

## REVIEW OF THE RULES OF THE MAGISTRATES' COURTS

### EXPLANATORY MEMORANDUM ON SECOND DRAFT

The Jurisdiction of Regional Courts Amendment Act 31 of 2008 (the Act) requires the Rules Board to enact rules of procedure which will enable the Regional Courts to exercise the civil jurisdiction given to them in terms of the Act. After the Act had been passed by Parliament, the Board approved a recommendation from its Magistrates Court Committee that, in the process of this review, the opportunity should be taken to bring the magistrates court rules in line with those of the High Courts as far as possible. This is in line with the harmonization policy of the Board and will also facilitate the achievement of one of the purposes of the Act, as set out in the preamble: namely to create a career path for judicial officers from the Lower Courts to the High Courts. The Board also approved a recommendation that the amended rules should serve for the District and Regional Courts.

In October 2008 a task team comprising members of the Magistrates Courts Committee of the Board and researchers employed by the Board began work on the review. At the end of November 2008 the first draft of the proposed amendments to the magistrates' courts rules, together with an explanatory memorandum was e-mailed to interested and affected parties for comment and subsequently posted on the Rules Board section of website of the Department of Justice and Constitutional Development. The deadline for comment was 13<sup>th</sup> February 2009.

Comment has been received from the following parties:

- Judge LTC Harms (Deputy President of the Supreme Court of Appeal)
- The General Council of the Bar of South Africa
- The Law Society of South Africa
- Advocate D van Loggerenberg SC
- Acting Regional Court President KZN, FW Heuer
- The Association of Regional Court Magistrates
- Ms Z Moletsane, Presiding Officer Central Divorce Court
- Senior Magistrate PS Joubert (Pietermaritzburg)
- Acting Senior Magistrate D Oberholzer (Kempton Park)
- Magistrate S Luthuli (Durban)
- Magistrate A Chaitram (Johannesburg)
- Magistrate C Meyer (Uitenhage)
- Magistrate H Meyer (Potgietersrus)
- De Broglio Attorneys
- Mervyn Dendy Attorney
- Tarica Inc. Attorneys
- Gerhard van der Merwe Attorneys
- The Banking Association of South Africa
- The Debt Counsellors Association of South Africa

Association of Debt Recovery Agents  
 Capital Data  
 Information Governance Consulting (Mark Heyink)  
 MicroFinance South Africa (MFSA)

These parties are thanked for their constructive input.

The Task Team has worked through the comments received and now publishes a second draft of the proposed amendments. This memorandum should be read together with the memorandum on the first draft, which can be found on the Rules Board page of the website of the Department of Justice and Constitutional Development, alternatively be provided on request.

The numbering below corresponds with the rules' numbers. It should kindly be noted that in compliance with legislative drafting principles certain repealed rules still retain their initial numbers, though the content is blank, with an accompanying notice of repeal. Same applies to forms.

## **1A Purpose and application of rules**

A number of parties who commented expressed the view that sub-rule 1A(3) might be *ultra vires* the powers of the Board in that it sought to give magistrates powers not provided for by the Magistrates Courts Act 44 of 1932. In the second draft this provision has been amended to bring it within the powers conferred upon a magistrate in terms of s 54 of the Magistrates Courts Act. The object of the provision is to enable magistrates to be proactive with regard to case flow management.

The other sub-rules are as set out in the first draft.

## **2 Definitions**

The following amendments have been made to rule 2(1)(b):

Definition of 'advocate' inserted.

Definition of 'attorney' amended.

Definition of 'company' deleted.

Definition of 'delivery' amended to provide for the possibility of fax or e-mail.

Definition of 'money' deleted.

Definition of 'property' deleted.

Definition of 'registrar' of the court' inserted.

Definition of 'signature' amended to include an electronic signature.

Definition of 'valuable security' deleted.

### **3 Duties of registrars and clerks of the court**

Rule 3(6)(b): The previous sub-rule 4(b)(ii) has been re-inserted with reference to rule 12(2)(a).

Rule 3(8) has been amended to refer specifically to s 9(6)(b)(ii) of the Jurisdiction of Regional Courts Amendment Act, 2008 which directs that the rules should provide for the registrar or clerk to assist litigants.

### **3A Registrar's and Clerk's Office Hours**

This is a new sub-rule which has been inserted to introduce the provisions of High Court Rule 3 into the Magistrates Courts Rules.

