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A Guide: New Civil Procedure Rules in the Magistrates' Court

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The New Magistrates' Court Rules

The rules of civil procedure in the magistrates' court in South Africa have recently undergone significant changes. In the effort to amend the rules so as to enable the regional court to exercise its newly endowed civil jurisdiction in terms of the Jurisdiction of Regional Courts Amendment Act of 2008, the opportunity presented itself to overhaul the entire rules and to also bring greater uniformity with the high court rules. The same set of rules is applicable in both the regional and district divisions of the magistrates' civil court inclusive of the regional court's jurisdiction in divorce matters. These amendments are effective from **15 October 2010**. Section 171 of the Constitution provides that all courts must function in terms of rules and procedures determined by national legislation. The Magistrates' Courts Act 32 of 1944 and the Magistrate Court Rules promulgated thereunder, prescribe the procedure, the time limits, and the forms to be used in the magistrates' courts.

This guide is intended to provide only a brief overview of the new rules. In the attempt, on the one hand, to provide something more than the bare restatement of the legislation, while on the other hand not wishing to repeat established tomes on the subject of civil procedure, sometimes more is stated and at other times less than what might be considered necessary. Those who have occasion to refer to this guide are therefore cautioned not to use it as a substitute for the well-known and reputable works on the subject but to consult those resources for any purposes of reference and research.

The opinions expressed in this guide are those of the respective authors only, unless stated otherwise, and do not necessarily reflect the views of Justice College. Each of the respective authors bears sole responsibility, and likewise the credit devolves, for their respective contributions as follows: R Francis-Subbiah - Rules 1 to 15, Rules 33-35, Rule 52, Rule 62, and for the Appendices relating to costs; T Deosaran – Rules 16 to 32, Rule 34, Rules 36 to 51, Rules 53 to 61, and Rule 63.

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1. Purpose and application of the rules – Rule 1

The extent of the changes to the rules is evident in the fact that at least thirty of the old rules have undergone substantial amendments. All of the rules are now gender sensitive and the use of plain language helps in the attempt at being clear, concise and contextualized. Rule 1 is a **new rule** which appropriately sets out an **introductory** and **contextual purpose** and application of the rules. The right of access to the courts with a fair public hearing as set out in section 34 of the Constitution is reflected in rule 1(1) which reads as follows:-

> *(1) The purpose of these rules is to promote access to the courts and to ensure that the right to have disputes that can be resolved by the application of law by a fair public hearing before a court is given effect.*

Its function facilitates process rather than limiting it. Rule 1(2) provides that the rules are to be applied in a manner that facilitates the expeditious handling of disputes with a minimization of costs. This can be interpreted as promoting judicial empowerment in directing parties and controlling the proceedings in the attempt to keep legal costs down and circumvent procedural delays. The third provision of this sub-rule also encourages judicial officers to use s54 of the Magistrate Court Act to direct or manage civil matters set down for trial or hearing. The S54 conference, also called a **pre-trial conference**, is not peremptory in the magistrate court as it is in the high court but can be effectively used by a judicial officer to call a conference of litigating parties in chambers at any time of civil proceedings. **Case-flow management interventions** of this nature by judicial officers have radically influenced the number of actions that proceed to trial. On the surface these interventions appear to increase the costs but in actual fact have a beneficial effect of narrowing and limiting the matters in dispute, shortening trials, encouraging more early settlements and thereby have the effect of limiting costs in the long term. Accordingly in ***Lekota v Editor, Tribute Magazine***[1] the court explained that the purpose of a pre-trial conference is not a full preparation for trial, but a possible cooperation in steps which will limit or prevent avoidable effort and costs. The other sub-rules are similar to the old ones

[1] 1995(2) SA 706 (W) at 709A

but are now better constructed. The following prescribed forms **must conform fully** with the **specimen forms** contained in Annexure 1:-

- No. 2- simple summons,
- No. 2A – provisional sentence summons,
- No. 2B-combined summons,
- No. 3-automatic rent interdict summons,
- No. 5A- s57 Request for Judgment and
- No. 5B – s58 Request for Judgment.

All other forms may be used with variation. Copies filed of record must comply with the standard A4 white paper printed in black ink. The office of the Registrar has been established in the regional court to oversee all administrative and quasi-judicial functions. Hence all reference to 'clerk of court' in the rules also incorporates the 'registrar'. The **registrar or clerk** of court retains the authority to **refuse to issue summons** where there is **non- compliance** with the **rules.** For instance where a summons does not contain all the necessary endorsements as required by the rules, e.g. it does not contain the form of the appearance to defend the registrar or clerk may refuse to issue the summons. Although the rule says that noncompliance does not give rise to an exception, the registrar or clerk of court may nevertheless refuse to issue a document that fails to comply with the prescribed forms. However a further challenge confronts the registrar or clerk of court as prescribed form 2B omits essential endorsements referred to in r5(5)(d) which is prescribed by the summons rule 5(5). This has the effect that form 2B as it stands does not comply with the true intention of the rules. It is desirable that the Rules Board effect an urgent amendment to form 2B to reflect the necessary endorsements as prescribed by rule 5(5).

2. Definitions - Rule 2

Some definitions such as attorney, company and Act have been deleted. The new rules retain definitions relating to 'meaning of word in act so assigned,' 'apply', 'clerk of court', 'deliver', 'notice,' 'pending case', 'plaintiff', 'defendant', 'applicant', 'respondent', 'party' and 'sheriff'. The period for calculation excludes Saturday, Sunday and public holidays. Calculating days in terms of the rules is practically '**court days**,' which **excludes the first day** and **includes the last**. In addition all distances are computed at the shortest route. New

inclusion to the definitions section include references to signature, registrars, the Electronic Communications and Transactions Act, 25 of 2002, the National Credit Act, 34 of 2005 and the Criminal Procedure Act, 51 of 1977.

3. Duties and Office Hours of registrars and clerks of court – Rule 3

All rules relating to the duties of the registrar and clerk of court have been consolidated in rule 3 from the previous rules 3 and rule 4. In essence four sub-rules have been retained with a further 8 being added to detail and clarify the role of the registrar and clerk of court.

I. It is the duty of the registrar and clerk of court to **issue or re-issue all processes** of court by manual or machine signature.

II. All **fines** imposed by court must be **paid** to the registrar or clerk of court.

III. Registrar and clerk are duty bound not to **receive subsequent documents** for **filing** which has not been **marked** with the **relevant case number**.

IV. **First documents filed** in a matter are given a **case no in consecutive order** for the **year** it is filed in.

V. All **documents** delivered to court and **minutes of court** must be **filed** in the **correct file** under the precise case number.

VI. All **copies** of documents from the court files must be **made** in the **presence** of the **registrar or clerk.**

VII. There is a **duty** in terms of new rule 3(8) for the registrar or clerk to assist litigants by **explaining these rules** and to assist in compliance with the directive contained in s 9 of the Jurisdiction of Regional Courts Amendment Act of 2008. Note must be taken that the duty set out in this provision is to assist litigants, which does not necessarily indicate that the registrar or clerk of court must draft summons and pleadings for litigants. The former divorce court rules which authorised a registrar or clerk of the divorce court to draft pleadings for litigants have been repealed. Although one of the purposes of the former divorce courts was to provide a cheaper, speedier “do it yourself” process, some drawbacks are apparent. Divorce changes the status of an individual and may impact seriously on his or her patrimonial benefits. Drafting of

pleadings by a non-legally trained registrar or clerk may impact negatively, for example, on a spouses claim relating to forfeiture of benefits.

