

REVIEW OF THE RULES OF THE MAGISTRATES' COURTS

EXPLANATORY MEMORANDUM ON FIRST DRAFT

1 Purpose and application of rules

The previous sub-rule (1)(1), which explained the application of certain trial-related rules with reference to summary judgment applications, has been deleted as it is thought not to be necessary, since almost all magistrates now have law degrees and do not need a rule to explain the effect of a summary judgment application.

- 1(1) This is a new sub-rule which aligns the rules with s 34 of the Constitution.
- 1(2) This is a new sub-rule which aligns the rules with the policy reflected in the guidelines set out in s
- 1(3) This is a new sub-rule which is designed to empower a judicial officer to dispense with the formal requirements of the rules where this is necessary to promote access to the courts. It is envisaged that such a rule would be utilized where a judicial officer is faced with a case in which one or more of the parties is not represented and would be prejudiced by the strict application of the rules. It is not, however intended that the sub-rule be utilised solely in such circumstances.
- 1(4) This was previously sub-rule 1(b). It is suggested that it be retained in rule 1 under the new heading since it deals with the application of the rules.
- 1(5) This was previously sub-rule 2(2). It also deals with the application of the rules.
- 1(6) Previously sub-rule 2(2). Deals with the application of the rules.
- 1(7) Previously sub-rule 2(3). Deals with the application of the rules.

2 Definitions

- 2(1) Nothing changed at this stage – will need to consider with reference to the High Court rule definitions before finalizing draft rules.

2(2) and (3) now in rule 1, as explained above.

3 Duties of registrars and clerks of the court

Previously the sub-rules dealing with the duties of the clerk of the court were either in rule 3 or rule 4. These have now been consolidated under the heading 'Duties of registrars and clerks of the court. The Department of Justice and Constitutional Development has advised that it intends to appoint registrars for the Regional Civil Courts.

- 3(1) This was previously rule 4(1)(a).
- 3(2) Previously rule 3(1).
- 3(3) Previously rule 3(2).
- 3(4) Previously rule 3(3).
- 3(5) Previously rule 3(4).
- 3(6) Previously rule 4(b), but rule 4(b)(ii) is deleted as it may be unconstitutional since it discriminates against unrepresented parties.
- 3(7) Previously rule 4(d).
- 3(8) This is a new rule which has been inserted in order to comply with s of the Jurisdiction of Regional Courts Amendment Act, 2008.
- 3(9) This was previously rule 4(2).
- 3(10) Previously rule 4(3).

4. Applications in terms of sections 57 and 58 of the Act

- 4(1) Previously rule 4B.
- 4(2) Previously rule 4A. Amended part added to ensure compliance with legislative requirements such as those found in the National Credit Act.
- 4(3) This is an entirely new sub-section, the object of which is to give effect to the consumer protection provisions of the National Credit Act.

5 Summons Commencing Action

The Task Team is of the view that the summons procedure in the magistrates' courts should be aligned with that of the High Courts by introducing the concept of simple and combined summons and doing away with requests for further particulars for the purpose of pleading.