### **4C Applications in terms of sections 57 and 58 of the Act (Rule 4 in 1<sup>st</sup> draft)**

The new sub-rule 4C(3) inserted by the first draft, which sought to introduce a requirement that consents in terms of s 58 of the Magistrates Courts Act be signed before a debt counsellor, elicited a great deal of adverse comment. 4C(3) now simply requires that such consents be signed before two witnesses, whose full names, addresses and contact details are recorded on the consent document. This is in line with the requirements for a consent to judgment in response to a summons, as contained in Magistrates Courts Rule 11(1)(c).

Rule 4C(4) is a new sub-rule which makes certain provisions of rule 12 applicable to applications for judgment in terms of sections 57 and 58 of the Act, as suggested by Magistrate Helen Meyer. The consequence of this will be that all such requests for judgment in respect of claims regulated by the National Credit Act will have to be referred to a magistrate.

### **5 Summons**

In rule 5(2)(b) the word 'shall' has been replaced by the word 'may'. The consequence is that a plaintiff whose claim is for a debt or liquidated demand may choose whether to issue a simple or combined summons. One reason for this change is that so many claims for debts and liquidated demands are now regulated by the provisions of the National Credit Act, 2005, and require numerous allegations to demonstrate compliance with that Act. Another reason is that a plaintiff who intends to apply for summary judgment if a notice of intention to defend is filed generally wants to place all the relevant information which supports its claim before the court by way of a combined summons, since it may not adduce any evidence in support of a summary judgment application. A third reason is that it was pointed out by Attorney Mervyn Dendy that, in practice, the word 'shall' in High Court rule 17(2)(b) is

often ignored and attorneys choose to issue a combined summons even though the claim is for a debt or liquidated demand.

Rule 5(3)(c) has been amended to require the request to be in writing.

Rule 5(7) has been slightly amended to now make it obligatory for a declaration, if any, to contain full particulars of compliance with applicable legislation in a situation where the initial simple summons merely contained bare allegations of such compliance. This corresponds with the amended rule 6(11) [previously rule 6(12)].

Rule 5(9) is a new addition, drawn from the existing rule 6(5)(c) concerning instances where plaintiff sues as cessionary. A recommendation by Magistrate P S Joubert.

Rule 5(10) has been inserted to ensure compliance with the directive of the Supreme Court of Appeal in *Standard Bank of South Africa Ltd v Saunderson and Others* 2006 (2) SA 264 (SCA).

Rule 5(11) has been added to make it clear that the remedy when a summons does not comply with the rule is an application to set the summons aside as an irregular procedure.

## **6A Rules relating to pleadings generally (Rule 6 in 1<sup>st</sup> draft)**

Rule 6(8) of the 1<sup>st</sup> draft deleted.

Rule 6A(11) – previously rule 6(12) – has been amended to make it clear that the allegations of compliance with applicable legislation should be made in the declaration or the statement of material facts annexed to a combined summons.

## **9 Service of Process, Notices and Other Documents**

The representations received regarding rule 9 mainly entailed submissions that the rule be amended to bring it in line with modern technology by providing for service by electronic mail and facsimile. It was also submitted that service by affixing and service at a *domicilium* address should be retained as abolition thereof will severely affect the cost of litigation and will also be time consuming as it may lead to various costly attempts to serve a specific process. It further appeared that service by the sheriff by registered post was hardly ever used in practice and most commentators were in favour of abolition thereof.

In order to accommodate the issues raised by commentators and to attempt to amend rule 9 to create a simple, speedy and efficient service rule, the

amendments to Rule 9 *inter alia* provide for service of the original or a certified copy of a process which will play an important role in aiding speedy and efficient service. In this regard, it is further provided that where the person to be served with any document initiating application proceedings is already represented by an attorney of record, such document may be served on the relevant attorney.

Service (of pleadings) by facsimile and electronic mail is also duly provided for *inter partes*. Service by affixing and at a *domicilium* address has now been retained. Adequate safeguards are provided by empowering the court, should there be any reason to doubt whether the process served has come to the actual knowledge of the person to be served, to treat such service as invalid in the absence of satisfactory evidence.

In order to achieve harmonization, the provisions of High Court Rule 4 relating to service in a foreign country have been incorporated into rule 9 and the provisions relating to edictal citation contained in High Court rule 5 have been incorporated into rule 9A.

#### **10 Delay in the Prosecution of an Action**

This rule has been deleted, as suggested by a number of commentators.

#### **11 Judgment by consent**

A provision has been inserted in sub-rule (1) to exclude divorce actions and nullity actions – see High Court rule 31(1)(a).