VIII. Office hours of the registrar and clerk of court are **Monday to Friday** from **08h00 to 13h00** and from **14h00 to 16h00**. All documents may be filed until 15h00. The exception is the notice of intention to defend which can be filed until 16h00. In addition the registrar or clerk may issue processes and accept documents in exceptional circumstances at any time and in addition shall do so when directed by a magistrate.

IX. Subrule 9 makes it pre-emptory for the registrar of the **regional court** to keep the following:-

- register of divorce cases containing the number of the action and names of the parties, as well as
- a daily index of all registered divorce cases.

X. The registrar or clerk of court has a **duty to inform** the **plaintiff in writing** of:-

- a defendant's consent to judgment before any notice intention to defend was filed.
- where a defective notice of intention to defend is filed by a self represented defendant and also state in what respect in terms of s12(2)(a) it is defective.
- where a request for default judgment has been refused.

XI. A **certified copy of judgment (CCJ)** is issued by the registrar or clerk of the court where judgment was granted to enable execution proceedings to commence in another court. Subrule 6 provides that a registrar or clerk must upon request note on a CCJ**:-**

- Particulars of any other judgment by court (stating the name of the relevant court)
- Any costs incurred after judgment & payable by judgment debtor
- second or further certified copy –upon filing of affidavit confirming loss of certified copy of judgment which it is intended to replace

It is noteworthy that a **judicial officer** may **perform any act of a registrar or clerk of court** with the **exception** of **writing affidavits, pleadings, processes** and **taxing of bills of costs**.

4. Request for judgment in terms of ss57 and 58 of the Act - Rule 4

New rule 4 deals with ss57 and 58 requests for judgment to the registrar or clerk of court. The rule sets out additional requirements that must be complied with to enable the granting of judgment.

The request for judgment must be in writing and is directed to the registrar or clerk of court. **Form 5A** or **5B** must be used. The form must be accompanied by an **affidavit** which contains **evidence** as is necessary to **establish** that all **requirements in law** have been **complied** with. Forms 5A requires a copy of the letter of demand sent to the defendant in terms of s56, the defendant's written acknowledgment of liability to the debtor for the amount of the debt and the costs claimed, copy of the plaintiff's written acceptance of offer and the affidavit or affirmation by the plaintiff or a certificate by the plaintiff's attorney. Proof of service or posting must accompany the request for judgment.

It is mandatory for an affidavit by a creditor indicating how the terms of an agreement or offer has been breached, detailing the payments made to date and how the balance owing has been arrived at. In addition, certain documents must accompany the request for judgment. For example the s129 National Credit Act notice should be annexed. Where applicable the original underlying written agreements between parties may be annexed.

The necessity for this provision is evident from the difficulty experienced in determining whether to grant judgment where one is not fully apprised of all the relevant legal requirements. One must be sure that all these requirements are met before entering a judgment and making it an order of court. Due to the serious consequences flowing from an order of court the law must be correctly applied.

Note that rule 4(1)(a) prescribes that where a letter of demand as referred to in s59 of the Act is used it **must '**contain particulars about the **nature** and the **amount of the claim**.' The National Credit Act, 2005 (NCA) impacts on the credit market significantly. Accordingly its' objectives to protect consumers and provide a consistent, transparent, fair, responsible, efficient, effective and accessible credit market is being addressed in the requirements set out in rule 4. Subrule 4(1)(b), refers specifically to the NCA and reads as follows:-

> "Where the original cause of action is a credit agreement under the National Credit Act, 2005, the letter of demand referred to in section 58 of the Act **must deal with each one of the relevant provisions of sections 129 and 130 of the National Credit Act**, 2005, **and allege that each one has been complied with."**

This subrule follows from the decision in ***African Bank v Additional Magistrate Myambo No and others.*** [2]

Frequently debts are ceded to debt collectors who proceed to recover the debt in their own name. To ensure that the debtor is fully apprised with the chain of events relating to the debt recovery, the fact and details of the cession must be communicated in the letter of demand. When suing by way of summons it is mandatory in terms of Rule 5((9) that a plaintiff who sues as cessionary must indicate the name, address and description of the cedent at the date of cession as well as the date of the cession. Accordingly it is imperative that the legal relationship between the parties that alleges the right to the claim and the grounds for the demand are communicated to ensure that there is no prejudice faced by the debtor due to ignorance.[3]

Subrule (3) makes the requirements for consents in terms of s 58 compatible with consents in terms of Rule 11(1). It reads as "a **consent to judgment** in terms of section 58 of the Act shall be **signed by the debtor and by two witnesses** whose **names** shall be stated in full and whose **addresses** and **telephone numbers** shall also be recorded."

The last subrule makes some of the provisions namely Rules 12(6), (6A) and (7) apply to a request for judgment in terms of sections 57 and 58 of the Act. Rule 12(6) requires that if the claim is based on a liquid document or any agreement in writing, then such agreement must be filed with the request. Rule 12(6A) requires that evidence confirming compliance with any legislative requirement be filed with the request. The effect of the reference to rule 12(7) is that the clerk may refer the application to a magistrate. The impact of this provision on s57 and 58 judgments is that proper consideration is given to the request by

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[2] 2010 (6) SA 298 (GNP)

[3] *SA Permanent Building & Investment Society v Gornitzka* 1939 TPD 385

ensuring that **all necessary facts and evidence** is **provided** and **judicial intervention** is sought where necessary.

5. Summons – Rule 5

This is a re-constructed rule. It combines provisions of rule 17 of the high court and provisions of rules 5 and 6 of the old magistrate court rules. It **introduces** the model of a **simple summons** and a **combined summons** from the high court.

In essence subrule 5(1) provides that a person claiming against another may sue by way of summons. The summons is issued and signed by the registrar or clerk of court which is addressed to the sheriff. The sheriff is directed to inform the defendant that the claim may be disputed and defended. The defendant has a stated time within which to give notice of intention to defend and file a plea, or exception or strike out.

Combined Summons

Rule 5(2)(a) prescribes that where the claim is **not for a debt or liquidated demand** the summons **must be** a **combined summons** (**Form 2B** of Annexure 1.) In so far as a claim for a debt or liquidated demand is concerned it may also be claimed by using a combined summons.

A combined summons is a summons to which is "annexed a statement of the material facts relied upon by the plaintiff in support of plaintiff's claim, and which statement shall, amongst others, comply with rule 6." Rule 6 relates to pleadings generally. In other words the annexed statement is the former particulars of claim which is a pleading.

In the former magistrate court rules the summons consisted of a single 2page double sided document. It set out particulars of the plaintiff and defendant, addresses for service, the nature and amount of the claim, interest, attorney costs, and all necessary endorsements. Only when the particulars in the claim contained more than 100 words, an annexure (called

the particulars of claim) had to form part of the summons.[4] This position no longer prevails and a combined summons with an annexure must be utilized for all claims not for debt or liquidated demand. A plaintiff for example who claims for damages must use a combined summons consisting of an annexure setting out the particulars of claim. In this regard it is noteworthy that the magistrate court tariff does not provide separately for the drafting of particulars of claim. It was previously considered part and parcel of the summons and all types of summonses attracted the same fee. Presently this leads to an inequitable situation where a simple summons comprising 4 pages and a combined summons consisting of 10 pages will attract the self same fee. A particular of claim is a pleading and a pleading is specifically excluded from the drafting provision provided under general provision 8(a) of table A, part 1 annexure 2. The tariffs under the new rules have not been changed to reflect the changes made in the rules and therefore it is suggested that urgent amendments be made to the tariff to dissolve any fee inequity.

