

*M Paleker*

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## Letters of demand (*interpellatio extraiudicialis*): substance and form\*

### Abstract

The purpose of this article is quite simple: it is to discuss the relevance, importance, and theoretical aspects of the letter of demand (or *interpellatio extraiudicialis* as it is otherwise known) in practice and especially, in Civil Procedure. Most textbooks on Civil Procedure do not cover this aspect of legal practice in much detail and yet, whenever I have been asked to address law students, trainee magistrates, candidate attorneys or clerks of court on the civil litigation process, the starting point of discussion has always been the letter of demand. This article proposes not only to give an exposition of legal principles pertaining to the juridical nature of the letter of demand, but also to illustrate the application of those principles by way of practical examples.

### Aanmaningsbriewe (*interpellatio extraiudicialis*): substansie en form

Die doel van hierdie artikel is om die relevansie, belang en sekere van die teoretiese aspekte rondom die aanmaningsbrief (of *interpellatio extraiudicialis* soos dit ook bekend staan) in die praktyk en spesifiek in die Siviele Prosesreg, te bespreek. Die meerderheid van die standaardtekste waarin die Suid-Afrikaanse Siviele Prosesreg vervat word, hanteer nie genoegsaam hierdie aspek van siviele regspraktyk nie en tog, wanneer ek gevra word om regstudente, leerling landdroste, kandidaat-prokureurs of hofklerke toe te spreek, is die beginpunt van die bespreking keer op keer die aanmaningsbrief. In hierdie artikel sal daar gepoog word om nie net die relevante regsbeginsels in hierdie verband aan te toon nie, maar ook om die toepassing van die beginsels, by wyse van praktiese voorbeelde, te illustreer.

\* I would like to acknowledge with gratitude the Visiting Scholars Programme of the University of Aberdeen for affording me the opportunity to complete a substantial part of this article while on a visit to Scotland in 2004.

## 1. Introduction

The letter of demand (or *interpellatio extrajudicialis* as it is otherwise known)<sup>1</sup> is often a precursor to litigation and yet, there is hardly any textbook that deals comprehensively with the letter of demand. This article is therefore dedicated to canvassing the nature, relevance and theoretical aspects of the letter of demand in legal practice, but more specifically in Civil Procedure. To fully appreciate the legal principles involved, reference will be made to practical examples.

## 2. The purpose of a letter of demand

Generally a plaintiff is not obliged to send a letter of demand to a defendant before commencing civil litigation. However, it is common practice for a plaintiff, through his/her attorneys, to send such a letter.

In the letter the plaintiff usually demands the relief he or she intends to claim in looming litigation, or gives notice of her intention to commence proceedings. The primary purpose of a demand is to inform the defendant that the plaintiff has a cause of action against him or her, and to persuade him or her to settle the claim, or to remove the cause of complaint within a stated time so as to avert formal proceedings from being instituted. The demand serves as a vehicle for alternative dispute resolution and is simply a precursor to the litigation process.

While there is no general legal obligation to send a letter of demand, there are instances in our law when it is necessary to send such a letter — when the letter of demand is necessary to complete a cause of action.<sup>2</sup>

Whether a demand is necessary to complete a cause of action depends on the requirements of substantive law. A defendant can take exception to a summons or a notice of motion that fails to perfect the cause of action.<sup>3</sup> If the court upholds the exception, the instituted action will be dismissed and the plaintiff would be required to commence proceedings afresh making sure, of course, that the cause of action has been perfected the second time round. The instances when a demand perfects a cause of action will be discussed below.

## 3. The benefits of a letter of demand where there is no obligation to send one

The primary purpose of addressing a letter of demand where the cause of action is complete, and thus where the demand itself is unnecessary, is to persuade the other party to settle the dispute without resorting to litigation. Litigation is expensive and time consuming.<sup>4</sup> Often a dispute can be settled by simply sending a letter of demand.

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1 See *Nel v Cloete* 1972 2 SA 150 (A); *Van der Merwe et al* 2003:313-314.

2 See *Christie* 1996:559; *De Wet and Van Wyk* 1992:164-165.

3 *Uniform Rule of Court* 23(1); *Magistrates' Court Rule* 17(2).

4 See *Paleker* 2003(a):304; *Paleker* 2003(b):48.

Aside from saving costs and time, there is a second reason for the prevalent practice of sending a letter of demand. If proceedings are instituted without making prior demand and the defendant settles the plaintiff's claim after receiving the plaintiff's summons, the defendant can be absolved from paying the cost of the summons. As a penalty for not sending a letter of demand, the plaintiff would have to pay the summons cost out of its own pocket.<sup>5</sup> Therefore, from a recovery-of-costs-perspective, it makes good sense to send a letter of demand before issuing a court process.

Demands which are not necessary to perfect a cause of action are easy to draft. They usually contain a brief description of the party claiming the relief, the cause of action, a demand for performance (action), and a brief statement of the consequences of non-compliance.<sup>6</sup> As will be discussed later, care should also be taken to claim the cost of the letter of demand in the letter itself.<sup>7</sup>

Example 1:

Dear Mrs Smithers

BY REGISTERED POST

MR SIMPSON V YOURSELF: MOTOR VEHICLE ACCIDENT CLAIM

We act for Mr H Simpson, the owner of a Toyota Corolla motor vehicle with registration number CA 984567.

On 20 March 2004, our client was involved in a collision with a motor vehicle with registration number CA 344563. The collision occurred at the intersection of Prim and Rose Drive, Happy Ridge, Wynberg, Cape. At the time of the collision, you were the owner and the driver of the other vehicle.

Our client is of the opinion that the collision was caused by your negligence.

Accordingly, our client has instructed us to demand payment from you of the sum of R5000,00 being the cost of repairing his vehicle. This amount must be paid at our offices on or before 25 May 2005, failing which we are instructed to institute proceedings for the stated amount and any other damages which our client may have suffered including, interest on the claim and costs of suit.

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5 *Theron v Theron* 1973 3 SA 667 (C); 673B; *De Kock v Davidson* 1971 1 431 (T). The rule preventing the plaintiff from recovering summons costs on settlement of a claim where a prior demand was not sent cannot be written in stone. If a claim is about to prescribe, the plaintiff may have no choice but to serve summons on a defendant as it is only through service of summons that prescription is interrupted (see section 15 of the *Prescription Act* 69/1969. In such a case, it is submitted, the court should lean in favour of permitting the plaintiff to recover the costs of the summons even if a prior demand was not made.