Additional requirements in respect of the details of witnesses have been inserted in sub-rule (1)(c).

#### **12 Judgment by Default**

The insertion of the provisions of High Court rule 31(5) as sub-rule (3) was reconsidered in the light of considerable adverse comment. On reconsideration, the Task team realised that these provisions are not appropriate for the Magistrates' Courts at this stage.

The revised sub-rule (3) simply provides that the clerk may either grant judgment, subject to certain other sub-rules, or refer the matter to a magistrate.

Reference in sub-rule (1)(e)(i) to court fees having been paid on the original summons is now down away with, as well as the requirement for original liquid documents to be duly stamped in sub-rule (6).

## **15A Declaration**

Sub-rules (4) and (5) have been inserted to provide the mechanism for serving a notice of bar when there is a failure on the part of the plaintiff to deliver a declaration, and to incorporate the provisions of High Court Rule 31(3), which allow the defendant to apply for absolution from the instance where the plaintiff has been barred from delivering a declaration.

## **16 Further Particulars**

There were no objections to the abolition of requests for further particulars for pleading and the introduction of further particulars for the purpose of trial.

## **22 Set-down of Trial**

Rule 22(4) has been amended to require the registrar or clerk, on receipt of an application for a trial date, to draw the file and take it to the magistrate to enable the magistrate to decide whether to call a conference in terms of s 54 of the Magistrates' Courts Act. The purpose of this sub-rule is to facilitate the effective use of s 54 to achieve good case flow management. The reference to s 54 has been inserted to address concerns about the provision in the first draft being *ultra vires*. The sub-rule is enabling – it does not compel a magistrate to make use of the opportunity created.

Rule 22(6) is a new sub-rule which incorporates the provisions of High Court rule 44, relating to undefended divorce actions.

## **23 Discovery of Documents**

Some commentators thought it unnecessary to introduce some of the High Court sub-rules relating to discovery which were previously not part of the Magistrates Courts Rules. After consideration the Task Team decided to retain these provisions in the 2<sup>nd</sup> draft since the High Court practice has established that they serve a useful purpose when matters involving documentation go to trial. Utilization of these provisions is not obligatory.

## **28 Joinder of parties and causes of action, separation and consolidation**

After consideration of comments received, the Task Team decided to revert to the existing rule 28(2) so as to avoid a possibility of conflict with the provisions of sections 41 and 42 of the Act.

High Court Rule 10(2) has been inserted as Rule 28(3). There is presently no rule relating to joinder of causes of action.

High Court Rule 10(5) has been inserted as Rule 28(4) as there is presently no rule relating to separation of causes of action.

High Court Rule 11 has been inserted as Rule 28(5) as there is presently no rule providing for consolidation of actions in the magistrates courts.

**28A Third party procedure**

No adverse comment was received with regard to the inclusion of this rule.

**32 Non-appearance of a party – withdrawal and dismissal**

Sub-rule (2) has been amended to insert a provision which indicates that the court should receive and consider such evidence as it deems necessary before granting judgment.

**33 Costs**

The tariff of fees payable to attorneys and advocates in regional court matters is outlined in rule 33(5).

Rule 33(13) has been amended to provide for an equitable award in instances where costs in convention and reconvention are awarded to different parties, by requiring that each party submit a bill of cost in respect of all costs and charges incurred in instituting and defending the claim in convention and reconvention in order to award the successful parties a proportionate amount of their costs in accordance with the award given by the court.

**34 Fees of the sheriff and the registrar or clerk of the court**

Sub-rule (4) has been deleted, in line with the abolishment of revenue stamps.

**44 Interpleader Claims**

After consideration of the submissions made by Attorney Jacques Tarica, amendments have been effected to address the problem experienced by sheriffs when a claimant lays claim to an item which has been attached, but does not initially provide sufficient information regarding such claim to enable the judgment creditor to make an informed decision as to whether to accept or reject such claim. The amended rule now requires that the claimant should, within a specified time period after making a claim, furnish certain detail by affidavit which is to be forwarded to the judgment creditor. Only once the judgment creditor rejects the claim, will an interpleader summons be issued by the sheriff. Rule 41(7)(e) has also been amended to provide for a suspension and so to avoid lapsing of the attachment pending the

adjudication of the interpleader. The provisions of existing rule 39(4), (5) and (6) have been incorporated into rule 44 so that all the provisions relating to interpleader proceedings are in one rule.