Simple Summons

A simple summons is used usually where the quantum is already determined or can be easily ascertainable usually without leading evidence. Rule 2(b) provides that where a claim is for a **debt or liquidated demand** a **simple summons** (**Form 2** of Annexure 1) **may** be used. This procedure is optional unlike the similar provision in the high court which is mandatory. Accordingly the plaintiff may choose to use a simple summons- form 2 or a combined summons form 2B when the claim is for a 'debt or liquidated demand.' Rule 5(2)(b) is not peremptory.

A simple summons consists only of the summons form and a brief description of the claim and the relief claimed is contained in the very same form. It is only when the **defendant enters an intention to defend** that the **plaintiff** becomes **duty bound** to **file** a full particulars of claim that is called a **declaration**. The declaration is a pleading which must comply with the provisions of rule 6. The plaintiff must deliver within 15 days after receipt of a notice of intention to defend a declaration. A declaration is similar to particulars of claim that is annexed to a combined summons. In other words it is the same type of document that is

[4] Former r6(3)(d) of MCR

served and filed at different stages in the proceedings. Rule 15(2) provides that a declaration must contain the nature of the claim, the conclusions of law and a prayer for relief. The declaration must contain full details to enable the defendant to respond by way of plea. The new rules similar to the high court no longer provides for a procedure requesting further particulars to enable pleading. The provisions of old rule 15 have been abolished. Further particulars may only be requested in terms of new rule 16 for purposes of trial.

A simple summons must set out the nature of the claim, the grounds on which it is based and the relief claimed. Some concerns arising out of a simple summons is whether the **defendant** can **except** to a **simple summons** on the ground that it does not disclose a complete cause of action. In ***Icebreakers No. 83 (Pty) Ltd v Medicross Health care Group (Pty) Ltd***[5] the court held that the summons serves the function of commencing the litigation and bringing the defendant before court and the summons is not a pleading. A defendant cannot have a plaintiff's simple summons set aside on the ground that it does not disclose a complete cause of action. An exception can be taken only against a pleading and a simple summons is not a pleading.[6]

It is evident where a simple summons does not disclose fully a cause of action it will prejudice the plaintiff seeking default judgment or summary judgment. Rule 5(7) provides that when a simple summons is issued, a bare allegation of compliance with legislation will be sufficient but full particulars of compliance must be pleaded in the declaration. This subrule also provides that if the original cause of action falls under the NCA the summons must deal with the ss129 and 130 provisions and allege its compliance to obtain a s58 judgment. If **default judgment** is applied for on the **basis of the simple summons**, **evidence** of such **compliance** must be **filed** with the application for default judgment.– **rule 12(6A).**

It has been expressed that there is a basis for maintaining a simple summons in the magistrate court. The simple summons is applicable in claims of debt or liquid amounts which are often undefended. Therefore there is no point in the plaintiff having to incur costs

[5][2011] JOL 27043 (KZN)
[6] *Susan v Kikillus* 1955 (2) SA 137 (W)

of filing full particulars of claim if the defendant responds to the summons by paying or making an offer to pay in instalments.

Debt or liquidated demand

'Debt' is defined in s55 of the Act as "any liquidated sum of money due." 'Liquidated demand' is not defined in the current rules but is canvassed in court decisions. A liquidated demand refers to much more than a liquidated amount in money.[7] Debt or liquidated demand has come to mean a claim for a fixed, certain or ascertained amount or thing. It was expressed in ***Erf 1382 Sunnyside (Edms) Bpk v Die Chipi Bk***[8] that a 'debt or liquidated demand' is not limited to claims for the payment of a sum of money.' In ***Fattis Engineering Co (Pty) Ltd v Vendick Spares (Pty) Ltd*** [9] the court held it is a claim for "a fixed or definite thing"; for example "ejectment, delivery of goods, tendering of an account, cancellation of a contract." It also held that a liquidated demand may include a claim for an amount capable of prompt and speedy ascertainment, eg a claim for past maintenance of a child, claim for reasonable remuneration for services rendered. However other judgments like ***Neves Builders & Decorators v De la Cour*** [10] held that not every commercial claim for reasonable remuneration for work done and material supplied will automatically qualify as 'liquidated'. A judge will have to exercise a discretion to determine whether a claim is capable of prompt ascertainment.[11] Liquidity is often favoured in making this determination. Although in ***Allied Bakeries***[12] it was held that a claim for payment of the amount found to be due after debatement of the account is not a debt or a liquidated demand. Authors Hebstein and Van Winsen explain that a claim in respect of which the amount due and payable can be determined by arithmetical calculation will always qualify as a claim 'for a debt or liquidated demand', as well as a claim for an agreed amount.[13] In ***Pick 'n Pay Retailers (Pty) Ltd h/a***

[7] (see the commentary to rule 31(2)(a) in Superior Court Practice, Erasmus, at pB1-198, and Jones and Buckle Vol 2 at p14-8)
[8] 1995 (3) SA 659 (T)
[9] 1962 (1) SA 736 (T) at 737H
[10] 1985 (1) SA 540 (C)
[11] *Whelan v Oosthuizen*, 1937 TPD 304
[12] 1962 (1) SA 339 (SR)
[13] *Herbstein and Van Winsen*, The Civil Practice of the High Courts of South Africa, 5th ed p 713

Hypermarkets v Dednam [14]a claim for contractual damages suffered as a result of a breach of contract of sale was held to be a liquidated amount for summary judgment. This amount was the purchase price that was agreed to between the parties. Credit cards are not a liquid document. [15]

Address for service and delivery

Changes have been made in the new rules for the appointment of an address for service and delivery of documents. Rule 5(3)(a) changes the 8km distance to **15km**. The former subrule relaxing the 8km rule for 3 or fewer attorneys practicing within a court's radius no longer applies. The summons must contain a physical or business address that is within 15km of the court. A new provision provides for the summons to be endorsed where available with the plaintiff's **fax and e-mail** address. Rule 5(3)(b) also 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) provides that if an action is defended the defendant may, at the written request of the plaintiff, deliver a consent in writing to the exchange or service by both parties of subsequent documents and notices in the suit by way of facsimilie or electronic mail. Rule 5(3)(d) gives plaintiff a remedy and the court a discretion if the defendant fails or refuses to give consent.

Reason for Jurisdiction

The old rules provided for specific allegations relating to jurisdiction to be set out in the summons. These provisions are contained in rule 5(6) and expanded in some respects. Where the defendant is cited in terms of s28(1)(d) of the Act, the summons must contain an averment that the whole cause of action arose within the court's district or region. In addition the new rules 5(6)(a) requires that **particulars in support of such averment** must be **set out in the summons**. Where a defendant is cited in terms of s28(1)(g) the summons

[14] 1984 (4) SA 673 (0)
[15] ***African Bank Limited v Additional Magistrate Myambo*** 2010 JDR 1020 (GNP).

must contain an averment that the property is situated within the courts district or region. Rule 5(6)(c) provides that any abandonment of part of a claim under s 38 of the Act and any set-off under s39 of the Act must be alleged.