- 5(1) Copied from High Court rule 17(1).
- 5(2) Copied from High Court rule 17(1).
- 5(3) Based on High Court rule 17(4).
- 5(3)(a) The requirement that the plaintiff must appoint an address within 8 km of the courthouse has been amended to require the appointment of an address within 15 kilometres – 3(a). Rule 3(c). This is believed to be reasonable in view of the fact that, today, almost everyone has access to some mode of transport. Note that, as an alternative, rule 11(a) allows delivery of any document which is not a process of the court by way of registered post. Rule 53(a) also requires that the summons be endorsed with the plaintiff's fax and e-mail address, where available,
- 5(3)(b) New sub-rule which requires the summons to indicate whether the plaintiff is prepared to consent to the delivery of documents and notices subsequent to the initial process other than by physical or postal address.
- 5(3)(c) New sub-rule which gives plaintiff a remedy and the court a discretion if the defendant fails so to consent. Special attention has been given to these issues because the present 8 km rule has been challenged on the basis that, where a party refuses to dispense with the requirement, the other party's access to the courts, as guaranteed by s 36 of the Constitution, is infringed.
- 5(4) Reflects the provisions of High Court rule 17(4), except that the requirement that a woman's marital status must be alleged has been deleted.
- 5(5) Sub-rules (a), (b), (c) and (d) are taken from existing magistrates' courts rule 5(1). These endorsements on the summons have always been required by the magistrates' courts rules.
- 5(6)(a) Taken from existing magistrates' courts rule 6(5)(f) – complements section 28(1)(d) of the Act.
- 5(6)(b) Taken from existing magistrates' courts rule 6(5)(g) – complements section 28(1)(g) of the Act.
- 5(6)(c) Taken from existing magistrates' courts rule 6(3)(d) – complements s 38 of the Act.
- 5(7) This is a new sub-rule which is intended to save costs and cut down on unnecessary documentation. Most monetary claims for a debt or liquidated demand arise from transactions which are now regulated by the National Credit Act The draft sub-rule provides that, where it is necessary to allege compliance with statutory requirements, such as those encompassed in the

National Credit Act, a bare allegation of compliance will be sufficient for the purposes of a simple summons. If an appearance to defend is entered then the declaration must contain full particularity with regard to the alleged compliance. If default judgment is applied for, evidence of such compliance must be attached to the application for default judgment – draft rule 12.

6 Rules relating to Pleading generally

This rule is the same as High Court rule 18, save for minor amendments in sub-rule 1, which relate to legal practitioners.

7 Amendment of Summons

No change. Same as the High Court rule 28, which was substituted for the previous rule in 1994 to align with the magistrates' courts rule.

8 Sheriff of the Court

No amendment necessary.

9 Service of Process, Notices and Other Documents

During 2006 the Magistrates Committee of the Rules Board circulated draft amendments to Rule 9 for comment. The aim was to 'tighten up' the service rule in order to ensure that the audi alterem partem principle is given effect to. We received very negative comment from the Association of Law Societies and further negative comment from some other role-players. As a result a workshop was held in June 2006 to discuss the issues raised. The process was not taken any further after that. The Task Team, after carefully considering that draft amendment and the responses thereto, believes that the provisions of that draft are the best way to ensure that the audi alterem partem principle and the provisions of s 34 of the Constitution are given effect to. We are accordingly again tabling that draft with some amendments. An alternative, which might be considered, is to substitute the provisions of High Court Rule 4 in the place of the present provisions of rule 9.

9(1)-(2) No amendment.

9(3)(a) Provision for service on minor or person under disability – from 4(1)(a)(i) of the High Court rules.

9(3)(d) Service at a domicilium citandi et executandi must be service on a person over the age of 16. The reason for introducing this requirement is that the present rule does not give proper effect to the audi alterem partem principle and the constitutional principle that access to the court must be a reality for plaintiff and defendant.

- 9(3)(e) Reference to juristic persons made broader and provision for service on registered office included.
- 9(3)(f) Existing sub-rule (f), providing for service by registered post deleted. The reason for this is that the provision is seldom used and proper proof of service is difficult to establish.
New sub-rule (f) provides for service on state authorities, replacing existing sub-rule (g).
- 9(3)(g) New sub-rule, similar to High Court rule 4(1)(a)(vi)

Proviso to rule 9(3):

Discretion to regard service as invalid extended to service at domicilium citandi et executandi and provision made for personal service of divorce process.

9(6), 9(7) and 9(8): It is suggested that these sub-rules which provide for pinning to the outer principal door be deleted because they do not give effect to the audi alterem partem rule and are too readily utilised by sheriffs.

Alternatively, the court may be empowered to accept this kind of service where it is satisfied by evidence given under oath that, despite the attorney having furnished all known details of the defendant to the sheriff, the sheriff has been unable to serve in any other manner provided by the rule.