6 Section 56 of the *Magistrates' Courts Act* 32/1944, which deals with letters of demand, does not state what a letter of demand should contain. However, *Magistrates' Court Rule* 4B provides that a letter of demand must at least set out the cause of action and the amount claimed.

7 According to section 56 of the *Magistrates' Courts Act* it is imperative to state the cost of the letter of demand in the letter itself. Should a party fail to do so, it would not be able to claim the costs of the letter later on.

Paleker/Letters of demand (*interpellatio extrajudicialis*): substance and form

Take note further that you are liable in terms of section 56 of the *Magistrates' Courts Act* for the cost of this letter of demand being R34,08.<sup>8</sup>

If you are insured, kindly hand this letter to your insurance company.

Yours faithfully...

Example 1 illustrates a number of things: a brief description of the parties; the cause of action; the relief sought; when and how the relief is to be tendered; and the consequences of non-compliance. The language and tone of the letter is firm. It is geared to place the recipient on terms.

Before discussing in greater detail the instances when a letter of demand is necessary to complete a case of action, let us first consider two important issues: (i) the cost of a letter of demand and manner of postage; and (ii) the importance of a letter of demand for the computation of interest on a claim.

#### 4. The cost of a letter of demand and manner of postage

A letter of demand is relatively expensive. Aside from the prescribed fee<sup>9</sup> for drafting a letter of demand, an attorney is also entitled to recover the postage costs of the letter<sup>10</sup> plus VAT on the prescribed fee (i.e. 14% on R17, 00=R2,38).

R17, 00 (prescribed fee) + vat on prescribed fee (R2. 38) + postage costs (R14.70)=R34.08.

Section 56 of the *Magistrates' Courts Act*<sup>11</sup> requires a letter of demand to be sent by registered mail. Unlike the prescribed fee for drafting a letter of demand, the postage costs for sending a letter of demand by registered mail is not stipulated in the Magistrates' Courts or High Courts' Fee Tariffs. Postage costs are regulated by the Post Office and are subject to periodic change.

It is imperative to note that in terms of section 56 the sender of a letter of demand can only recover the prescribed drafting fee and the postage costs if the attorney specifically states the cost of the letter in the letter itself. If you refer to Example 1, you will note that the cost of the letter of demand is set out in the letter. It is also extremely important to note that only attorneys

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8 The fee for a letter of demand in a magistrates' court matter is prescribed in Item 1 of Part II of Table A of Annexure 2 to the *Magistrates' Courts Rules*; see notes 5-7 above. In the High Court, an attorney can charge up to R40,00 for a letter of demand: see Item 3 of Table B of *High Court Rule 70*.

9 In terms of Item 1 of Part II of Table A of Annexure 2, an amount of R17, 00 is allowed for a letter of demand. In *Independent Newspapers Kwazulu-Natal Ltd v Chief Magistrate, Durban* 1999 1 SA 842 (N): 844J-845A, the court held that the cost of a letter of demand is recoverable by the plaintiff as part of the costs of the action and the plaintiff is therefore entitled to include the cost of the letter of demand in the summons in terms of *Magistrates' Courts Rule 6(3)(a)(iii)*. It is respectfully submitted that although the court referred to the cost of a letter of demand, the reference to cost must be construed to include the attorneys' fee as well.

10 The cost of sending the letter by registered mail must be recovered as a necessary expense under *Magistrates' Courts Rule 33(5)(a)(i)*.

11 32/1944.

can claim the cost of a letter of demand. If laypeople write letters of demand, they cannot recover the costs.<sup>12</sup>

The obvious point must be made: just because a letter of demand is sent by registered mail does not guarantee that the addressee will receive and read the letter. The post office of the district where the addressee resides will send a notice to the addressee requesting that he or she collects the registered letter from the post office. However, as it is often the case, people do not collect their registered mail. As far as the law is concerned, there is a rebuttable presumption in favour of receipt of a letter of demand sent by registered mail, and thus the onus is on the person alleging non-receipt to rebut that presumption.<sup>13</sup> The sender need not prove that the recipient fetched the letter from the post office, or that he or she actually read the letter or understood the contents thereof. As long as a letter is sent by registered mail and is properly addressed, that is sufficient. Where the addressee has chosen a *domicilium citandi et executandi* address,<sup>14</sup> it is sufficient for the sender to send the letter by registered mail to the domicilium address even if, as our courts have stated, the *domicilium* address turns out to be a vacant plot of land.<sup>15</sup>

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12 Many debt collection agencies also send debtors letters of demand. However, they are unable to recover the legal costs of a letter of demand. Section 56 applies only where the creditor causes the letter of demand to be sent through an attorney. It must also be noted that section 56 of the *Magistrates' Courts Act* refers specifically to a registered letter. According to Erasmus and Van Loggerenberg vol II 1996: 240-241:

Should the debtor pay the debt due by him upon receipt of an unregistered letter of demand or a demand sent by prepaid certified post, the costs of the letter of demand cannot be recovered from the debtor.

The learned writers go on to state at 241 fn1:

Prepaid certified post, or 'certified mail service' as it is officially termed, is 'not registered post' (*Caldwell v Savopoulos* 1976 3 SA 741 (D)...).

13 *Savden v ABSA Bank Limited and Others* 1996 3 SA 814 (W).

14 A *domicilium* address may be chosen in an agreement. Section 5(1)(b) of the *Credit Agreements Act* 75/1980 provides that a credit agreement must state the business or residential addresses of the credit receiver and the credit grantor. If a party to a credit agreement does not have such an address, he or she may nominate 'any other address in the Republic.' According to section 5(4), these addresses serve, for all purposes of the agreement, as the *domicilium citandi et executandi* of the parties. Section 6(1)(f) prohibits the inclusion in any credit agreement, other document, or agreement a provision having the effect that a buyer chooses a *domicilium citandi et executandi* at an address other than the address referred to in the credit agreement in compliance with section 5(4).

In terms of section 6(1)(a) of the *Alienation of Land Act* 68/1981, a contract concluded in terms of the Act must include the residential or business addresses of the purchaser and seller. Section 23 provides that these addresses shall serve as the *domicilium citandi et executandi* of the parties for all purposes of the contract.

15 *Van der Merwe v Bonaero Park (Edms) Bpk* 1998 1 SA 697 (T).