Endorsements

Every summons must include a form of consent to judgment- r5(5)(a), a form of appearance to defend–r5(5)(b), a notice drawing the defendant's attention to the provisions of s109 of the Act –r5(5)(c) and a notice in which the defendant's attention is directed to the provisions of ss57,58,65A and 65D of the Act in cases where the action is based on a debt referred to in s55 of the Act- r5(5)(d). However combined summons (form 2B) contains only the endorsement of the form of appearance to defend. It fails to contain the three other endorsements and therefore does not comply with the intention of the rules. Further, as a combined summons can be utilized to claim for a debt or liquidated demand, it is critically essential that it contains the r5(5)(d) endorsement. Likewise the endorsements required by rules 5(5)(a) and (c) also serve a necessary function. The defendant referred to in rule 11, for whose benefit a consent to judgment be endorsed on the summons and who desires to consent to judgment is unable to do what rule 11 requires and allows him or her to do. It has the effect of rendering the provisions of rules 11(a), (b) and (c) in this context ineffective. With the exception of a divorce summons all other summons ought to contain all endorsements. Currently Form 2B reflects the only endorsement, a notice of intention to defend which correctly reflects the provisions of the divorce summons. Hence it is suggested that rule 5(5) be amended to reads as follows:-

" Every summons shall include a form of appearance to defend and where applicable –

(a) A form of consent to judgment;

(b) a notice drawing the defendant's attention to the provisions of section 109 of the Act; and

(c) a notice in which the defendant's attention is directed to the provisions of sections 57, 58, 65A and 65D of the Act in cases where the action is based on a debt referred to in section 55 of the Act."

Lapse of a summons

Lapsing of a summons as contained in old rule 10 has been abolished. A summons no longer lapses after issue from 15 October 2010. A question arising, if proceedings continue after a long lapse of time there is likely prejudice to be suffered by the defendant who does not defend the summons. Therefore the defendant needs to be made aware of continuing proceedings. In this regard the high court practice is persuasive. It provides that where an application for default judgment is made six months after the date of service of summons, it is the practice to require a notice of set down to be served on the defendant informing him or her that such default judgment will be sought on a given date. Such date and time should not be less than 5 days from the date of the notice. In addition reasons for delay could be requested by court or the re-service of the summons could be ordered.

As there are no transitional provisions in place, the question of retrospective application of the new rule arises. Where a summons was issued prior to 15 Oct 2010, it is in terms of the old rules and the critical question is whether such summons is capable of lapsing. Where a default judgment is being requested a year later, if old rule 10 is applicable the summons would have lapsed. If the new rules are applied retrospectively the summons would not have lapsed. In such instance the court should require a notice of set down to be served on the defendant. See paragraph 42 of this guide on retrospective application of the rules.

Claim for Execution

Where a claim is for execution of residential property rule 5(10) prescribes that the summons must contain a notice drawing the defendant's attention to section 26(1) of the Constitution which accords to everyone the right to have access to adequate housing. Where the defendant claims that the order for eviction will infringe such a right the defendant is bound to place information before the Court that supports such claim. In a recent constitutional court decision of ***Gundwana v Steko Development CC and others*** [16]

[16] (CCT 44/10)[2011] ZACC 14 (11 April 2011)

the court referring to the ***Jafta***[17] decision affirmed the need for judicial oversight even if a process of execution results from a default judgment. In this case it was declared unconstitutional for a registrar of the high court to grant residential immovable property executable in a default judgment under uniform rule 31(5). Hence the importance of this notice in the summons not only reflects an important value enshrined in the Constitution but its application at grass root level.

Form 2A must be used for provisional sentence proceedings and the proceedings remain the same as before. The rent interdict summons which may be used by a landlord to secure the hypothec over the tenant' personal property on the leased premises under s31 of the Act also remains the same. Rule 5(7) provides that the summons be in form 3 as prescribed in Annexure 1.

A party failing to comply with any provisions of the rules relating to summons it is deemed to be a irregular step entitling an application in terms of r60 A and a discretion by court.

6. Pleadings – Rule 6

This rule relates to all pleadings generally and is primarily duplicated from the high court rule 17. It applies to the particulars of claim, the declaration, plea, replication, exceptions and all subsequent pleadings. The rule provides as follows:-

1) Every pleading must be signed by an attorney or personally by an unrepresented party.

2) The description of parties and case number must be given at the head of pleadings.

3) Pleadings must be divided into paragraphs with consecutive numbering and each paragraph ought to contain a distinct averment.

4) Each pleading must contain clear, concise statement of material facts relied upon with sufficient particularity to enable reply.

[17] 2005 (2) SA 140 (CC)

5) A denial of allegation must not be evasive but answer the point of substance.

6) Where contract is relied upon, it must state whether it is oral or written, and when, where, and by whom concluded. Written copy or part relied upon must be annexed to the pleadings.

7) It is not necessary to state the circumstance from which an alleged implied term can be inferred.

8) Out of community of property divorce proceedings require the party to give full details of entitlement for claiming division, transfer or forfeiture of assets.

9) Damages claim must be set out in manner which enables the defendant reasonably to assess the quantum. In respect of personal injury claims the pleading must specify plaintiff's date of birth, nature and extent of injuries, nature, effects, duration of disability alleged to give rise to such damages and *separately state what amount is claimed for*:

   a) Medical, hospital and similar costs;
   b) Pain and suffering, whether temporary or permanent and which injuries caused it;
   c) Disability for loss of earning and enjoyment of amenities of life with full particulars;
   d) Disfigurement with full description and stating whether permanent or temporary.

10) Claim for damages resulting from death of another requires date of birth of deceased and of persons claiming damages.

11) Cause of action based on agreements governed by legislation must state the nature and extent of compliance with relevant provisions of such legislation.

12) Where a cessionary sues must indicate name, address, description of cedent at date of cession and actual date of the cession.

13) Failure to comply with any provisions of this rule results in the pleading being deemed an irregular step and the opposing party is entitled in act i.t.o r60A (non-compliance provisions).

The particulars of claim must set out the basis of a claim or the cause of action. In ***Liquidators Wapejo Shipping co Ltd v Lurie Bros*** **1924,** ***Brits v Coetzee*** [18] the court explained that a plaintiff sets out facts that give rise to his claim and the claim will show nature and amount of claim, the rate at which interest is calculated and the costs and attorney's fees.

7. Amendment of Summons – Rule 7

There are no significant changes to amendments to summons. Before a summons is served a plaintiff may amendment the summons as he or she deems fit. Once the summons has been served any amendments must be effected by means of r55A application. The only exception to this is found in subrule 3(a). It has the effect that where a defendant's first name, or initials, or correctly spelt first name is disclosed in the return of service the plaintiff may request the registrar or clerk of court without notice to the defendant to make such amendments in the summons. Such an amendment will be considered as though it was made before service of summons. The amendments before or after issue of summons must be initialed by the registrar or clerk of court otherwise the amendments will have no force or effect. It is also a practice for the plaintiff's attorney to first initial the summons following any alterations. All alterations to the summons should be dated.

8. Sheriff of the Court – Rule 8

No changes have been made to this rule. All processes of court must be served or executed by the sheriff except where otherwise provided. Examples of processes are summonses, orders of court, warrants of arrest and warrants of execution. These documents must be issued by the registrar or clerk of court for them to be valid. The sheriff must serve without unreasonable delay. A return of service must be provided by the sheriff setting out how

[18] 1967 (3) SA 570 (T)

process or service was affected and a detail of charges for such service. A sheriff is appointed for a particular jurisdiction and where a sheriff who does not have jurisdiction serves a process, such a service is deemed invalid as expressed in ***Barclays National Bank v Wentzel***.[19]

9. Service of process, notices and other documents -Rule 9

Significant amendments are made to this rule combining provisions of the former rule 9 and rule 4 of the High Court rules. Some new provisions have been added.