- 9(11) Provisions in relation to possible service by fax or e-mail included – refer discussion on rules 5 and 13.
- 9(12) The reference to rule 63 is to the new edictal citation rule.
- 9(15) Existing sub-rule 9(15) deleted, since provision for service of a process by registered post deleted.

New sub-rules (15) to (26): The provisions of High Court rules 4(3) to 4(15), which deal with service in a foreign country have been inserted. This is thought necessary because the value jurisdiction of the lower courts has been substantially increased in recent years and modern modes of communication, transport and travel have increased inter-country transactions.

9A Edictal Citation and Substituted Service

Drawn from both High Court and Divorce Court Rules.

10 Delay in the Prosecution of an Action

11 Judgment by Consent

12 Judgment by Default

12(3) Existing sub-rule (3) relating to service by registered post deleted – see discussion on rule 9 above.

High Court rule 31(5) inserted as new sub-rule (3). If this is necessary in the High Court, where the registrars are required to have legal qualifications, it is necessary in the lower courts, where clerks generally do not have such qualifications.

12(5) Introduces reference to National Credit Act of 2005 and deletes reference to Hire Purchase Act of 1942. Experience with the new Act has demonstrated that it is not reasonable to expect that clerks should be able to grant judgment in respect of an Act which is far more complex than the Credit Agreements Act of 1980. At most clerks should be able to raise queries where there is obvious non-compliance with the Act.

12(6) This sub-rule has been broadened to require all written agreements upon which a claim is based to be attached to applications for default judgment.

12(6)(A) This is a new sub-rule which requires that evidence of compliance with regulating legislation (such as the National Credit Act of 2005) be attached to applications for default judgment. See discussion of rule 5(7) above.

13 Notice of Intention to Defend

This is based on High Court rule 19, but, in line with the summons rule (see above rule 5) makes provision for :

The furnishing of fax and e-mail details – 3(a)

A physical address within 15 kilometres – 3(a)

Choice of method of service in respect of subsequent documents – 3(b)

Consent to exchange of documents by fax or e-mail

Application to court if consent refused

14 Summary Judgement

Aligned with High Court rule 32. the only amendments of substance are the deletion of the option of payment in court as a means of defeating an application (see discussion on payments into court in respect of rule 18) and the requirement of an affidavit in addition to a copy of the liquid document where a claim is based on a liquid document.

14A Provisional Sentence

No amendment – same as High Court rule 8.

15 Declaration

This is the same as High Court Rule 20.
Comment is invited as to whether the terminology ‘full particulars of claim’ should be used instead of ‘declaration’.

16 Further Particulars

This rule now reads the same as High Court rule 21, abolishing further particulars for the purpose of pleading.

17 Plea

Aligned with High Court rule 22, save for rule 22(4) concerning counterclaims – see rule 20 below.

18 Payment into Court

Aligned with High Court rule 34. there is no reason to retain the requirement of payment into court.

19 Exceptions and Applications to Strike out

Provisions of High Court rule 23 inserted. Provisions relating to exceptions and applications to strike out previously contained in magistrates’ courts rules 17 and 19 deleted.

20 Claims in Reconvention

Provisions of High Court rule 22(4).

21 Reply to the plea

Aligned with High Court rule 25.

21A Close of Pleadings

Aligned with High Court rule 29.

22 Set-down of Trial

Some amendments introduced.

23 Discovery of Documents

Amendments to discovery procedure: Rule 23

Note: It is suggested that we amend section 23 in its entirety and substitute it with High court rule 35, which is a far more comprehensive but not necessarily a more complicated, rule. The advantage of such a substitution would be that it would achieve harmonization and would also ensure that a detailed discovery procedure is catered for in the Magistrates courts. It would inter alia enable parties to obtain (with leave) discovery prior to close of pleadings in relevant instances, to obtain discovery of documents previously in a party's possession, to utilize the various Forms provided for in the Uniform Rules, to use the procedure provided for in Rule 35(3) to obtain further discovery, it has its own built-in sanctions contained in the rule, it enables parties to avail themselves of rule 35(8) which does not have a counterpart in the magistrates court and which will enable better discovery, it provides for admission of documents, it also states its application to application proceedings, etc. Rule 35(14) may even do away with the need for a procedure like Magistrates court rule 15.