Practical tip:

Since the purpose of a letter of demand is to inform the defendant of intended proceedings with a view to settlement of the dispute without resorting to litigation, it may be prudent to send a letter of demand by registered and ordinary mail. In this way a dilatory addressee is more likely to read the letter (because he or she will receive the letter without having to fetch it from the post office). However, bear in mind that if an attorney sends a letter by registered and ordinary mail, the attorney cannot recover (on behalf of his/her client) the cost of both letters from the addressee. In terms of the legislation,<sup>16</sup> the attorney can only recover the cost of one letter of demand, that is, the one sent by registered mail. The cost of the second letter (sent by ordinary mail) will have to be borne by the client, but the attorney must inform the client of his or her strategy before sending the letter otherwise the strategy may be perceived as constituting a duplication of work for which the attorney will not be compensated.

When a letter is sent by registered mail, the post office hands the sender (normally the attorneys' firm) a slip which basically says that a letter was sent to the defendant by registered mail. This slip must be carefully filed because it must, along with a copy of the letter of demand, be annexed to a summons commencing action or produced at court if need be.

## 5. Claiming interest in a letter of demand

There is generally no obligation to pay interest until a debt becomes due and payable.<sup>17</sup> To determine when a debt becomes due and payable, one must keep two factors in mind:

- i) whether a date for payment of the debt has been stipulated; and
- ii) whether the debt is liquid or illiquid.

These two factors are important since they affect the calculation of interest on a claim.

- i) whether a date for payment of the debt has been stipulated:
  - Where a debt is claimed in terms of an agreement and the agreement stipulates a date for payment/ performance, the debt becomes due and payable from that date. Consequently, interest runs from that date.<sup>18</sup>
  - Where no date for payment/performance is stipulated by agreement between the parties, or where the debt is not based on an agreement, the debt would become due and payable from the date when the debtor falls into

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16 Section 56 of the *Magistrates' Courts Act 32/1944*.

17 Harms 2003:246; *Schenk v Schenk* 1993 2 SA 346 (E): 351.

18 *West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1926 AD 173:195.

*mora*<sup>19</sup> and consequently, interest can be claimed from the *mora* date.<sup>20</sup> *Mora* is the moment when performance is considered due and owing. In cases where parties have not agreed on a date for performance of an obligation, the creditor must do some act which places the debtor (defendant) on terms to perform. For the calculation of interest, it is critical for the debtor to be in *mora*. A debtor may be placed in *mora*, *inter alia*, by way of letter of demand<sup>21</sup> or by summons.<sup>22</sup>

ii) whether the debt is liquid or illiquid:

A debt is regarded as liquid when the value of the debt is certain (or clearly ascertainable) or when the debtor admits to the amount owed.<sup>23</sup> A disputed debt may therefore still be considered a liquid debt if it is of such a nature that the accuracy of the amount can be clearly established by proof in court e.g. an amount owing in terms of an acknowledgement of debt, invoice, or cheque.<sup>24</sup> On the other hand, a debt is illiquid if the value of the debt cannot be readily determined and would have to be proved in court by leading evidence. For example, a claim for damages for defamation, or damages arising from a motor vehicle accident would be considered illiquid because the plaintiff would have to prove damage suffered.

Factors (i) and (ii) must be applied as follows:

- If one is working with a liquid claim (debt) and the date for performance is stipulated, interest is calculated from the date agreed upon by the parties for performance. Thus if one is suing on a cheque, for example, interest would be calculated from the date when the cheque is presented for payment<sup>25</sup> as it is on presentation of the cheque that the debtor falls in *mora*. If the creditor subsequently sends the debtor a letter of demand, the letter of demand will not interfere with the calculation of interest.

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19 Here the word *mora* is not used in its contractual sense. It has a much wider meaning, for it is intended to cover all situations when a debt is deemed due and owing to a creditor. It thus also covers the situation where a debtor is liable for a debt arising from a delict, etc.

20 *West Rand Estates Ltd v New Zealand Insurance Co Ltd (supra)*:195. See also Van der Merwe *et al* 2003:313-314.

21 *Standard Bank of SA Ltd v Lotze* 1950 2 SA 698 (C).

22 *Standard Bank of SA Ltd v Lotze* 1950 2 SA 698 (C); *Turner & Wright v Versatile Pump & Foundry Works (Pty) Ltd* 1953 3 SA 556 (T); *Commissioner of Inland Revenue v First National Industrial Bank Ltd* 1990 3 SA 641 (A). See also LAWSA reissue vol 5 1994:§220.

23 Voet 16.2.17; *Garlick's Wholesale Ltd v Davis* 1928 AD 164; *Fatti's Engineering Co (Pty) Ltd v Vendick Spares (Pty) Ltd* 1962 1 SA 736 (T).

24 Willes *Principles of South African Law* 1991:484.

25 'An instrument is dishonoured by non-payment if it is duly presented for payment, and payment is refused or cannot be obtained, or if presentment for payment is excused and the instrument is overdue and unpaid.

If an instrument is dishonoured by non-payment, a right of recourse against the drawer and endorsers immediately accrues to the holder': LAWSA reissue vol 19 1994:§129.

- If one has a liquid claim, but the date for performance is not stipulated by the parties, then to claim interest one must reach *mora*. To arrive at *mora*, the creditor may either institute proceedings by way of summons or send a letter of demand to the debtor.<sup>26</sup> The summons or the letter of demand has the effect of placing the debtor on terms to perform.

The question as to when interest begins to run is a contentious one. According to section 2A(2)(a) of the *Prescribed Rate of Interest Act*<sup>27</sup> interest on a claim runs, where there is no agreement or customary practice to the contrary, from the date on which payment of the debt is claimed by the service (receipt) on the debtor of a demand or summons, whichever date is the earlier. There is also case authority for the view that a letter of demand and a summons places a debtor in *mora* from the 'date of receipt of the letter of demand' or from the date of service of the summons, as the case may be.<sup>28</sup> However, the learned writers of Jones & Buckle take the view, and it is submitted that they are correct, that the aforementioned legal statements cannot be accepted without qualification.<sup>29</sup> It seems one must distinguish between contractual claims and delictual claims. Section 2A(2) is, by and large, applicable to delictual claims. However, for contractual claims, the general proposition that *mora* occurs from the moment a debtor receives a letter of demand or summons makes nonsense of the decision of Wessels JA in *Nel v Cloete*<sup>30</sup> (which is still treated as good law by our courts). In *Nel*, the court held that where parties enter into a contract and fail to set a date for performance, a debtor, who receives an *interpellatio* (letter of demand), falls in *mora* on the expiration of a reasonable time period to perform. In such cases, it is submitted, a debtor falls in *mora* when he fails to perform by the (reasonable) date stipulated in the letter for performance. Furthermore, the writers of Jones & Buckle argue,<sup>31</sup> correctly, it is submitted, that:

the view that a demand by way of summons places a debtor in *mora* from the date of service of summons cannot be accepted without qualification. The summons is equivalent to a demand, and in *Nel v Cloete* it is made clear that in the demand the debtor must be given a reasonable time within which to perform. A summons demands immediate performance and if a demand for immediate performance is not reasonable in the circumstances, *mora* will not arise and *mora* interest will not start to run on the date of service of the summons. It seems that in such a case the court, if it gives judgment for the plaintiff, will have to determine what constituted a reasonable time in the circumstances.<sup>32</sup>

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26 Steyn 1929:53.

