. 3. 1; 25.3</p> <p>2.7 Admissions and undertakings made and settlement concluded by counsel on behalf of clients Code of Conduct 25.6</p> <p>3. <i>The referral rule</i></p> <p>3.1 Prohibition against receiving instructions directly from the public S34(2)(a)(i) of the LPA Code of Conduct Part IV and sections 27 and 28.1 De Freitas v Society of Advocates of Natal 2001 (3) SA 750 (SCA) (2001 (6) BCLR 531) General Council of the Bar of SA v van der Spuy 1999 (1) SA 577 (T) at 610-611</p> <p>3.2 Exception to the referral rule S34(2)(a)(ii) of the LPA Code of Conduct Part V</p>
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3.3 Counsel should not perform work within the exclusive ambit of the functions of attorneys
 Code of Conduct 23. 2. 1 -23. 2. 19
 Rösemann v General Council of the Bar of SA 2004 (1) SA 568 (SCA)

Rules governing consultations witnesses and cross-examination

4.1 Consultation to take place in counsel's chambers and in the presence of instructing attorney and exceptions to the general rule)
 Code of Conduct 25. 7; 25. 8; 55. 1-55.5

4.2 Interviewing witnesses of opponent
 Code of Conduct 55.6-55.8
 Code of Conduct 55. 9-55. 1 1

4.3 Undesirability of counsel deposing to affidavits and becoming witnesses in cases
 Carolus v Saambou Bank Limited 2002 (6) SA 346 (SECLD) at 3481-J

4.4 Interviewing witnesses during trial

4.4.1 General prohibition against interviewing witnesses who are under cross-examination as well as between cross-examination and re-examination
 Code of Conduct 55.5

4.4.2 Interviewing witnesses after they have been sworn in (that is in chief)
 Code of Conduct 55.5 (generally prohibited)

Cross-examination
 Code of Conduct 56.1-56.6
 President of the Republic of South Africa & Others v SA Rugby Football Union & Others 2000 (1) SA 1 (CC) at paras 61-64 (duty to challenge evidence in cross-examination)

Rules governing counsel's fees

5.1 Contingency fee agreements
 Code of Conduct 32
 South African Association of Personal Injury Lawyers v Minister of Justice and Constitutional Development (Road Accident Fund, Intervening Party) 2013 (2) SA 583 (GSJ) (Full Bench) paras [23-26], [68]

5.2 *Pro bono* and *pro amico* briefs
 Code of Conduct 31

5.3 Champerty agreements
 Price Waterhouse Coopers Inc and Others v National Potato Co-Operative Ltd and Another 2004 (6) SA 66 (SCA) (2004 (9) BCLR 930; [2004] 3 All SA 20; [2004] ZASCA 64): paras [26] - [44] especially dictum in para [41]

	<p>5.3 Costs <i>de bonis propriis</i> and orders disentitling counsel to charge fees</p> <p>5.4 Fee agreements reasonableness of counsel’s fees marking briefs and furnishing fee accounts Code of Conduct paras 29-35</p> <p>6. Counsel’s qualified privilege and freedom of speech in court Code of Conduct 3. 14; 9. 7. 1; 56.2; 56.4; 56.6</p> <p>7. Court and professional etiquette Code of Conduct 36, 61. 3-61. 12</p> <p>8. Duty to obey rules of the profession Code of Conduct 2; 21. 1; 54.1</p> <p>9. Applications for admission and enrolment as an advocate Sections 24(1) and (2); 26(1) of the LPA Rule 17 of the Legal Practice Council Ex Parte Goosen 201 9 (3) SA 489 (GJ) Ex Parte Swain 1973 (2) SA 427 (N) at 434H Northern Cape Society v Mziako [2018] ZANCHC 28 paras 30-34 Alves v Legal Practice Council and Similar Matters 2019 (6) SA 18 (WCC)</p> <p>10. Applications to strike off and concept of “fit and proper” person to practise S31(1), s43 and s44 of the LPA General Council of the Bar of South Africa v Geach and Others 2013 (2) SA 52 (SCA) ([2013] 1 All SA 393; [2012] ZASCA 175) Johannesburg Society of Advocates v Edeling 2019 (5) SA 79 (SCA)</p>
Norms and Standards	Reading List
<p>16 Constitutional law <u>Content:</u></p> <p>Introduction to Constitutional law and Customary law. For Customary Law see the online course below at item 20.</p> <p>Constitutional Law: Citation of Constitutional Laws Act 5 of 2005</p>	<p>Constitution of the Republic of South Africa, 1996 Rules of the Constitutional Court, 2003 Directives of the Constitutional Court</p> <p>1. GENERAL This course will prepare pupils/candidates to understand the principles, concepts and the procedure of Constitutional litigation.</p> <p>1.1. <i>Access to the Constitutional Court</i> - Superior Courts Act, sections 16 and 17 - Constitutional Court Rule 19</p>