24 Medical Examinations, Inspection of Things, Expert Testimony and Rendering in Evidence any Plan, Diagram, Model or Photograph

Amendments: Medical examination: Rule 24(1)-24(5)

Note: These rules were amended in 1991 to bring them in line with the Uniform rule 36(1) to (5). Content-wise they are thus basically identical to the High court rules and in my opinion, in certain respects their wording is more precise and their lay-out they are even better and less cumbersome as they have been divided into more subparagraphs to aid easier reading .In principle I think they should remain as they are and we can only add a subrule similar to Rule 36(5A) in the High Court. The high court rule does not in subrule (1) refer to registered medical practitioners and should actually be amended to do so. The amounts referred to in subrule (2)(b) could also possibly be amended.

25 Pre-trial Procedure for Formulating Issues

26 Subpoenas, Interrogatories and Commissions de bene esse

After comparing MR26 with the new HR38 it appeared that the provisions of the latter rule regarding subpoenas are a bit more comprehensive than those of the Magistrates Court rule. However, the High Court rule provides for the documents to be handed in to the registrar and for the parties to inspect same. Currently no procedure exists in the Magistrates Courts to facilitate such handing over and inspection. As such a procedure will severely impact on the workload and amounts of paperwork in the Magistrates Court and it is doubtful whether they have the infrastructure to accommodate same. Consequently, it is suggested that the latter procedure requires a policy decision to be taken during the Civil Justice Review. Therefore it appeared feasible at this stage only to harmonize the initial parts of High Court rule 38(1)(a)(i) and (ii) with Magistrate Court rule 26 for purposes of use in the Magistrates Courts. It is submitted that during the review it should also be considered whether to incorporate parts of MR26 into HR38 and whether to provide for specific time limits.

27 Withdrawal, Dismissal and Settlement

Amendment to Rule 27

Note: The current Magistrates Court rule 27(5) has been deleted as it appears to be seldom used, seldom granted and does not have an exact counterpart in the High Court. Rule 27 *per se* has no exact counterpart in the High Court and it has been attempted to harmonise it to a certain extent with High court rule 41 by providing for an express duty to inform the court of settlements, postponements and withdrawals by agreement and by harmonising rule 27(9) with high court rule 41(4). In the latter regard the restrictive time period of twelve months was removed from rule 27 as there is no such restriction in the High Court and no reason to retain same in the magistrates' court. Provision was also expressly made for prior notice of the rule 27(9) application but the high court notification period of 5 days was not incorporated as the usual notice period in regard to magistrates' court applications is ten days

28 Joinder of parties and causes of action

This rule was previously entitled 'Intervention of Persons in any Proceedings.' This title was too restrictive, even with regard to the present rule, because that rule deals both with intervention and with joinder. The High Court title has been substituted because its ambit is much wider.

High Court Rules 10(1); 10(3) and 10(4) have not been included because similar provisions are contained in sections 41 and 42 of the Magistrates' Courts Act, 1944.

Intervention: The provisions of High Court Rule 12 has been substituted for Magistrates' Court Rule 28(1), dealing with intervention, because the Magistrates Court Rule is too narrow because it refers only to parties with an interest in the proceedings. The High Court rule accommodates intervention both on the grounds of convenience and interest.

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

Separation of trials: High Court Rule 10(5) has been inserted as Rule 28(4) . there is presently no such rule for the magistrates courts.

Third party joinder: This is not presently provided for by the rules of the Magistrates' Courts, although it has been held that the provisions of Rule 28(2) are wide enough to allow such joinder. It is important that this type of joinder and its consequences are expressly regulated. Rule 13 of the High court has been inserted as rule 28A. Rule 28(10) is a new rule which has been inserted to make a decision by a court with regard to partial liability on the part of a joined in defendant executable in the hands of the original defendant. See *Khumalo v Wilkins & another* 1972 (4) SA 470 (N), citing *Shield Insurance Co Ltd v Zervoudakis* 1967 (4) SA 735 (E).