27 55/1975.

28 *West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1926 AD 173: 183, 197; *Ridley v Marais* 1939 AD 5: 8.

29 Erasmus and Van Loggerenberg Vol II 1996:6-9.

30 1972 2 SA 150 (A): 165ff.

31 Erasmus and Van Loggerenberg Vol II 1996:6-9.

32 See also *Theron v Theron* 1973 (3) SA 667 (C): 674A; *LAWSA* reissue vol 5 1994:§220 fn 22 and the authorities there cited; Christie 1996:558-561.

On account of the complexity and uncertainty in law as regards when interest begins to run in a contractual claim where the contract itself is silent as regards a date for performance, it is safer to suggest, as a general and uncontroversial proposition, that interest may be claimed from the date stipulated in the letter of demand for performance (provided, of course, that the date is reasonable); or in the case where no demand is sent but summons is issued after a reasonable time has elapsed from when the summons was served on the defendant.<sup>33</sup> In the latter case, the court will, at the time of granting judgment, make the determination as to the reasonable date from when interest may be claimed. As such, litigants are advised when pleading their summons to simply pray for interest to be awarded a *mora tempore* thereby obviating precision as regards the exact date from when interest is claimed.

- In the case of an illiquid claim, subject to what has been said above, interest may be claimed from the date when the debtor receives the letter of demand or when the summons is served on the debtor, whichever date is earlier. See Example 2 (below).

There is an exception though: Where a party institutes a claim for future loss/damages (which is thus an illiquid claim for future loss/damages), the interest on such future damages begin to run from the date when the quantum of such future loss/damages is decided by judgment of court.<sup>34</sup> Say, for example, a person institutes a delictual action in which he or she claims damages that he or she has already suffered. In addition, he or she also claims damages which he or she is likely to suffer in the future. As regards interest on his or her future damages, such interest is calculable from the date when the court quantifies his or her future loss by granting judgment for such damages. As regards the damages that he or she has already suffered, the interest thereon is calculable either from the date when the defendant/debtor letter of demand, or when summons is served on the defendant/debtor, whichever date is the earlier.<sup>35</sup> See Example 3 (below).

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33 The court determines what is reasonable. For a discussion of the factors that a court will consider in making this assessment see *LAWSA* reissue vol 5 1994: §220.

34 Section 2A(3) of *Prescribed Rate of Interest Act 55/1975*.

35 Section 2A(2) read with 2A(3) of *Prescribed Rate of Interest Act 55/1975*. In the discussion above relating to the uncertainty as regards when interest begins to run on claims, it was noted that while section 2A(2) cannot be unquestioningly applied to contractual claims, the section is not problematic when it comes to delictual claims as there is no requirement under the common law for the debtor to be given an indulgence to pay.

Example 2:

BY REGISTERED POST

Dear Mr Berns

MRS SIMPSON V YOURSELF: GOODS SOLD AND DELIVERED

We act for Mrs Margerie Simpson

On 24 January 2005, our client sold and delivered a consignment of jackets to you to the amount of R20 000.

On taking delivery of the said jackets you signed a delivery invoice ("the invoice") thereby holding yourself bound to the terms and conditions contained therein. In terms of the invoice, you undertook to pay the amount of R20 000 within 30 days of taking delivery of the jackets.

To date you have failed to pay the amount of R20 000.

Accordingly, our client has instructed us to demand payment from you of the amount of R20 000. This amount must be paid at our offices on or before 15 March 2005. Should you fail to make payment by this date, we are instructed to institute proceedings to recover the said amount, plus interest on the said amount calculated from 25 February 2005 (being the date when the said amount became due and payable in terms of the invoice). We are furthermore instructed, in the event of legal proceedings being instituted against you, to recover costs of suit.

Take note further that you are liable in terms of section 56 of the *Magistrates' Court Act* for the cost of this letter of demand being R34.08.

Yours faithfully...

It is clear that the plaintiff in Example 2 has a liquid claim because the cause of action arises from a simple sale transaction for goods sold and delivered. The value of the debt is certain; the debt is of such a nature that the accuracy of the amount claimed can be clearly established.

In terms of the letter of demand, the plaintiff claims the amount of R20 000. Notwithstanding that a date for payment has been stipulated in the letter of demand (i.e. 15 March 2005), interest can be claimed from the date when the debt became due and payable in terms of the invoice (25 February 2005). However, if a date for payment was not stipulated in the invoice, either expressly or impliedly, interest would be recoverable from the date stipulated for payment in the letter of demand.<sup>36</sup> Naturally, were this to be the case the letter would have been worded differently.

For argument sake, let us assume that the plaintiff had not sent the letter of demand and simply issued summons. Were this to be the case, the plaintiff would still be able to claim interest from the date when the debt became due and payable (25 February 2005) in terms of the invoice. However, if the invoice was silent on the terms of payment: interest would be recoverable from a date determined by the court.<sup>37</sup>

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36 See the discussion above relating to the uncertainty as regards when interest begins to run on a claim.

37 See the discussion above relating to the uncertainty as regards when interest begins to run on a claim.

Example 3:

Dear Sir

BY REGISTERED POST

MR SIMPSON V YOURSELF: MOTOR VEHICLE ACCIDENT CLAIM

We act for Mr H Simpson, the owner of a Toyota Corolla motor vehicle with registration number CA 984567.

On 20 March 2005, our client was involved in a collision with a motor vehicle with registration number CA 000776. The collision occurred at the intersection of Prim and Rose Drive, Happy Ridge, Wynberg, Cape. Our client informs us that at all material times, you were the driver and owner of the other vehicle.

Our client is of the opinion that the collision was caused by your negligence.

As a result of the collision, our client has incurred alternatively, will incur the following expenses/damages:

R5000: for repairs to motor vehicle;

R5000: for loss of income incurred to date; and

R25 000: for future loss of income.

Accordingly, our client has instructed us to demand from you payment of the sum of R35 000. This amount must be paid at our offices on or before 25 May 2005, failing which we are instructed to institute proceedings for the aforementioned amount and any other damages which our client may have suffered, plus interest and costs of suit.