<p>Jurisdiction of our courts to hear constitutional matters. The 2013 change to the jurisdiction of the Constitutional Court.</p> <p>Introduction to the Rules and Directives in the Constitutional Court. Eleven ways to get to the Constitutional Court.</p> <p>How to enforce Constitutional rights. How to advise clients about their Constitutional rights, duties and obligations.</p> <p>How to apply Chapter 2 of the Bill of Rights and the limitations clause. How to apply the rest of the Constitution in giving advice to clients.</p> <p><u>Note to Trainer</u></p> <p>Summative assessments need to be open book exams.</p> <p>Candidates must have access to the Constitution, 1996 and the Constitutional Court Rules and the Uniform Rules of Court.</p> <p>Candidates must understand and be able to apply the: Citation of Constitutional Laws Act 5 of 2005 when drafting legal documents.</p>	<p>What is a “constitutional matter”? <i>S v Boesak</i> 2001 (1) SA 912 (CC) especially paras [10] to [15].</p> <p>1.2. <i>The Bill of Rights, Constitutional matters & any other matter that raises an arguable point of law of general public importance which ought to be considered</i></p> <ul style="list-style-type: none"> - Constitution, section 167(3)(b) & 167(6)(a) & (b) CC Rule 18. CC Rule 19. - Intervention in the Constitutional Court CC Rule 8. - Confirmation proceedings in the Constitutional Court Section 167(5) of Constitution. CC Rule 16. <p>- The exclusive jurisdiction of the Constitutional Court</p> <p>CC Rules 14 to 1. Section 167(4) of Constitution</p> <p>Content and limitation of rights Chapter 2 of the Constitution, especially section 36. <i>NM and Others v Smith</i> 2007 (5) SA 250 (CC) especially paras [33] to [45]. <i>Government of the Republic of South Africa and Others v Grootboom</i> 2001 (1) SA 46 (CC) especially paragraphs [9] to [15].</p> <p>1.3. <i>Costs in Constitutional matters</i></p> <ul style="list-style-type: none"> - <i>Biowatch Trust v Registrar Genetic Resources and Others</i> 2009 (6) SA 232 (CC) paras [16] and [20] to [24] and [56] <p>2. SPECIFIC PROCEDURES</p> <p>2.1. <i>Direct access applications</i></p> <ul style="list-style-type: none"> - Constitutional Court Rule 18 - <i>Lesbian & Gay Equality Project v Minister of Home Affairs</i> 2006 1 SA 524 (CC) par 39 - <i>Mazibuko v Sisulu</i> 2013 6 SA 249 (CC) - <i>SA Informal Traders Forum v City of Johannesburg; SA National Traders Retail Assoc. v City of Johannesburg</i> 2014 4 SA 371 (CC) - Urgent applications o Constitutional Court Rule 12 <p>2.2. <i>Declaration of constitutional invalidity</i></p> <ul style="list-style-type: none"> - Constitution, section 172(2) - Constitutional Court Rules 15 and 16 - <i>Director of Public Prosecutions v Mohamed</i> 2003 (4) SA 1 (CC) at para [56]
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2.3. *Amicus curiae and joinder applications*
 - Constitutional amicus interventions in the High Court
 Uniform Rule 16A.
 Constitutional amicus interventions in the the SCA
 SCA Rule 16.
 - Constitutional Court Rules 5, 8 and 10

3. CONSTITUTIONAL REMEDIES

Minister of Health and Others v Treatment Action Campaign and Others (No 2) 2002 (5) SA 721 (CC) especially paras [96] to [114].
Mwelase v Director General, Department of Rural Development & Land Reform 2019 (6) SA 597 (CC) (2019 (11) BCLR 1358; [2019] ZACC 30) at para [51].