29 Trial

30 Record of proceedings in Civil Matters

31 Adjournment and Postponement

32 Non-appearance of a Party - Withdrawal and Dismissal

33 Costs

Rule 33(13)

The amendment was made in order to give effect to a representation which was made to the Rules Board which stipulated that the rule as it stood could lead to an unfair and/or unequal distribution of costs (on taxation) in instances. The case law generally applied by the courts on such issue is that of *Venter v Dickson* 1965 (4) SA 22 ECD.

34 Fees of the Sheriff and the Clerk of Court

35 Review of Taxation

36 Process in Execution

- 37 Second or Further Warrants or Emoluments Attachment orders or Garnishee Orders**
- 38 Security by Judgment Creditor**
- 39 General Provisions Regarding Execution**
Recommendations received from attorney Jacques Tarica are available on request.
- 40 Execution against a Partnership**
- 41-42 Execution against Movable Property**
Rule 41(8)(c)
The value of the goods attached is increased from R3000,00 to R5000,00 to accommodate for an increase in costs i.e. taking into consideration the CPIX, inflation rates etc.
- 43 Execution against Immovable Property**
Rule 43(2)(c)
Inclusion of Rule 43(2)(c). This amendment is made in lieu of a representation made to the Rules Board where a problem was identified in cases where there exists an interdict on a property and where such interdict is not uplifted, even though the attachment of the immovable property has lapsed. This then may give rise to problems when an owner now wishes to deal with and/or resell the property for example some time thereafter and no record exists of the property.
- Rule 43(10)
The Rules Board has, over the years, received several representations to provide for sales in execution with reserve. More recently, one of the main reasons herefor and given the judgment of *Jaftha and van Rooyen v Schoeman, Scholtz and others*, is that immovable property sometimes gets sold for very low values at sales in execution, for example R100,00 and that this may also lead to an abuse of the system with the debtor unjustifiably losing out as a result of such sales. Given the latter, the amendment provides for sales in execution with reserve as drafted.
- Rule 43(14)(a)
The amendment has been made to provide for a more practical approach to the sheriff handling the moneys received as referred to.
- Rule 43(6)(c)
This amendment has been before the Rules Board for consideration and has already been approved by the Rules Board. The amendment is now to be submitted before the legislature and is ready for passing

43A Enforcement of Foreign Civil Judgements

44 Interpleader Claims

Recommendations received from attorney Jacques Tarica are available on request.

45 Enquiry into Financial Position of Judgment Debtor

Rule 45(1)(e)

The Credit Agreements Act 75 of 1980 was repealed by the National Credit Act 34 of 2005. As there is no similar provision of section 19 of the Credit Agreements Act 75 of 1980 in the National Credit Act 34 of 2005, this paragraph gets deleted.

Rule 45(4)

The Credit Agreements Act 75 of 1980 was repealed by the National Credit Act 34 of 2005. The amendment is made as there is no similar provision of section 19 of the Credit Agreements Act 75 of 1980 in the National Credit Act 34 of 2005.

46 Attachment of Emoluments by Emoluments Attachment Order

Rule 46(2)

The amendment is made mainly so that the wording conforms with that of the other rules or subrules similar to the one in Rule 46(2) i.e. where forms are referred to.

47 Attachment of a Debt by Garnishee Order

Rule 47(1)(b)

The Hire-Purchase Act 36 of 1942 was repealed by the Credit Agreements Act 75 of 1980, which, in turn was repealed by the National Credit Act 34 of 2005. as there are no similar provisions of section 18 of the Hire-Purchase Act 36 of 1942 and section 19 of the Credit Agreements Act 75 of 1980 in the National Credit Act 34 of 2005, this paragraph gets deleted.

48 Administration Orders

Rule 48(4)

The maximum amount to be in the possession of the administrator is increased from R30,00 to R300,00 given that the rule was last amended in 1978 and thus and also taking into consideration the CPIX, increase in inflation rates etc.