Take note further that you are liable in terms of section 56 of the *Magistrates' Courts Act* for the cost of this letter of demand being R34.08.

Yours faithfully...

The plaintiff in Example 3 has an illiquid claim because his claim for damages arises from a motor vehicle accident. In terms of the letter, the plaintiff demands his or her immediate damages (R5000 for repairs to his motor vehicle plus R5000 for loss of income incurred to date) plus future loss/damages (R25 000 for future loss of income). He or she also stipulates a date (25 May 2005) for payment of the total damages (R35 000) that he or she suffered. Should the defendant fail to pay the total damages by the stipulated date: interest on the immediate damages can be calculated from when the defendant receives the letter of demand (because that is the date when the debtor is in *mora* in respect of the immediate damages).<sup>38</sup> However, as regards the future damages (R25 000): interest on this amount can only be calculated from the date when the court quantifies such future damages and grants judgment for that amount. The letter of demand is thus irrelevant when it comes to computing interest on the future damages.

Where the plaintiff does not send the letter of demand and simply issues summons for both the immediate and future damages, the plaintiff would be able to recover interest on the immediate damages (R10 000) from the date when the defendant receives the summons (because that is the date when

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38 Section 2A(2) of *Prescribed Rate of Interest Act* 55/1975. See also note 36 above.

the defendant is *in mora* with respect to immediate damages).<sup>39</sup> As regards the future damages (R25 000), interest on these damages, too, would be calculated from the date when the court quantifies the future damages and grants judgment for such damages.<sup>40</sup> It is important to note that the *mora* date as regards the immediate damages might not coincide with the *mora* date of the future damages. In fact, it is safe to say that the *mora* date of the immediate damages will invariably precede the *mora* date of the future damages.

## 6. Demands which are necessary to complete a cause of action

There are several instances under common law and statute when a demand is necessary to complete a cause of action. In such cases, the demand must contain sufficient information to complete the cause of action. If the demand is defective, or if the demand is not sent, and summons is issued, the defendant may take exception to the plaintiff's summons on grounds that the plaintiff's summons does not disclose a cause of action.

Since it is impossible to discuss all the instances under common law or statute where a demand is necessary, only the most important instances will be highlighted in this article.

### 6.1 The common law

Under the common law, as a general rule,<sup>41</sup> a party suing on a contract cannot cancel an agreement for non-performance of the contract, unless the guilty party is in *mora* (i.e. performance in terms of the contract is due and owing).<sup>42</sup> Even where the guilty party is in *mora*, the contract may nevertheless contain provisions which require the innocent party, before she can cancel or enforce the contract, to give the guilty party a written notice to perform within a certain time period and a simultaneous undertaking that the contract will be cancelled should performance not be forthcoming within the stated time.<sup>43</sup> Since the rules of contract law are rather nebulous in this regard all that needs to be said is this: where the rules of contract law, or a contract itself, stipulates for any written notice to be sent prior to cancellation or enforcement of a contract, the notice usually takes the form of a letter of demand. Failure to send the letter of demand may prevent the contract from being cancelled or from being enforced.<sup>44</sup> If proceedings are instituted in the absence of such a notice, the defendant may raise exception to the plaintiff's summons on the grounds that

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39 LAWSA reissue vol 5 1994:§220. See also note 36 above.

40 Section 2A(3) of *Prescribed Rate of Interest Act* 55/1975.

41 An exception to this general rule would be where the contract is cancelled for anticipatory breach. See Van der Merwe *et al* 2003: 329ff.

42 *Nel v Cloete*: 160D.

43 *Ponisammy v Versailles Estates (Pty) Ltd* 1973 1 SA 372 (A); *Ver Elst v Sabena World Airlines* 1983 3 SA 372 (A); *Wehr v Botha* 1965 3 SA 46 (A).

44 LAWSA reissue 1994: Vol 5:§222.

the contract was not validly cancelled or that performance in terms of the contract is not owing, and consequently, that the plaintiff's action is premature.<sup>45</sup>

Example 4

Dear Sir

BY REGISTERED POST

ALL AFRICA PROPERTIES LTD V YOURSELF: RENTAL

We act for All Africa Properties Ltd.

On 29 November 2004, our clients entered into a written lease agreement in terms of which our client leased you shop 5, Wellington Square.

As of 1 March 2005, an amount of R103 000, 00 was outstanding in respect of rental. We enclose herewith a reconciliation statement prepared by our clients setting out how this amount is calculated.

Accordingly, we are instructed to demand, in terms of clause 7 of the lease agreement, that you settle all outstanding rental on or before 15 March 2005. Should you fail to settle the amount by 15 March 2005, our client will, without further notice, immediately cancel the lease agreement and issue summons for outstanding rental and any other damages sustained by our client, including costs of suit on a scale as between attorney and client. Our client will furthermore, evict you from the premises.

Take note further that you are liable in terms of section 56 of the *Magistrates' Courts Act* for the cost of this letter of demand being R34,08.

Yours faithfully...

Example 4 is quite interesting. It is axiomatic that the parties entered into a written lease agreement, which presumably entrenched many standard clauses, including a breach clause. Let us assume that the breach clause looked something like this:

"7 Breach

7.1 Should the Lessee default *in any payment due under this lease* or be in breach of its terms in any other way, and fail to remedy such default or breach *within 7 days after receiving a written demand* that it be remedied, the Lessor shall be entitled, without prejudice to any alternative or additional right of action or remedy available to the Lessor under the circumstances, *without further notice, to cancel this lease with immediate effect*, be repossessed of the Premises, and recover from the Lessee damages for the default or breach and the cancellation of this lease. [Italics added for emphasis].

7.2 Clause 7.1 shall not be construed as excluding the ordinary lawful consequences of a breach of this lease by either party (save any such

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45 As De Wet and Van Wyk 1992:164-165 point out, where a *lex commissoria* in a contract provides for a written notice to be given to a debtor before a contract can be rescinded, the stipulation has the effect of giving the debtor an extra opportunity within which to purge his *mora*. Christie 1996:559 is more emphatic. He says: '...if the contract expressly requires demand or notice, the giving of [such a demand or notice] then becomes part of the creditor's cause of action.' See also *LAWSA* reissue vol 5 1994: §222.

consequences as are expressly excluded by any of the other provisions of this lease) and in particular any right of cancellation of this lease on the ground of a material breach going to the root of this lease.