3.1. *Declaration of invalidity, reading down, reading in & severance*
 - Hierarchy of remedies

- o *Van Rooyen v The State* 2002 (5) SA 246 (CC)
 - Declarations of invalidity
- o *S v Makwanyane* 1995 (3) SA 391 (CC) par 151
- o *National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs & Others* 2000 (2) SA 1 (CC) par 73–76
 - Reading down & Severance
- o *Investigating Directorate: Serious Economic Offences & Others v Hyundai Motor Distributors (Pty) Ltd & Others: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO & Others* 2001 (1) SA 545 (CC)
- o *Lawyers for Human Rights & Another v Minister of Home Affairs & Another* 2004 (4) SA 125 (CC)
- o *Coetzee v Government of the Republic of South Africa; Matiso & Others v Commanding Officer, Port Elizabeth Prison, & Others* 1995 (4) SA 631 (CC) par 51
- o *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) & Others* 2005 (3) SA 280 (CC)
- o *National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs & Others* 2000 (2) SA 1 (CC) par 63-64
 - Reading In
- o *National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs & Others* 2000 (2) SA 1 (CC) par 67-68
- o *Khosa & Others v Minister of Social Development & Others; Mahlaule & Others v Minister of Social Development & Others* 2004 (6) SA 505 (CC)
- o *Bhe & Others v Magistrate, Khayelitsha & Others; Shibi v Sithole & Others; SA Human Rights Commission & Another v President of the RSA & Another* 2005 (1) SA 580 (CC)

3.2. *Retrospectivity and suspension of invalidity*
 - *Nyathi v MEC of the Department of Health & Another* 2008 (5) SA 94 (CC)
 - *Matatiele Municipality & Others v President of the Republic of South Africa & Others* 2007 (1) BCLR 47 (CC) par 96
 - *Ex Parte Women's Legal Centre: In re Moise v Greater Germiston TLC* 2001 (4) SA 1288 (CC) par 13

	<p>- <i>Masiya v Director of Public Prosecutions, Pretoria & Another (Centre for Applied Legal Studies & Another, Amici Curiae)</i> 2007 (5) SA 30 (CC) par 47-57</p> <p>3.3. <i>Interdicts, interim orders and supervisory orders</i></p> <p>- <i>Black Sash Trust v Minister of Social Development and Others (Freedom Under Law NPC Intervening)</i> 2017 (3) SA 335 (CC)</p> <p>3.4. <i>Constitutional damages</i></p> <p>- <i>Fose v Minister of Safety and Security</i> 1997 (3) SA 786 (CC) paras [60] and [67]</p> <p>- <i>Minister of Safety and Security & Another v Carmichele</i> 2004 (3) SA 305 (SCA)</p> <p>- <i>Minister of Safety and Security v Van Duivenboden</i> 2003 (1) SA 389 (SCA) para [21]</p> <p>- <i>President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, Amici Curiae)</i> 2005 (5) SA 3 (CC)</p>
Norms and Standards	Reading List
<p>20 Customary Law (Online)</p> <p><u>Content:</u></p> <p>Customary law in the context of the Constitution, 1996</p> <p>The anomaly of the <i>Bhe</i> decision (living versus official customary law)</p> <p>Marriages into customary law – section 15 of the Constitution</p> <p>Recognition of Customary Marriages Act 120 of 1998</p> <p>Language and culture – section 30 of the Constitution</p> <p>Traditional leadership – ss 211 & 212 of the Constitution</p> <p>Social structure of indigenous communities</p>	<p>PRINCIPAL WORKS:</p> <p>• Nhlapo ‘Customary Law in Post-apartheid South Africa: constitutional confrontations in culture, gender and “living law”’ <i>South African Journal on Human Rights</i>, 2017 Vol 33 No. 1, 1-24</p> <p>1. GENERAL</p> <p>1.1. <i>Historical approach to customary law</i></p> <p>- Law of Evidence Amendment Act 1988 s 1(1), (2)</p> <p>1.2. <i>Customary law under the constitution</i></p> <p>- The Constitution, sections 30, 31, 39, 211</p> <p>o <i>Alexkor Ltd and Another v Richtersveld Community and Others</i> 2004 (5) SA 460 (CC) (2003 (12) BCLR 1301; [2003] ZACC 18) at para [51]</p> <p>o <i>Bhe and Others v Magistrate, Khayelitsha and Others; Shibi v Sithole and Others; SA Human Rights Commission and Another v President of the RSA and Another</i> 2005 (1) BCLR 1 (CC) 2005</p> <p>o <i>Shilubana and Others v Nwamitwa and Others</i> 2008 (9) BCLR 914 (CC) 39</p> <p>2. CUSTOMARY LAW IN THE COURTS</p> <p>2.1. <i>Ascertainment and proof of African customary law</i></p> <p>- <i>Shilubana and Others v Nwamitwa and Others</i> 2008 (9) BCLR 914 (CC)</p> <p>- <i>Mayelane v Nwengwenyama and Another (Women’s Legal Centre Trust and Others as amici curiae)</i> 2013 (8) BCLR 918 (CC)</p> <p>2.2. <i>Conflicts between common law and customary law: choice of law guidelines</i></p> <p>- Section 211(3) of the Constitution</p>