- Service of process, notice or other documents shall **not be served on a Sunday or public holiday** except where the court orders or it is posted. However an interdict, warrant of arrest or warrant of attachment of property can be executed on any day, hour and place. Rule 9(2)
- Rule 9(3)(a) provides for personal service and service on a **duly authorised agent**. In case of minors and persons under disability it provides for service on guardians, tutors, curators.
- Service may be affected on a person's **residence or place of business** on a person who is apparently **not less than 16 years old** and **apparently residing or employed there** – r9(3)(b).
- Service on a **place of employment** – r9(3)(c) - can be effected **on a person** who is apparently not less than 16 years old and who apparently has **authority over the defendant**.
- Rule 9(3)(d) provides for service at a ***domicilium citandi et executandi*****,** but the proviso to the rule allows the **court to treat such service as invalid**, if it becomes aware that the service has not come to the knowledge of the person who must be served. The court ought to query the service. It is open to the plaintiff to provide the court with satisfactory evidence to enable the court to accept the service. The court may exercise similar powers in terms of service affected under subrules 9(3)(b), (c) and (f).[20]

[19] 1978 (3) SA 976 (0)
[20] Proviso under rule 9(3)

- The reference to **juristic persons** in rule 9(3)(e) has been made **broader** and provision for service on a **corporation** at its **registered office** is **included,** on a responsible employee or by affixing to the main door, or in any manner provided by law.
- In Rule 9(3)(f) a proviso has been added to the sub-section which allows a sheriff to serve by **registered post when so instructed**. S/he should place a copy in a pre-paid, addressed and registered envelope. The proviso enables a debt counsellor who makes a referral to court in terms of s 86(7)(c) of the National Credit Act to cause the referral to be sent by registered post or by hand.
- Service upon **state organs and officials**, this includes provincial premiers – r9(3)(g). Service affected on state attorney's office in Pretoria or a branch of the office that serves the area of jurisdiction of the court from which the process has been issued. The name of person served and capacity must be stated in the return of service.
- In the case of service in terms of subrules 9(3)(b),(c),(e) or (g) the sheriff will indicate on the **return of service** the **name** and **capacity of such person in relation to the defendant.**
- Where a person keeps his residence or place of business closed preventing service, process can be affixed on the **outer or principal door or security gate or post box** of such residence or place of business – rule 9(5). In such an instance it is necessary for the sheriff to state what inquiry and investigation was conducted to ascertain that the defendant still resided or conducted business at the given address.[21]
- **Service on partnership** – r9(7)(a) at office or place of business of partnership, if none than upon any member of the partnership.
- **Service on trustees of insolvent estates, liquidators of companies, executors, curators, or guardians** are to be served in accordance with any manner prescribed in the rules. - r9(7)(b).
- Service upon **syndicates, unincorporated companies, clubs, societies, churches public institutions, or public bodies** must be effected upon its **local office or place of**

[21] *Barens v Lottering* 2000 (3) SA 305(C).

business. If there is none, service must be effected on the **chairperson or secretary** or similar officer in a manner prescribed in the rules- r9(7)(c).

- Rule 9(9) provides that service of any notice, request, statement or other document which is **not a process of court**, such as a notice of intention to defend or pleadings need **not be served by the sheriff**. It can be affected by delivery of hand or by registered post. The new rules now provide for **service by facsimile or e-mail**. Where service by fax or e-mail is used, chapter 111, part 2 of the Electronic Communications and Transactions Act 25 of 2002 will be applicable.
- Subject to rule 10 where the **court** having jurisdiction is satisfied that service cannot be effected in terms of rule 9, it may make an **order allowing a person other than a sheriff** to effect such service in a **manner specified in such order.** [22]
- In a **divorce action** service must be **personally** on the defendant.[23]

Provisions for service in foreign countries have been included in subrules (14)-(25).

10.Edictal citation and substituted service -Rule 10

The former rule 10 dealt with the lapse of a summons which is now abolished. This rule now caters for the edictal citation provisions as contained in high court rule 5. **Edictal citation** is a procedure to effect service on a defendant or respondent **outside the borders of South Africa**. **Substituted service** is used when the defendant or respondent is **in South African but** his or her exact **whereabouts is unknown.**[24]

The edictal citation procedure in terms of rule 10(1)(a) is used irrespective of whether the whereabouts of the defendant or respondent is known. However the leave of the court must be obtained as well as the direction as to the method of service. Any person who desires to serve outside the borders of South Africa must obtain leave from the court to do so. Where service cannot be affected in terms of rule 9 an application for substituted service must be brought. In both these situations this is done by means of an *ex parte* application using the short form of notice of motion contained in form 1 of annexure 1 together with an

[22] Rule 9(10)
[23] Rule 9(3)
[24] Rule 10(1)(b)

affidavit. A magistrate may consider the application in chambers.[25] The applicant will have to set out the reasons, nature and extent for the relief, and the grounds on which the court has jurisdiction, the manner of service being requested, the defendant's whereabouts if known, and inquires made to ascertain his or her whereabouts. It may not be sufficient to state that he has done his best to find out where the defendant is. The court will require information to enable it to decide whether to grant leave and how the process should be brought to the defendant or respondent's attention. Information must be provided relating to the defendant's last-known place of residence, or domicile, last place from which news of him or her was obtained, residence of spouse, parents, relatives, place of birth and any other relevant information to assist the court.

11. Judgment by Consent -Rule 11

This rule has been amended to bring it in line with high court rule 31(1)(a). In this respect a new provision has been added to subrule (1) excluding divorce actions and nullity of marriage. In other words **one cannot consent to judgment in a divorce action**.

Additional provisions have been inserted in subrule (1)(c). It provides that the consent to judgment lodged with the registrar or clerk of court be **signed by** the **defendant** and by **two witnesses** whose **names are sta**ted in full and whose **addresses and telephone numbers** are **recorded.**

Where defendant consents to judgment prior to service of summons it is not necessary to serve the summons and the defendant will not be charged for service fees.

12. Default Judgment -Rule 12

Judgment by default is a procedure provided in the Magistrates' Court Rules, whereby judgment may be obtained without the necessity of a trial. The magistrate normally grants judgment in chambers and in the absence of the parties. In certain circumstances as set out

[25] Rule 10(1)(b)

below a registrar or clerk of court may also grant default judgment. Default judgment in essence refers to a judgment entered or given in the absence of the party against whom such judgment is made.[26] The ordinary purpose of a default judgment is to award a plaintiff a speedy and inexpensive remedy where a defendant has failed to enter an appearance to defend the summons, or filed to a defective notice of intention to defend, or failed to deliver a plea timeously. This is done by way of plaintiff filing with the registrar or clerk of the court a request for default judgment. The registrar or clerk of court processes the request and notifies the plaintiff of the outcome by endorsing the duplicate copy of the request for judgment of the result and date.[27] Additionally rule 3(6)(c) also provisions that the registrar or clerk of court must notify the plaintiff in writing where a request for default judgment has been refused.

The rule sets out the instances and the specific requirements that must be complied with when a default judgment may be granted. The basis for a default judgment is founded in ***Fattis's Engineering Co (Pty) Ltd v Vendick Spares (Pty) Ltd*** [28]where it was held that the defendant is in default and that it is reasonable to suppose in the majority of cases that the defendant is not disputing the claim or the amount. In addition the summons forewarns the defendant of failure to file and serve the appropriate notices and pleading will result in judgment being given against him or her.

There are three significant amendments to rule 12. Rule 12(5) replaces the reference to the Hire Purchase Act of 1942 with a reference to the **National Credit Act** of 2005, requiring all requests for default judgment on claims arising from transactions regulated by the National Credit Act to be **referred to a magistrate**. Rule 12(3)(A) is a new addition but does not have any additional value as the effect of its provisions have already been canvassed in subrules (2), (4), (5), (6), (6A) and (7). Rule 12(6)(A) is a new sub-rule which requires that **evidence of compliance with regulating legislation** (such as the National Credit Act of 2005) be **filed** together with the request for default judgment.