7.3 In the event of the Lessor having cancelled this lease justifiably but the Lessee remaining in occupation of the Premises, with or without disputing the cancellation, and continuing to tender payments of rent and any other amounts which would have been payable to the Lessor but for the cancellation, the Lessor may accept such payments without prejudice to and without affecting the cancellation, in all respects as if they had been payments on account of the damages suffered by the Lessor by reason of the unlawful holding over on the part of the Lessee.”

It is common cause that the lessee has failed to pay its rental on time and consequently, is in arrears. Non-payment of rental constitutes a material breach of the lease agreement and one could say that the lessor is entitled to cancel the contract immediately.<sup>46</sup> However, consider clause 7.1. In terms of 7.1, the lessor is required to give the lessee a written notice advising him of the breach. Furthermore, 7.1 states that the notice should give the lessee seven days to rectify the breach and should he fail to do so within the stated time, the lease may be cancelled. The notice is thus a precondition for cancellation of the lease.

It therefore comes as no surprise that the contents of the letter of demand refer to the provisions of clause 7.1. The lessor, via the letter of demand, addresses a notice to the lessee in terms of clause 7.1, calling on lessee to pay his rental. Furthermore, as stipulated in the agreement, the lessor makes it quite clear that it will cancel the lease agreement, without further notice, should the rental not be paid by the stipulated date (which cannot be less than 7 days).

It is interesting to note that that the lessor seeks, in the event that proceedings are instituted, to claim costs of suit on a scale as between attorney and client. Although a discussion of costs is beyond the scope of this article, it is important to note that unless there is an express provision in an agreement entitling a claimant to recover attorney and client costs, a claimant would not ordinarily be able to recover costs on this scale.<sup>47</sup> If the lease agreement is silent on the issue of costs, the claimant would only be able to recover costs on a scale as between party and party, since this is the standard tariff recoverable by a litigant in proceedings. Attorney-client costs are much higher than party-party costs.<sup>48</sup>

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46 Cooper 1994:167ff.

47 *Sapirstein v Anglo African Shipping Co (SA) Ltd* 1978 4 SA 1 A: 14; *Permanent Building Society v Powell* 1986 1 SA 722 A: 726.

48 Cilliers 1997:\$4.03.

## 6.2 Some of the more important statutes which require prior demand

There are several statutory provisions that require for letter of demand to precede litigation. Most of these concern matters against the state.

General Law Amendment Act 62 of 1955.

Interim interdicts against the State

35 Notwithstanding anything to the contrary contained in any law, no court shall issue any rule nisi operating as an interim interdict against the Government of the Union including the South African Railways and Harbours Administration or the Administration of any Province, or any Minister, Premier or other officer of the said Government or Administration in his capacity as such, *unless notice of the intention to apply for such a rule, accompanied by copies of the petition and of the affidavits which are intended to be used in support of the application, was served upon the said Government, Administration, Minister, Premier or officer at least seventy-two hours, or such lesser period as the court may in all the circumstances of the case consider reasonable, before the time mentioned in the notice for the hearing of the application.*

[S. 35 amended by s. 4 of Act 18 of 1996.] [Italics added for emphasis]

There is no magic in the phrase notice of intention. There is no need for the notice to take any prescribed format and may be in the form of a letter of demand setting out the cause of action, the relief sought, and the consequences if the relief sought is not met.

Customs and Excise Act 91 of 1994

Notice of action and period for bringing action

96 1) (a) No process by which any legal proceedings are instituted against the State, the Minister, the Commissioner or an officer for anything done in pursuance of this Act may be served before the expiry of a period of one month *after delivery of a notice in writing setting forth clearly and explicitly the cause of action, the name and place of abode of the person who is to institute such proceedings (in this section referred to as the 'litigant') and the name and address of his or her attorney or agent, if any.*

(b) Subject to the provisions of section 89, the period of extinctive prescription in respect of legal proceedings against the State, the Minister, the Commissioner or an officer on a cause of action arising out of the provisions of this Act shall be one year and shall, subject to the provisions of section 95A (7), begin to run on the date when the right of action first arose.

(c) (i) The State, the Minister, the Commissioner or an officer may on good cause shown reduce the period specified in paragraph (a) or extend the period specified in paragraph (b) by agreement with the litigant.

(ii) If the State, the Minister, the Commissioner or an officer refuses to reduce or to extend any period as contemplated in subparagraph (i), a High Court having jurisdiction may, upon application of the litigant, reduce or extend any such period where the interest of justice so requires.

Paleker/Letters of demand (*interpellatio extrajudicialis*): substance and form

(2) This section does not apply to the recovery of a debt contemplated in any law providing for the recovery from an organ of state of a debt described in such law.

[S. 96 substituted by s. 136 of Act 60 of 2001.] [Italics added for emphasis].

It is submitted that, again, there is no magic in the phrase notice in writing and hence, the notice may take the format of a letter of demand. However, the Act expressly provides what the notice must contain. It must set out the cause of action with clarity; the person intending to institute proceedings must be identified and his place of residence must be stated; and lastly, the name and address of his or her attorney must be stated.

*Expropriation Act 63 of 1975: Section 6(2) & (3).*

6 (1)

(2) If any person has suffered any damage as a result of the exercise of any power conferred in terms of subsection (1), the State shall be liable to pay damages or to repair such damage.

(3) *Any proceedings by virtue of the provisions of subsection (2) shall be instituted within six months after the damage in question has been caused or within six months after completion of the acts contemplated in subsection (1), whichever period is the longer, and may only be instituted if the plaintiff has given the Minister not less than one month's notice thereof and of the cause of the alleged damage.*

[Italics added for emphasis]

The notice referred to in section 6(3), it is submitted, may take the form of a letter of demand. Although the Act does not set out any formal requirements for the notice, it is submitted, that the notice should at least identify the claimant, contain an exposition of the facts giving rise to the cause of action, the relief sought and the consequences of non-compliance. Unfortunately, this Act does not give the courts discretion to relax the requirement for notice. Accordingly, it is submitted, this Act is ripe for constitutional challenge.<sup>49</sup>

### 6.3 *Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002.*

The most important legislation dealing with proceedings against the state, and one which practitioners will encounter the most in practise, is the *Institution of Legal Proceedings Against Certain Organs of State Act* (hereinafter referred to "PACOS"). In the past, one had to refer to several statutes to determine notice periods when wanting to sue different branches of government. PACOS, which came into force on 28 November 2002, simplifies the life of the legal practitioner for it codifies the notice periods for the institution of legal proceedings against all organs of state (national, provincial, local and municipal organs of state) in respect of the recovery of debts. Therefore, if one wants to sue

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<sup>49</sup> See discussion on the *Institution of Legal Proceedings Against Certain Organs of State Act 40/2002*.

a minister, government official, public servant, police officer, member of the defence force etc. one must apply the provisions of PACOS.