<p>Succession and inheritance</p> <p>Land and property rights</p>	<p>2.3. <i>Conflict of laws between customary law systems</i> - Section 1(3) Law of Evidence Amendment Act</p> <p>3. CUSTOMARY LAW INSTITUTIONS 3.1. <i>Traditional leadership</i> – s 211 and 212 of the Constitution</p> <p>4. SPECIFIC CUSTOMARY LAW ISSUES 4.1. <i>Land</i> - Communal Land Bill of 2017 - Interim Protection of Informal Land Rights Act 31 of 1996 (IPILRA)</p> <p>4.2. <i>Customary marriage</i> - Registration, recognition & status, s 15 Constitution o Recognition of Customary Marriages Act 120 of 1998 sections 2, 3, 4, 8 & 10 o <i>Mayelane v Ngwenyama and Another (Women’s’ Legal Centre Trust and others as amici curiae)</i> 2013 (8) BCLR 918 (CC) - Proprietary consequences o <i>Gumede v President of the Republic of South Africa and Others</i> 2009 (3) SA 152 (CC) (2009 (3) BCLR 243; [2008] ZACC 23) o <i>Ngwenyama v Mayelane and Another</i> 2012 (10) BCLR 1071 (SCA) o <i>Ramuhovhi v President of the Republic of South Africa</i> 2016 (6) SA 210 (LT) <i>Ramuhovhi and Others v President of the Republic of South Africa and Others</i> 2018 (2) SA 1 (CC) (2018 (2) BCLR 217 <i>Netshituka v Netshituka</i> 2011 (5) SA 453 (SCA) ([2011] ZASCA 120) <i>Mayelane v Ngwenyama and Another</i> 2013 (4) SA 415 (CC); 2013 (8) BCLR 918 (CC) <i>Holomisa v Holomisa and Another</i> (CCT146/17) [2018] ZACC 40; 2019 (2) BCLR 247 (CC) (23 October 2018) <i>MM v MN and Another</i> 2013 (4) SA 415 (CC) (2013 (8) BCLR 918; [2013] ZACC 14)</p> <ul style="list-style-type: none"> - Disputes about validity - Change of marriage system <p>4.3. <i>Succession</i> - Black Administration Act 38 of 1927 - Regulations for the Administration and Distribution of the Estates of Blacks (GN R200 of 1987) - Intestate Succession Act 81 of 1987 - Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009. - Himonga pp 158-185 - <i>Mthembu v Letsela and Another</i> 1998 (2) SA675 (T) - <i>Mthembu v Letsela</i> 2000 (3) SA 867 (SCA) - <i>Bhe and Others v Magistrate, Khayelitsha and Others; Shibi v Sithole and Others; SA Human Rights Commission and Another v President of the RSA and Another</i> 2005 (1) BCLR 1 (CC) - <i>Gumede v President of the Republic of South Africa and others</i> 2009 (3) SA 152 (CC)</p>
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	<p>4.4. <i>Ownership of Property</i> Communal ownership of land v Individual ownership . Interim Protection of Informal Land Rights Act 31 of 1996 Section 1 - definitions “community”; “informal right to land” Section 2 <i>Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Ltd and Another</i> 2019 (2) SA 1 (CC) (2019 (1) BCLR 53; [2018] ZACC 41)</p> <p>4.5. <i>Traditional Leadership - status, powers, administration</i> Structures of traditional leadership . Constitution 1996, sec 211 & 212 . Traditional Leadership and Governance Framework Act 41 of 2003 Traditional and Khoi-San Leadership Act 3 of 2019 - Sections 2; 3; 4; 11; 12 & 19 <i>Shilubana and Others v Nwamitwa</i> 2009 (2) SA 66 (CC) (2008 (9) BCLR 914; [2008] ZACC 9)</p>
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PAPER 5: LEGAL WRITING AND DRAFTING