#### **48 Administration orders**

As a result of a recommendation by the LSSA, the administrative fee provided for in Rule 48(4) has been increased to R600.

#### **49 Rescission and variation of judgments**

Sub-rule (5) has been amended to provide that a request for rescission of a default judgment with the consent of the judgment creditor may be made at any time after plaintiff has agreed in writing to the rescission or variation. Sub-rule (1) has been amended accordingly.

#### **55 Applications**

The new draft rule based on High Court rule 6 has been well received. No changes of significance have been made in the 2<sup>nd</sup> draft. The equivalent of High Court rule 6(15) has been inserted as rule 55(9).

#### **56 Arrests *tanquam suspectus de fuga*, interdicts, attachments to secure claims and mandamenten van spolie**

The amendments to this rule complement the amended rule 55.

#### **57 Attachment to Found or Confirm Jurisdiction**

All references to the arrest of a person to found or confirm jurisdiction have been deleted in view of the decision in *Bid Industrial Holdings (Pty) Ltd v Strang and Another (Minister of Justice and Constitutional Development, Third Party)* 2008 (3) SA 355 (SCA).

**58A.** This is the equivalent of High Court Rule 43 and Divorce Courts Rule 32. New sub-rules (7) and (8) have now been inserted thereto, concerning the amount of fees chargeable by advocates and attorneys.

#### **62 Security for costs**

The rule has been amended to align it with High Court rule 47, however, the list of circumstances in which a party is entitled to demand security has been retained.

## **EXPLANATORY MEMO ON SOME AMENDED AND/OR ADDED FORMS TO THE MAGISTRATES' COURTS RULES**

1. Form 1, Notice of application (general form) is being substituted with Notice of Motion (Short Form) akin to Form 2 of the High Court (HC) rules. A new form 1A, Notice of Motion (Long Form), has been added, drawn from HC Form 2(a) with appropriate adjustments. This, in view of the amended rule 55.
2. Form 2, Summons commencing action (ordinary), is being substituted with Summons (Claims in respect of debt or liquidated demand), incorporating aspects of HC Form 9. However, it also contains similar notices as in the previous Form 2 drawing defendant's attention to Section 65A provisions, Section 109 provisions, Consent to judgment provisions, Notice of intention to defend sub-form, and so forth.
3. After the existing Form 2A, Summons: Provisional Sentence, a new Form 2B, Combined Summons, is inserted derived from HC Form 10. Both the amended Form 2 and new Form 2B are a result of amended rules 5 and 6.
4. The old Form 4, Notice under rule 9(12) for substituted service, is now substituted with Edictal citation/substituted service: short form of service, drawn from HC Form 1, and in keeping with the newly introduced rule 9A.
5. The old discovery forms 13, 14 and 15 are now deleted. In their place comes new forms 13A Discovery – form of Affidavit, 14A Notice in terms of Rule 23(5), 15A Discovery – Notice to Produce, 15B Discovery – Notice to Inspect Documents, and 15C Discovery – Notice to Produce Documents in Pleadings, etc. These new forms are drawn from HC Forms 11, 12, 13, 14 and 15 and correspond with the amended rule 23.
6. In Form 18, Order for Attachment of Person or Property to Found or Confirm Jurisdiction, all references to the attachment or arrest of persons have been deleted, in line with the amended rule 57.

7. Contents of Form 24, Subpoena, have been slightly altered to indicate that the subpoena is now being served by the Sheriff, in line with amendments to rule 26.
8. Form 60, Notice in terms of section 309B(2)(b) of the Criminal Procedure Act, has now been substituted with the gazetted form subsequent to the amendment of rule 67. These amendments were published, with the commencement date being 15 June 2009.
9. There is a new Form 61, Notice in terms of Rule 58A(2)(a), to give effect to the provisions new rule 58A in respect of applications for maintenance *pendente lite*, contribution towards costs, interim custody and access to children. It combines elements of both HC Form 17 and Form 6 of the Divorce Courts Rules.
10. New Form 62, Notice to Third Party, is drawn from HC Form 7, and gives effect to the provisions of new rule 28A.
11. New Form 63, Certificate of Service of Foreign Process, is drawn from HC Form J, and is in line new rule 9(24).
12. Generally, most of the forms have been retained but with some technical alterations, for instance gender neutral phrases, correct year phrases (20 instead of 19..), registrar/clerk of the court and so forth. Also, all references to payment or attachment of revenue stamps have been deleted.

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