[26] Rule 12(1)(b)
[27] Rule 12(1)(c)
[28] 1962 (1) SA 736 (T) at 739B-C

In terms of Rule 12 (1) (a) where the defendant has failed to enter an appearance to defend within the prescribed time limit or even after the expiry of the prescribed time a request for judgment may be lodged by the plaintiff. On receipt of the summons the defendant has the stipulated ten days in which to enter an appearance to defend the plaintiff's action or 20 days if the opponent is the State. If the summons was served by registered mail, the sheriff must file an acknowledgment of receipt of the registered letter together with his return of service before the default judgment should be considered.[29] The request for default judgment must be accompanied by the original summons, original return of service and any original documents upon which the course of action is based. Rule 12(6) provisions that where **originals** cannot be submitted an **affidavit** setting out the reasons to the satisfaction of the court or registrar or clerk of court together with a copy must be filed.[30]

Where it appears to the registrar or the clerk of the court that the defendant intends to defend the matter but that the entry of appearance to defend is defective in terms of rule 12(2), in one or more of the follow respects:

- has not been properly delivered; or
- has not been properly signed; or
- does not set out the postal address of the person signing it or contain an address for service as provided in rule 13; or
- exhibits any two or more of such defects or any other defect of form,

the registrar or clerk of court shall not enter judgment against the defendant. The registrar or clerk of the court then gives **written notification** to the **plaintiff** of the **unrepresented defendant's defective notice of intention to defend** and **in what respect** the **entry is defective.**[31] The plaintiff must call upon the defendant to deliver a proper appearance to defend within five days of receipt of the notice. If the defendant fails to remedy the defect then the court may proceed upon the plaintiff's request to grant a default judgment.

[29] Rule 12(3)
[30] ***Barclays Western Bank Ltd v Creser*** 1982 (2) SA 104 (T) at 106E
[31] R3(6) (b) read with r12(2)(a)

Rule 12(1)(b) refers to the instance, where a defendant has already entered an appearance to defend but has failed to deliver (deliver means to file a copy with the registrar or clerk of the court and to serve a copy on the opposite party) a plea within the time specified in terms of Rule 17(1). This time is twenty days or any other extended time granted by the plaintiff. After the defendant has entered an appearance to defend, the defendant has twenty days to take the next procedural step when a combined summons is served and in the circumstance of when a simple summons is served the defendant has twenty days after a declaration has been served. Where a plaintiff on receiving a notice of intention to defend **fails to file a declaration** timeously rules 15(4) and (5) have been introduced to provide the **mechanism for serving a notice of bar by the defendant on the plaintiff.** It provides for the defendant to apply for absolution from the instance where the plaintiff has been barred from delivering a declaration.

As an established procedure in the magistrate court if the defendant fails to deliver his or her plea on the expiry of the time periods or any extended time granted, the plaintiff has to place the defendant in bar. In terms of Rule 12 (1)(b)(i), the **notice of bar** will call on the defendant to deliver a plea within five days of the receipt of the notice, and on failure to do so within the prescribed or agreed period the defendant will be in default with such a plea and be *ipso facto* barred. In the case of ***F & J Car Sales v Damane***[32] a notice of bar was prematurely served and therefore the default judgment was erroneously granted. The reason being the defendant had requested further particulars and therefore the plaintiff was obliged to respond to the defendant's notice for further particulars before serving a notice of bar. This decision will no longer apply because the defendant may **no longer request** the plaintiff to deliver **further particulars** to the summons **before pleading**. In terms of the new rules the defendant can no longer request further particulars for the purpose of pleading, further particulars may only be requested after the close of pleadings for the purposes of trial as set out in new rule 16(2).

[32] 2003 (3) SA 262 (W)

It is the defendant who is given five days from date of service to comply with the notice and in ***Speelman v Duncan and another*** [33] the court held that, "all that Rule 12(1) requires is that a copy of the notice must be delivered to the registrar or clerk of the court, but the notice must give the defendant who receives it five days from the date of receipt of the notice within which to comply with it."

The question arises whether there is an obligation on the plaintiff to place the defendant in bar. This subrule provides that "the plaintiff **may** deliver a notice in writing calling upon the defendant to deliver a plea..." The magistrates' court rules submit that the meaning of the word "may" in this context casts a duty upon the plaintiff to deliver a notice of bar and also to lodge a request for judgment if the defendant fails to comply with the notice of bar. It further provides that if these two requirements are not complied with, then it is the plaintiff who is in default of not complying with the rules and thus default judgment may not be entered against the defendant. Therefore we may conclude that the plaintiff is bound by the rule to place the defendant in bar in this instance. Where a defendant has been **barred from filing a plea**, **notice** of the **request** for default judgment must be **served** on the **defendant**.

In ***Santam Ltd and Others v Bamber***[34] the defendant served the plea on the plaintiff's attorney on the last day allowed in terms of notice of bar but filed at magistrate's court only on following day. The plaintiff's attorney applied for default judgment despite knowing, of the service of the plea. The court held that the application was an abuse of process of court and the plaintiff's attorney could have been in no doubt that the defendant intended to defend the action. The plaintiff's attorney should have disclosed fact of service of plea in request for default judgment. The court referred to ***Modesi v Mosiga***[35] stating 'that approach of the courts had always been and would always be that a defendant should not easily be deprived of the opportunity to defend the case against him.' This was intrinsically

[33] 1997 (1) SA 868 (C) G at 870H-J
[34] 2005(5) SA 209 (W)
[35] 1927 TPD 150 at 153

bound up in the principle of natural justice, *audi alteram partem*, the object of which was to achieve justice between all parties in litigation. The court also referred to ***Mthanthi v Pepler***[36] where it was explained that 'a magistrate should generally not grant default judgment where there are documents in the court file (regardless of whether they have been lodged timeously) which indicate that the defendant intends to defend'**.**

It must be noted that a counterclaim is not a plea. Where the defendant files only a counterclaim and not a plea as well, the plaintiff is entitled to obtain a default judgment.

The plaintiff is also entitled to request default judgment where a defendant has consented to judgment in terms of s58 and rule 11. The purpose of obtaining a default judgment is to obtain a court order to facilitate execution. Such a request is commonly referred to as a s58 consent to judgment which is ordinarily granted by the registrar or the clerk of court. So is a s57 judgment. In addition the new provisions of rule 4 also apply to ss57 and 58 judgments.

Judgment by the registrar or clerk of court

In terms of Section 58A of the Magistrates' Court Act any judgment entered or granted by the registrar or clerk of the court is deemed to be a judgment of the court. The registrar or clerk of court may grant a default judgment in terms of rule 12(2),(3),(3A) and (6) when the claim is liquidated. The registrar or clerk of court does not have jurisdiction to grant a default where a plea is delivered and then is withdrawn. The registrar or clerk of court may also not grant a default judgment where the defendant files a plea and consents to judgment on a portion of the claim but disputes the balance, and the plaintiff then abandons the disputed portion and requests judgment on the admitted portion. In these circumstances the registrar or clerk must refer the request to court for a judgment.

Rule 12(4) provides that when the claim is unliquidated the registrar or clerk must refer the request to the magistrate. An unliquidated claim, for example damages is a claim for an amount that must be assessed by the court before judgment can be given. Rule 12(5)

[36] 1993 (4) SA AT 374B-C

provides for requests for default judgment based on credit agreements and the NCA be referred to the magistrate. R12(6A) a new sub-rule also requires that **evidence of compliance with regulating legislation** be **filed** together with the request for default judgment to the satisfaction of the court. It having the intention that only the magistrate may grant a default judgment where there must be compliance with legislation. If the **registrar or clerk** of court has any doubt regarding a liquidated claim, if and after considering any submissions made by the plaintiff, he or she **acting in terms of rule 12(7)** may **refer** the **request** for default judgment to the **magistrate**.