NORMS AND STANDARDS	READING LIST
Legal writing and drafting: Reg 7(9)(g): Open book.	
<p><u>3 Drafting Legal Documents – Pleadings and Motions</u> <u>Content:</u></p> <p><u>Managing Fact:</u></p> <ol style="list-style-type: none"> How to obtain relevant facts. What are the sources of fact. Obtaining documents including electronic documents. How to preserve documents. Obtaining witness statements. Carrying out <i>in loco</i> inspections if necessary: how to record the evidence. How to obtain and preserve relevant exhibits: what exhibits are. The explanation above is required before any papers are drafted. <p><u>Analysing Fact.</u></p> <ol style="list-style-type: none"> Candidates must understand what to do after gathering the facts. Candidates must learn, at the outset, to sequence all the facts and documents. 	<p>PRINCIPAL WORKS:</p> <ul style="list-style-type: none"> • Harms: Amler’s Precedents of Pleadings • Hussain: Practical Drafting Skills • Marnewick: Litigation Skills for South African Lawyers <p>COMPULSORY READING MATERIAL “The ethics of the hopeless case”, by Owen Rogers, in the Advocate magazine, December 2017 especially the summary at pages 50 and 51.</p> <p>1. LANGUAGE AND WRITING TRAINING</p> <p>1.1. <i>Professional Writing</i> - Different forms of written communication</p>