Section 3 provides that no legal proceedings may be instituted for the recovery of a debt<sup>50</sup> unless the plaintiff has given the organ of state notice in writing of his intention to do so. The notice must be given within 6 months from the date when the debt became due.<sup>51</sup> A debt becomes due when the plaintiff, exercising reasonable care, comes to know of the identity of the organ of state and the facts giving rise to the debt.<sup>52</sup> The notice must set out the facts giving rise to the debt and also any particulars relating to the debt as the plaintiff is able to give,<sup>53</sup> for example, how the debt has been calculated. Once the notice is given, the plaintiff must wait for 30 days before issuing a summons or an application.<sup>54</sup>

PACOS does, however, provide that the organ of state may in writing waive the aforementioned notice periods and, if it refuses to do so, the plaintiff may apply to court for condonation. The court 'may' grant an application for condonation if it is satisfied that:

- (i) the debt has not been extinguished by prescription;
- (ii) good cause exists for the failure by the creditor; and
- (iii) the organ of state was not unreasonably prejudiced by the failure.

PACOS also provides for a number of ways in which a notice can be served on the state: by hand, certified mail; facsimile transfer, or e-mail.<sup>55</sup> Where something is served by fax or e-mail, the Act requires that the plaintiff, nevertheless, posts the notice by certified mail and attaches thereto an affidavit in which she, *inter alia*, indicates the date of which the notice was sent by electronic means, the number or e-mail address to which the notice was forwarded, any independent proof to corroborate that the notice was in fact sent, steps taken by the plaintiff to ensure that the officer or person to whom the notice was sent received it, and the details of any person who was contacted.<sup>56</sup>

It will be interesting to see if PACOS will withstand a constitutional challenge. In *Moise v Greater Germiston Transitional Council*,<sup>57</sup> the Constitutional Court declared one of PACOS' predecessor, Act 94 of 1970, section 2(1)(a), unconstitutional. The Court held that the 90-day notice and limitation period contained in that Act could not be reconciled with section 34<sup>58</sup> of the

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50 For the definition of debt refer to section 1.

51 Section 3(2)(a) read with section 3(3)(a) of PACOS.

52 Section 3(2)(a) read with section 3(3)(a) of PACOS.

53 Section 3(2)(b) of PACOS.

54 Section 5(2) of PACOS.

55 Section 4(1) of PACOS.

56 Section 4(2) of PACOS.

57 2001 (4) SA 491 (CC).

58 Section 34 of the *Constitution of the Republic of South Africa Act 108 of 1996* provides as follows:

Constitution. The Court acknowledged that while there may be justification for placing time periods within which proceedings must be instituted against the state,<sup>59</sup> the time period *in casu* was 'very short.'<sup>60</sup> If one considers that many potential litigants are indigent and illiterate, held the Court, the 90-day time period did not constitute a 'real and fair opportunity to approach the courts for relief.'<sup>61</sup> The Court went on to hold that the condonation provisions contained in section 4 of the Act<sup>62</sup> did not do much to ameliorate the harshness of section 2(1)(a) because the condonation provisions were 'by no means open-ended.'<sup>63</sup> The courts' discretion to grant condonation, said the Constitutional Court, was circumscribed by the wording of subparagraphs a) and b) of section 4 of Act 94 of 1970.

It is interesting to note that the Government in the *Moise* case refused to argue the constitutionality of section 2(1)(a) and basically agreed to abide by the Court's decision.<sup>64</sup> At the time when *Moise* was decided, Parliament had just drafted the *Institution of Legal Proceedings Against Organs of the State Bill 65B* of 1999. The Government thus saw no need to waste its time to save an Act was in any event in the process of being decommissioned.

It is submitted that if one considers the concern showed by the Constitutional Court in the *Moise* case for indigent and illiterate litigants, the 6-month period in PACOS, too, might not be enough to meet the constitutional guarantee of access to the courts. One must remember that illiteracy and poverty are of pandemic proportions in our country. Not all litigants are familiar, or are indeed capable of being familiar with their legal rights.

Furthermore, even though PACOS empowers a court on application to waive compliance with the notice requirements and the wording in PACOS does differ from the wording of section 4 of Act 94 of 1970, it does, however, appear that the wording in PACOS is also not 'open-ended.' A fettered judicial discretion to grant condonation, mixed with stark social and economic inequalities suffered by a vast majority of our population, might easily lead to the downfall of this legislation as well. Only time will tell.

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Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'

59 *Moise v Greater Germiston Transitional Council*: 499G.

60 *Moise v Greater Germiston Transitional Council*: 496E.

61 *Moise v Greater Germiston Transitional Council*: 496G; 497A.

62 In terms of Act 94 of 1970 a court could condone non-compliance with the 90 day period if it was satisfied that the state was not prejudiced by the failure, or that by reason of special circumstances a litigant could not have been expected to comply with the 90 day limitation period contained in the Act.

63 *Moise v Greater Germiston Transitional Council*: 497B.

64 *Moise v Greater Germiston Transitional Council*: 498G-499A.

Example 5

THE PROVINCIAL COMMISSIONER OF THE SOUTH AFRICAN  
POLICE SERVICE<sup>65</sup>

BARRACK STREET

CAPE TOWN

BY REGISTERED POST

Dear Commissioner Fowler

COLLISSION ON 20 MAY 2004 IN BUITENKANT STREET CAPE  
TOWN

We act for Mr Bumpalot, the owner of a Toyota Corolla motor vehicle  
with registration number CA 984567.

On 20 May 2004 our client was involved in a collision with a vehicle with  
registration number SAPS 2364 driven by Constable Goody, who at  
all material times was in the employ of the South African Police Services  
and was acting within the course and scope of his duties.

Our client is of the opinion that the collision was caused by the sole  
negligence Constable Goody.

Accordingly, our client has instructed us to demand from you payment  
in the amount of R23000, 00 being the fair and reasonable cost of  
repairing his vehicle. This amount must be paid at our offices within  
one month of the receipt of this letter, failing which we are instructed  
to institute proceedings for the said amount and any other damages  
which our client may have suffered, and costs of suit.

Take note further that you are liable in terms of section 56 of the  
*Magistrates' Court Act* for the cost of this letter of demand being R34.08.

Yours faithfully...