49 Review of Judgments

50 Appeals and Transfers of Actions to Magistrates' Courts

- 51 **Appeals in Civil Cases**
- 52 **Representation of Parties**
- 53 **Pro Deo Applicants**
- 54 **Actions by and against partners, a person carrying on business in a name or style other than his own name, an unincorporated company, syndicate or association**
- 55 **Applications**

A new draft rule based on High Court rule 6 has been inserted.

The present rule 55 is totally inadequate, particularly in that it makes no provision for directions to the respondent as to how to oppose. It provides that applications need not be supported by an affidavit, except where otherwise required by the rules, and makes no provision for answering or replying affidavits. It was probably intended only for interlocutory applications, though it is inadequate even for those when they are opposed. Attorneys have always improvised when an application is opposed, but this often results in arguments as to when answering and replying affidavits should have been filed.

The failure of the present Rule 55 to provide directions to respondents as to what they should do in order to oppose carries serious potential prejudice for respondents. Rule 55(9) also creates the impression that the general rule is that applications may be brought ex parte and that the giving of notice is the exception to the rule. It was held in *Office Automation Specialists CC and another v Lotter* 1997 (3) SA 443 (E) at 447 A—C that, despite its wording, this is not the way the rule is to be interpreted. The draft new rule gives effect to the case law on ex parte applications and consolidates all the provisions relevant to ex parte applications under one heading.

The present Rule 55 contains no provision for urgent applications. This is problematic, particularly since Magistrates Courts have the power to grant interdicts, orders of attachment, orders of spoliation and orders of arrest tanquam suspectus de fuga in terms of s 30 of the Magistrates' Courts Act. These kind of applications often justify urgency. In the past they would simply be brought ex parte in chambers because Rules 55 and 56 seemed to give applicants carte blanche to proceed ex parte, but now case law has established that notice can be dispensed with only in the same circumstances that it can be dispensed with in the High Court.

56 Arrests tanquam suspectus de fuga, Interdicts, Attachments to Secure Claims and mandamenten van spolie

The amendments to this rule go hand in hand with Rule 55.
The provisions relating to ex parte applications have been moved into Rule 55, under the heading 'Ex parte applications'
55(5) concerning a rent interdict summons has been moved to rule 5(8)

57 Attachment to Found or Confirm Jurisdiction

All references to arrest have been deleted – see *Bid Industrial Holdings (Pty) Ltd v Strang and Another (Minister of Justice and Constitutional Development, Third Party)* 2008 (3) SA 355 (SCA).

58 Maintenance *pendente lite*, contribution towards costs, interim custody and access to children

New rule, drawn from both the High Court and Divorce Court Rules.

59 Assessors

60 Non-compliance with Rules, including Time Limits and Errors

Insertion of Rule 60A: irregular proceedings. This Rule addresses the problems with regard to irregular proceedings which is not dealt with in the Magistrate's Courts Rules. The Rule is taken from the High Court Rules, more particularly Rule 30 of the High Court Rules and also has the effect of bringing the Magistrate's Court Rules in line with the High Court Rules.

61 Records, Entries or Documents as Evidence in Civil Matters

62 Security for Costs by Plaintiff

63 Filing, preparation and Inspection of documents

New rule, drawn from High Court Rule 62, mainly with a view towards introducing the requirement of pagination and indexing of documents in the Magistrates' Courts.

64 Procedure for Securing the Attendance or Witnesses in Criminal Cases

65 Criminal Record Book

66 Records of Criminal Cases

67 Criminal Appeals

68 Oath of Office of Interpreter

69 Repeal of Rules

KINDLY TAKE NOTE: amendments in respect of rules 39(2)(a), (b), (c); 39(3)(a), (b); 39(4); 39(7)(a), (b), (c); 40(2); 41(7)(e)(i) & (ii); 41(8)(a); 43(5); 43(12); 43(14)(b); and 44(2)(a)(i) & (ii) have already been approved by the Rules Board, and are in the process of being gazetted, their envisaged date of coming into operation being 12 January 2009.