

## **PROPOSED NEW RULE 55**

The Magistrates Court Committee proposes that the following rule be substituted for the existing rule 55 dealing with applications:

### **55 Applications**

#### **(1) Substantive applications**

(a) Every application claiming substantive relief shall be brought on notice of motion supported by an affidavit as to the facts upon which the applicant relies for relief.

(b) The notice of motion must be addressed to the party or parties against whom relief is claimed and to the clerk of the court.

(c) Where it is necessary or proper to give any person notice of such application, the notice of motion must also be addressed to such person and served on such person.

(d) The notice of motion shall be in accordance with Form 1 of Annexure 1 and true copies of the notice, and all annexures thereto, shall be served upon every party to whom notice thereof is to be given.

(e) In such notice the applicant shall appoint an address within eight kilometers of the office of the clerk of court, at which notice and service of all documents in such proceedings will be accepted, and shall set forth a day, not less than five days after service thereof on the respondent, on or before which such respondent is required to notify the applicant, in writing, whether it intends to oppose such application, and shall further state that if no such notification is given the application will be set down for hearing on a stated day, not being less than 10 days after service on the said respondent of the said notice.

(f) If the respondent does not, on or before the day mentioned for that purpose in such notice, notify the applicant of its intention to oppose, the

applicant may place the matter on the roll for hearing by giving the clerk of the court notice of set down before noon on the court day but one preceding the day upon which the same is to be heard.

(g) Any party opposing the grant of an order sought in the notice of motion shall -

(i) within the time stated in the notice, give applicant notice, in writing, that it intends to oppose the application, and in such notice appoint an address within eight kilometres of the office of the clerk of the court, at which it will accept notice and service of all documents;

(ii) within ten days of notifying the applicant of its intention to oppose the application, deliver its answering affidavit, if any, together with any relevant documents; and

(iii) where it intends to raise questions of law only, deliver notice of intention to do so, within the time stated in the preceding sub-paragraph, setting forth such question.

(h) Within 10 days of the service upon it of the affidavit and documents referred to in sub-paragraph (ii) of paragraph (d) of subrule (4), the applicant may deliver a replying affidavit.

(i) The court may in its discretion permit the filing of further affidavits.

(j) Where no answering affidavit, or notice in terms of sub-paragraph (iii) of paragraph (g), is delivered within the period referred to in sub-paragraph (ii) of paragraph (g) the applicant may within five days of the expiry thereof apply to the clerk of the court to allocate a date for the hearing of the application. Where an answering affidavit is delivered the applicant may apply for such allocation within five days of the delivery of its replying affidavit or, if no replying affidavit is delivered, within five days of the expiry of the period referred to in paragraph (e) and where such notice is delivered the applicant may apply for such allocation within five days after delivery of such notice. If the applicant fails so to apply within the appropriate period aforesaid, the respondent may do so immediately upon the expiry thereof. Notice in writing of the date allocated by

the registrar shall forthwith be given by applicant or respondent, as the case may be, to the opposite party.

(k) Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as to it seems meet with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the foregoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for that person or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise.

## **(2) Counter applications**

(a) Any party to any application proceedings may bring a counter-application or may join any party to the same extent as would be competent if the party wishing to bring such counter-application or join such party were a defendant in an action and the other parties to the application were parties to such action. .

(b) The periods prescribed with regard to applications shall apply *mutatis mutandis* to counter-applications: Provided that the court may on good cause shown postpone the hearing of the application.

## **(3) *Ex parte* applications**

(a) No application in which relief is claimed against another party shall be considered *ex parte* unless the court is satisfied that –

(i) the giving of notice to the party against whom the order is claimed would defeat the purpose of the application; or

(ii) the degree of urgency is so great that it justifies dispensing with notice.

(b) Any order made against a party on an *ex parte* basis shall be of an interim nature and shall call upon the party against whom it is made to appear

before the court on a specified return date to show cause why the order should not be confirmed.

(c) Any person against whom an order is granted *ex parte* may anticipate the return day upon delivery of not less than twenty-four hours notice.

(d) A copy of any order made *ex parte* and of the affidavit, if any, on which it was made shall be served forthwith on the respondent thereto.

(e) Where cause is shown against any such order the court may order the applicant or respondent or the deponent to any such affidavit to attend for examination or cross-examination.

(f) Any order made *ex parte* may be discharged or varied by the court on cause shown by any person affected thereby and on such terms as to costs as may be just.

(g) *Ex parte* applications may be heard in chambers.

#### **(4) Interlocutory and incidental applications**

(a) Interlocutory and other applications incidental to pending proceedings may be brought on notice supported by such affidavits as the case may require and set down at a time assigned by the clerk of the court or as directed by the court.

(b) Applications to the court for authority to institute proceedings or directions as to procedure or service of documents may be made *ex parte* where the giving of notice of such application is not appropriate or not necessary.

#### **(5) Urgent applications**

(a) A court, if satisfied that a matter is urgent, may make an order dispensing with the forms and service provided for in these rules and may dispose of the matter at such time and place and in accordance with such procedure (which shall as far as practicable be in terms of these rules) as the court deems appropriate.

(b) An application brought as a matter of urgency must be supported by an affidavit which sets out explicitly the circumstances which the applicant avers

render the matter urgent and the reasons why the applicant claims that it could not be accorded substantial redress at a hearing in due course.

**(6) Leave to renew an application**

The court, after hearing an application, whether brought *ex parte* or otherwise, may make no order thereon (save as to costs if any) but grant leave to the applicant to renew the application on the same papers supplemented by such further affidavits as the case may require.

**(7) Order**

(a) The minutes of any order required for service or execution shall be drawn up by the party entitled thereto and shall be approved and signed by the clerk of the court.

(b) The copies of such minutes for record and service shall be made by such party and the copy for record shall be signed by the clerk of the court.

(c) The provisions of rule 41 shall, in so far as it may be necessary in the execution of an order under this rule, *mutatis mutandis* apply to such execution.