The court's powers regarding written or oral evidence

The magistrate acting in terms of subrules (4), (6A), (7)(a) and (c) may call upon the plaintiff to produce written or oral evidence in support of the claim to assess the amount claimed to the magistrate's satisfaction before awarding judgment. In practice it is usual to attach an affidavit to the request for default judgment setting out the particulars that support an entitlement to the judgment and the quantum claimed. Damages claim will always necessitate evidence led to assess the quantum of damages. The court will require proof, to its satisfaction that the plaintiff's claim for compensation has been reasonably assessed. In ***Western bank Ltd v Meyer***[37] it was held that it is in the court's discretion to determine whether oral evidence or an affidavit will suffice or both. In ***Revelas and Another v Tobias***[38] it was held that the evidence proving damages for bodily injuries had to be evidence given under oath (either written or oral). If such evidence was only in the form of a report it was inadequate. Also in ***Briel v Van Zyl*** [39]it was held that the affidavit attached to the request for default judgment must be that of an expert in the applicable field and that it must be stated that he or she is qualified to be considered an expert. In some instances, eg defamation cases, an affidavit by an expert is not required. In ***Dorfling v Coetzee***[40] the court said that as a rule evidence of the cause of action must be led when damages are claimed, but it is left to each court to decide whether in a particular case such evidence can be dispensed with. In

[37] 1973 (4) SA 697 (T)
[38] 1999 (2) SA 440 (W)
[39] *1985 (4) SA 163 (T) at p169*
[40] 1979 (2) SA 632 (NC)

Dorfling, which concerned damage sustained in a motor collision, the court held that it was essential that evidence of the cause of action be led in order to determine whether there had been contributory negligence on the part of the plaintiff calling for an apportionment of damages. Similarly in ***Havenga v Parke*** [41] it was held that in a default judgment claim for damages, evidence of medical practitioners, mechanics, valuers and others can be placed by way of affidavits, subject to the Court always retaining the power to require oral evidence where it considers it necessary.

Eviction and Execution Claims

Although both eviction and execution may be referred to as liquidated claims, these must be referred to the court when they relate to residential immovable property. Both claims in terms of the Constitution require judicial oversight before being granted. The decision of Justice Mokgoro in ***Jaftha v Schoeman and Others Van Rooyen v Stoltz and Others*** [42] demonstrates the developing law in a constitutionally entrenched human rights context. The failure to provide judicial oversight over sales in execution against immovable property prejudices the right to adequate housing- s26 of the Constitution and human dignity (dignity is interrelated with socio-economic rights). The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE), (although this Act has been amended to redefine the scope of its application), Extension of Security of Tenure Act 62 of 1997 (ESTA) and ***Ndlovu v Ngcobo***[43] may impact on the claim for ejectment and its requirements will have to be considered by the court. In a recent constitutional court decision of ***Gundwana v Steko Development CC and others*** [44] the court referring to the ***Jafta*** decision affirmed the need for judicial oversight even if a process of execution results from a default judgment. In this case it was declared unconstitutional for a registrar of the high court to grant residential immovable property executable in a default judgment under uniform rule 31(5). Similarly a registrar or clerk of the magistrate court cannot grant claims of eviction and execution of residential immovable property. A magistrate considering a default judgment for eviction

[41] 1993 (3) SA 724 (T)
[42] 2005 (2) SA 140 (CC)
[43] *2003(1) SA 113 (SCA)*
[44] (CCT 44/10)[2011] ZACC 14 (11 April 2011)

from residential immovable property must postpone the eviction sine die requiring the matter to be set down for judicial intervention in terms of Act 4 of the PIE Act.

Default judgment orders

A judgment may be granted for any sum not exceeding the amount claimed in the summons or other relief so claimed; interest at the rate specified in the summons or the legal rate of 15.5% and costs of the suit. A minute record of the judgment must be entered as set out in rule 12(9). It is inferred that although a registrar or clerk of court may grant a judgment on a liquidated claim, he or she cannot refuse judgment. In instances after queries cannot resolve the problem the request for default judgment must be referred to the magistrate who in terms of rule 12(7)(e) is the only person with the authority to refuse a request for default judgment. Such a dismissal or refusal is a final judgment which can be appealed. Therefore a request for default judgment should not be refused or dismissed where a query to the plaintiff will resolve the problem.

Default judgment in terms of rules 60(3) and 32(2)

A default judgment may also be granted in terms of **Rule 60(3**). The failure to comply with magistrates' court rules or with any request made in pursuance thereof is not sufficient ground for the giving of a default judgment -Rule 60(1). However, the plaintiff may apply to court in terms of Rule 60(2) for an order compelling the defendant to comply within a stated time. If the defendant fails to comply with the order then the plaintiff may apply for a default judgment against the defendant. The judgment will only be entered against a party who recklessly disregards his/her obligation. **Rule 32(2)** provides a further method for obtaining a default judgment. This provision provides that if the defendant or the respondent does not appear at the appointed time for the trial of the action or the hearing of the application, a judgment with costs may be given against the defendant or the respondent. If the plaintiff or the applicant does not appear at the time appointed for the trial of the action or the hearing of the application, the action or the application may be dismissed with costs.[45]

[45] Rule 32(1)

13. Notice of Intention to Defend -Rule 13

This rule is aligned with rule 5 dealing with summons. It is similar to high court rule 19. Every defendant is allowed 10 court days after service of summons to file and serve a notice of intention to defend personally or through an attorney. In the case of the state it is 20 days unless the court specially authorizes a shorter period. Rule 13(1) provides for a period of *non dies* between 16 December to 15 January both days inclusive and such days must not be counted in the time allowed within which to file a notice of intention to defend. Note that this applies to the notice of intention to defend only.

The rule also introduces new provisions in respect of the method of service of subsequent documents in the case. In accordance with subrule 3(a) the defendant must give a physical address of either a residence or business, as well as a postal address. The physical address must be within 15km of the court house. The choice of method of service in respect of subsequent should also be set out.[46] A consent to exchange documents by means of fax or e-mail is also encouraged where available. Where consent is refused an application to court can be made for an appropriate order to resolve the stalemate.

The defendant delivery of a notice of intention to defend does not waive any rights to object to the court's jurisdiction or any irregularity or impropriety in the proceedings. Where a notice is delivered later than the expiry of the *dies* it remains valid as long as a default judgment has not been granted. In such an instance where a notice of intention to defend was delivered after the plaintiff lodged the request for default judgment, the plaintiff will be entitled to the costs of the request for default judgment, even though the judgment was not granted.

14. Summary Judgment -Rule 14

[46] Rule 13(3)(b)

An amendment to this rule requires an affidavit where a claim is based on a liquid document. The other amendment relates to the deletion of the option of making payments into court as a means of defeating the purpose of the summary judgment application.

A summary judgment application can be brought by a plaintiff in an action matter where although the defendant files a notice of intention to defend, the plaintiff believes that the defendant has no defence. It may **only** be brought if the claim is for:

- a claim based on a liquid document;
- a claim for a liquidated amount;
- a claim for delivery of specified movable property; or
- a claim for ejectment.

It must be noted that a claim for ejectment from a residential property must comply with the provision of the PIE Act.