In addition to the legislation discussed above, a number of other statutes  
also require for a written notice to precede legal proceedings. They are, *inter  
alia*: the *Credit Agreements Act* 75 of 1980,<sup>66</sup> the *Alienation of Land Act* 68 of  
1981,<sup>67</sup> the *Attorneys Act* 53 of 1979,<sup>68</sup> and the *Public Service Commission  
Act* 65 of 1984.<sup>69</sup>

Before concluding, something needs to be said about section 11 of the *Credit  
Agreements Act*<sup>70</sup> and section 19 of the *Alienation of Land Act*.<sup>71</sup>

The *Credit Agreements Act* deals with instalment sale transactions. Where  
a credit receiver breaches a credit agreement, the credit grantor is entitled to  
repossess the sale item. In terms of section 11, the credit grantor must notify  
the credit receiver of his failure to comply with his obligations and require his  
compliance within a stipulated time, which in terms of the Act cannot be less

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65 Section 5(1)(b) of PACOS.

66 Section 11 of *Credit Agreements Act*.

67 Section 19 of *Alienation of Land Act*.

68 Section 48 of *Attorneys Act*.

69 Section 11 of *Public Service Commission Act*.

70 75/1980.

71 68/1991.

than 30 days. The credit grantor cannot in the absence of this notice repossess the sale item in respect of which the agreement was concluded. Should the credit grantor institute proceedings to recover the item, the credit receiver will be able to rely on section 11 to persuade a court to dismiss the proceedings. Furthermore, should the credit grantor take the law into his own hands by forcibly removing the item, the credit receiver would be able to bring the mandament van spolie for restoration of the removed property.<sup>72</sup>

According to section 19 of the *Alienation of Land Act*,<sup>73</sup> a seller may not in respect of a sale involving immovable property cancel; enforce an acceleration clause or penalty clause; or institute a claim for damages, unless he has given the purchaser 30 days' notice to fulfil his obligations.<sup>74</sup> Where the full purchase price is already due and payable in terms of the agreement, no notice is necessary in terms of section 19.<sup>75</sup> It is submitted that a notice in terms of section 11 of the *Credit Agreements Act*, or section 19 of the *Alienation of Land Act*, may take the form of a letter of demand.

Example 5:

BY REGISTERED POST

Dear Ms. Radebe

DEED OF SALE DATED 15 NOVEMBER 2001: ERF 4567 HAPPY RIDGE, WYNBERG;

NOTICE IN TERMS OF SECTION 19 OF THE ALIENATION OF LAND ACT 68 OF 1981.

We act on behalf of Ms. Lois Lane who sold Erf 4567, Happy Ridge, Wynberg to you in terms of a written agreement of sale.

In terms of the agreement, you agreed to pay off the purchase price in monthly instalments of R4000 as from 1 December 2003.

You have failed to pay these instalments on due date and consequently, you are presently in arrears with an amount of R16 000. You are hereby notified that should you fail to pay the amount of R16 000 within 30 days of the date of the postmark hereon:

- (a) The agreement will be cancelled without further notice;
- (b) You must vacate the premises;
- (c) All arrear instalments will be claimed from you plus interest thereon;
- (d) You will forfeit all payments made to date as precalculated damages.

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72 If the goods were repossessed unlawfully, the credit receiver is entitled to a spoliation order. See *Trust Bank van Afrika Bpk v Eales* 1989 4 SA 509 T. For further discussion see Grové and Jacobs 1993:36-38.

73 68/1981.

74 The Act does, however, make provision for the time period to be reduced to 7 days if the seller has in the same calendar year sent the purchaser two such notices at intervals of more than 30 days. See Hosten *et al* 1995:780-784.

75 Section 19(4) of the *Alienation of Land Act*; *Phone-A-Copy Worldwide (Pty) Limited v Orkin* 1986 1 SA 729 (A).

Take notice further that you are liable in terms of section 56 of the *Magistrates' Courts Act* for the cost of this letter of demand being R34,08.

Yours faithfully...

Example 6:

BY REGISTERED POST

Dear Mr Selby

NOTICE IN TERMS OF SECTION 11 OF THE CREDIT AGREEMENTS ACT

Client: Wesbank Finance Limited

Account Number: 96895986956956

Subject Matter: 2000 BMW 735

Amount in arrears: R78 500

We act on behalf of Wesbank Limited.

We give you notice in terms of section 11 of the Credit Agreements Act 75 that if you fail to pay the amount in arrears, as reflected above, to our client within 30 days of the posting of this notice:

- our client will institute action against you for, *inter alia*, the return of the subject matter; and
- any other claims which our client may have against you in terms of the agreement, which shall include interest at the rate stipulated in the agreement and costs of suit.

Take notice further that you are liable in terms of section 56 of the *Magistrates' Courts Act* for the cost of this letter of demand being R34,08.

Yours faithfully...

## 7. Conclusion: practical drafting tips

It is fitting to end this rather lengthy, but much needed, discussion of letters of demand on a practical note: One should make it stock practice never to set out *facta probantia* in a letter of demand or for that matter, any other notice which serves as a precursor to legal proceedings. One must only set out *facta probanda* in a letter of demand. *Facta probanda* are those material facts which must be stated to establish the existence of a cause of action. *Facta probantia* refer to facts that are of evidential character and which only serve to support or corroborate the existence of the *facta probanda*.<sup>76</sup> Admittedly, it may difficult to tell *facta probantia* from *facta probanda* in practice, but one must think of *facta probantia* in letters of demand as all those facts which one would not plead in a summons and which are really to be ascertained in court by examining witnesses. Thus just as one would not ordinarily set out exact times, colours, weather conditions, specifications, and qualities of things and people in a summons,<sup>77</sup> one should not do so in a letter of demand.

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<sup>76</sup> Schwikkard and Van der Merwe 2002:17.

<sup>77</sup> See Marnewick 2003:88-92.

Furthermore, letters of demand should always be drafted in plain English. Our former Chief Justice, Mr Justice MM Corbett, in an address at an orientation course for new judges said:

my advice (for what it is worth) is to keep your language and your sentence construction simple. Write short sentences and do not try to pack too many ideas into a single sentence [...] Try to avoid repetition of words and phrases and observe the normal rules of grammar.<sup>78</sup>

The judge went on to say:

One must also avoid giving the impression of striving for effect or of literary and intellectual ostentation.<sup>79</sup>

Although the judge offered the above advice for writing judgments, the advice is the opposite even for something as routine as writing a letter of demand.

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78 Hon MM Corbett 1998:126.

79 Hon MM Corbett 1998:127.

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