<p>c) Candidates must be able to analyse facts on the basis that only relevant facts must be retained and presented at a hearing; only facts that are admissible, in terms of the rules of evidence, can be relied on. Further, candidates must understand that any version of facts they intend to rely on, must be probable in relation to the circumstances of the case.</p> <p>d) Candidates must learn, early in their careers, that they cannot go to court with a version that is improbable or implausible.</p> <p>e) Candidates must be able to work out that there are facts which support their own client's version of what actually happened; and that there will be facts that do not support their client's version.</p> <p>f) Candidates must understand that carrying out such an analysis is the only way for lawyers to understand the facts of their client's case.</p> <p>g) Merely reading witness statements and documents is of no value. Nor is it of any value merely to accept a version on the basis that "those are my instructions"; one must carry out an objective fact analysis first.</p>	<ul style="list-style-type: none"> - Tone and register - Plain meaning <p>1.2. <i>Reading for Meaning</i></p> <ul style="list-style-type: none"> - Main and subordinate ideas - Managing facts, opinions and argument - Opinion and Memorandum • What are sources of facts, how to obtain facts, preserving exhibits - Working out the case concept/theory of the case • Cause of action & defence - Summary and precis
<p><u>Working out the case concept</u> (or theory of your case)</p> <p>a) What happened according to your client's version of the facts?</p> <p>b) What are the issues, factual and legal, that emerge from the facts?</p> <p>c) What are you going to tell the judge at the hearing?</p> <p>d) What version are you going to present in your papers?</p> <p>e) How will you present evidence?</p> <p>f) Who will be the witnesses and what documents will you need?</p> <p>g) How will you run the case from pleadings to final argument?</p> <p>h) This process has to be applied before any papers are drafted.</p>	<p>1.3. <i>Writing for Argument</i></p> <ul style="list-style-type: none"> - Structuring an argument - Developing an argument - Persuasive writing
<p><u>Working out the cause of action or defence</u></p> <p>a) There must be a comprehensive explanation, using case studies, of how one takes a set of facts and works out what your client's cause of action or defence is. Look to the case concept and the applicable law. Do not draft papers without first undertaking this step.</p> <p>b) Candidates must understand the meaning of the elements of one's cause of action or defence and where and how to find those elements in the peculiar facts of your case and with reference to the law.</p> <p>c) Candidates must know how to recognise and formulate a cause of action and defence before any drafting commences.</p> <p>d) The object is for candidates to understand this method instead of consulting a precedent first.</p>	<p>2. WRITTEN EXERCISES (USING CASE STUDIES)</p> <p>2.1. <i>Drafting Applications</i> (Rule 6)</p> <ul style="list-style-type: none"> - Notice of motion - Founding/answering/replying affidavit (3 sets) Rule 6, Erasmus B1-33 to 58 - Rule 16A notice - Application to strike out - Heads of argument <p>2.2. <i>Drafting Actions</i> (Rule 18 and 22)</p> <ul style="list-style-type: none"> - Particulars of claim / Combined Summons / Declaration / Amendment of pleadings (i) Contractual matter (ii) Action for damages (iii) Action for divorce. <p>(Rules 17, 18, 20 and 28) Erasmus B1-123 to 134A, B1-136 to 137, B1-176 to 186B</p> <ul style="list-style-type: none"> - Pleas and special pleas (Rules 22, 24 and 25) Erasmus B1-141 to 150 - Exception (Rule 23) Erasmus B1-150 to 163
<p><u>Deciding what procedure to use Action / Application</u></p> <p>a) Candidates must understand the test whether to proceed by way of action or motion.</p> <p>b) Candidates must understand the main differences between actions and applications.</p> <p>c) Refer to the Uniform Rules of Court and practice directives.</p> <p>d) What is meant by a dispute of fact: how does one test a set of facts?</p> <p>e) Candidates must know what happens in court when an application cannot be adjudicated on the papers.</p>	
<p><u>Drafting pleadings</u> (including how to get to your first rough draft)</p>	

<p>a) Candidates must draft on their own without the assistance of a precedent.</p> <p>b) Candidates must read and understand rules 18 and 22 of the Uniform Rules.</p> <p>c) Candidates must know how to draft particulars of claim and a plea.</p> <p>d) Candidates must draft causes of action in contract, delict, divorce and unjust enrichment. The focus must be on contract and delict.</p> <p>e) Candidates must do assignments for formative assessments.</p> <p>f) Candidates must grasp the lay-out of pleadings with proper paragraph numbering, appropriate spacing, font types, use of headings and point first drafting.</p> <p>g) No pleading may be vague: each pleading must disclose a cause of action.</p> <p>h) A plea must comply with Rule 22 of the Uniform Rules. Bare denials are not allowed. Candidates must plead their client's version, which, if proved, will amount to a defence to plaintiff's claim.</p> <p>i) Candidates must be able to draft a Special Plea and to know when and how to draft a Special Plea.</p> <p><u>Drafting Notices of Motion and three sets of affidavits</u></p> <p>a) Candidates must learn the different types of notices of motion and when each is used. This must include a long form notice of motion, a short form notice of motion and a Two-Part notice of motion.</p> <p>b) Candidates must know when and how each of the three types is used.</p> <p>c) Candidates must learn to draft founding, answering and replying affidavits.</p> <p>d) Candidates must know the required lay-out of each of the affidavits with reference to the requirements in the Uniform Rules and directives.</p> <p>e) Candidates must know how to index and paginate court files.</p>	<p>- Request for further particulars for trial. (Rule 21) Erasmus B1-137 to 140</p> <p>- Advice on evidence</p> <p>- Expert notice</p> <p>2.3. <i>Third Party Notice and Annexure</i> (Rule 13) Erasmus <i>Superior Court Practice</i>, B1-105 to 110A B1-453 tot 454</p> <p>2.4. <i>Heads of Argument</i> Rules 49(15), 50(9), Rule 10 of the Rules of the SCA, Erasmus C1-12 to 14; B1-372 to 372A</p> <p>2.5. <i>Appeals</i> - Application for leave to appeal Application to the Supreme Court of Appeal for leave to appeal. Section 17(2) and (3) of the Superior Courts Act 10 of 2013. Rule 6 of the Rules of the SCA, Erasmus A1-52B to 54, C1-4 to 6.</p>
<p>23 b) Advanced drafting course – 5 days</p> <p>From the Notes to Trainers:</p> <p>Candidates are expected to draft particulars of claim in Contract and Delict.</p> <p><u>Content:</u></p> <p>Candidates must receive practical training in the following skills:</p> <p><u>Drafting Pleadings</u></p> <p>Candidates must receive training in the following disciplines:</p> <p>a) How to obtain the facts and documents;</p> <p>b) How to sequence the facts and documents;</p> <p>c) How to contextualise the matter in law;</p> <p>d) Where to find the applicable law;</p> <p>e) How to apply the law to the facts of the case;</p> <p>f) How to work out the cause of action or defence.</p>	
<p><u>Drafting skills</u></p> <p>With the use of case studies, candidates must draft the following:</p> <p>a) Be able to write down the material facts of the case;</p> <p>b) Be able to recognise the material elements of the cause of action or defence;</p> <p>c) Be able to use this to prepare a rough draft of particulars of claim';</p>	

<ul style="list-style-type: none"> d) Draft particulars of claim with reference to the Uniform Rules and practice directives; e) Draft particulars of claim with reference to the peculiar facts of the case; f) Draft particulars of claim without reference to precedents. g) Be able to draft a plea with reference to the Uniform Rules and practice directives; h) Be able to draft a version setting out a defence to plaintiff's claim. i) Candidates must be introduced into drafting statements of claim and statements of defence. 	
<p><u>Motion Court</u> Candidates must learn the following skills:</p> <ul style="list-style-type: none"> a) To assess the facts and the law to decide whether a matter may be dealt with in an application rather than an action. When is a dispute of fact not capable of being adjudicated on the papers? b) To draft notices of motion; including long and short form notices as well as two-part notices of motion. A notice of motion in search and seizure applications (Anton Piller). c) To draft a founding affidavit. This must include the recommended layout in the Uniform Rules and practice directives. Candidates must learn how to set out the cause of action and the supporting evidence and be able to provide justification for the order sought. d) To draft an answering affidavit. The most effective layout must be explained including how to set out a version that will answer an applicant's case. e) To draft a replying affidavit. It must be short and only drafted if strictly necessary. f) To know how to use annexures. Avoid bulky documents and ones not strictly necessary to support the deponent's case. g) Candidates must know how to apply the <i>Plascon-Evans</i> test. 	
<p><u>Heads of Argument</u> Candidates must be familiar with the layout and method of drafting the different types of heads of argument (concise heads; comprehensive heads; main heads of argument (SCA) and written argument (CC)). The following must be in this module:</p> <ul style="list-style-type: none"> a) The typical layout of heads of argument; b) The method to be used in Applications; c) The method to be used in Trials; d) The method to be used in Appeals and Reviews. e) Candidates must know how to draft chronology documents to be filed with heads of argument. f) Candidates must know the relevant Rules and practice directives; in particular regarding page limitations and the prohibition of copying and pasting from authorities. 	
<p><u>Writing Opinions</u> Candidates must learn how to set out and write an opinion. <u>Course content</u> The following must be in this module:</p> <ul style="list-style-type: none"> a) The modern method of setting out an opinion. b) Understanding the question. c) The need to answer the question and provide recommendations. 	

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| d) An efficient approach to legal research.
e) How to write short opinions.
f) How to justify your position with reference to the facts and the law. | |
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