A plaintiff must apply for summary judgment within 15 days after a notice of intention to defend was delivered and 10 days' notice must be given to the defendant of the date on which the application will be heard. The notice of application must be in accordance with Form 1A of Annexure 1. It must be accompanied by an affidavit Form 7 of Annexure 1, which is made by the plaintiff or any other person who can swear positively to the facts. The affidavit must verify the cause of action and the amount, if any, claimed. Summary judgment has been refused in some cases because the cause of action was not verified and in others because the amount was not verified. Without this verification, there is no evidence before the court in support of the plaintiff's claim.[47] The particulars of claim should, however, not be repeated in the affidavit, nor may any additional facts be introduced by way of the affidavit.[48]

[47] ***Barclays National Bank Ltd v Swartzberg*** 1974 (1) SA 133 (W); ***Mmabatho Food Corporation (Pty) Ltd v Fourie*** 1985 (1) SA 318 (T)
[48] ***Trust Bank of Africa Ltd v Hansa*** 1988 (4) SA 102 (W)

The affidavit must contain a statement that the deponent believes that the defendant has no *bona fide* defence to the claim and that appearance to defend has been entered solely for the purpose of delaying the action.[49]

15. Provisional Sentence -Rule 14A

This **rule** was **not amended**. A provisional sentence summons must be in accordance with Form 2A of Annexure 1. It calls a person to pay the amount claimed or failing payment to appear in court to admit or deny liability personally or by practitioner. The day is stated in the summons which cannot be less than 10 days after the service upon him or her of such summons. Rule 5 also applies to this rule. Copies of all documents upon which the claim is founded will be annexed to the summons and served.

The defendant may deliver an affidavit setting forth the grounds upon which he or she disputes liability. This must be done not later than three days before the day upon which he or she is called upon to appear in court. A plaintiff is also afforded a reasonable opportunity to reply to the affidavit. The court may hear oral evidence as to the authenticity of the defendant's signature, agent's signature or authority, or to the document upon which the claim is based on. Where the court refuses provisional sentence it may order the defendant to file a plea within a stated time and may make such order as to the costs of the proceedings as it deems fit. Rules relating to pleadings are applicable. If security is demanded by the defendant, the registrar or clerk will decide the amount. A defendant entitled and wishing to enter into the principal case shall, within two months of the grant of provisional sentence, deliver notice of his or her intention to do so, and he or she shall deliver a plea within 10 days thereafter. Where a plea has not been delivered, the provisional sentence becomes a final judgment and the security given by the plaintiff will lapse.

16. Declaration -Rule 15

[49] Rule 14(2)

The declaration is a new inclusion in the magistrate court. It is based on high court rule 20. It provides that where a plaintiff has issued out a **simple summons** and only when the defendant has **delivered a notice of intention to defend**, the plaintiff shall within 15 days after receipt of the notice of intention to defend deliver a declaration. The **declaration is a pleading** which must comply with the provisions of rule 6. Rule 15(2) provides that a declaration must contain the nature of the claim, the conclusions of law and a prayer for relief. It must contain full details to enable the defendant to respond by way of plea. The new rules similar to the high court no longer provides for a procedure requesting further particulars to enable pleading. The provisions of old rule 15 have been abolished. Further particulars may only be requested in terms of new rule 16 for purposes of trial. Where a plaintiff has failed to deliver a declaration subrule (4) provides a means for serving a **notice of bar by the defendant**. Where a plaintiff has been barred from delivering a declaration the defendant may apply for **absolution from the instance.**

17. Further particulars (r16)

The old rules provided in r15 for the delivery of copies and for the inspection of the originals of all or any of the accounts or documents upon which the action was founded. A defendant was entitled to request for such copies prior to delivery of the plea. R16 provided for the delivery of such further particulars as were necessary to enable a party to plead.

R16 no longer allows for the request for further particulars for the purpose of pleading; it now allows only for further particulars as are strictly necessary to enable a party to prepare for trial. The request may be made by any party and only after the pleadings have closed. It is the pleadings which primarily determine what further particulars may be necessary, although regard may also be had to other documents such as reports of expert witnesses. The purpose is to prevent a party being taken by surprise at the trial and also to establish

with greater certainty what a party intends to prove at the trial since the pleadings alone may not establish this with sufficient exactness. The requester may then prepare sufficiently in order to counter the allegations made by the other party. The request must be made not less than 20 days before the trial and must be complied with within 10 days after receipt of the request.

Failure to comply with the request may result in an application to court for an order to compel delivery or for the dismissal of the action or striking out of the defence; r60 and not r60A is therefore the appropriate rule. Note that r16(5) imposes a duty on the court to *mero motu* determine, at the conclusion of the trial, whether the request for further particulars as well as the reply, or both, were strictly necessary and to make an appropriate order for costs including costs on an attorney and client basis.

Insofar as the request for copies of accounts and documents and inspection of the originals for the purpose of pleading it should be noted that r23(13) and (15) provide for the obtaining of copies or transcriptions and inspection of the originals of any document or tape, electronic, digital or other form of recording before the close of pleadings. R23(13) provides that any party may at any time before the hearing give notice to any other party for copies and inspection of any document or tape or recording which are referred to in that other party's pleadings or affidavits. R23(15) removes any doubt and confirms that after appearance to defend any party may, for the purposes of pleading, require any other party to make available for inspection and copies a clearly specified document, tape or recording.

18. Plea (r17)

The contents of r17 reflect that of Uniform Rule 22 except that r17 retains the provisions dealing with tender from the old r19 of the Magistrates Court Rules. The plea has to be delivered within 20 days of delivery of the declaration, and, in the case of a combined summons within 20 days of delivery of the appearance.

Insofar as the material facts on which the plaintiff's claim is based it is incumbent upon the defendant to either admit or deny, or confess and avoid, or to state to what extent the facts are not admitted. The defendant is also obliged to clearly and concisely state all the material

facts upon which he or she relies. R17(3)(b) also provides that the plea shall state any explanation or qualification of any denial where this might be necessary.

An important change from the old rule is that r17(3)(a) provides that where an allegation of fact is not stated to be denied or admitted then it shall be deemed to be admitted. The old rule was less severe in its application in that it provided that any allegation which was inconsistent with the plea was presumed to be denied and every other allegation was taken to be admitted. It is not difficult to anticipate the difficulties which might follow in the instance where, due to imprecise pleading, an allegation is not specifically denied but is nevertheless inconsistent with the plea. In the face of long established authority[50] that the court should look rather at the substance than at technicalities of pleadings it is suggested that the common sense approach would be to allow an amendment in order to comply with the rule. In any event, a court is hardly likely to ignore a plea which is clearly inconsistent with an allegation of fact which has not been specifically denied especially where the other party has not taken any step under r60A. In ***Absa Bank Ltd v I W Blumberg and Wilkinson*** 1997 (3) SA 669 (SCA), it was held, at p674, that:

> 'The plea must be read in its totality and as one composite document. As pointed out by the Court a quo, whilst it is true that Rule 22(3) provides that every allegation of fact 'which is not stated in the plea to be denied or to be admitted, shall be deemed to be admitted', this does not mean that the Rule should be applied 'piecemeal to a party's averment; nor can it be applied so as to deprive a party of a defence which is plainly, though perhaps imprecisely, raised on the pleadings'.'

R17(4) provides for the postponement of judgment on the plaintiff's claim, pending judgment on the claim in reconvention, where the defendant claims that judgment on the claim in reconvention will have the effect of extinguishing the plaintiff's claim. This does not prevent the court from giving judgment on that portion of the plaintiff's claim which will not be extinguished provided that no other defence has been raised as regards that portion.

The provisions relating to tender provide that any plea of tender as to part of the amount claimed should be accompanied by securing of the amount tendered to the satisfaction of the plaintiff on delivery of the plea. It should be noted that there is no longer the option for

[50] *Robinson v Randfontein Estates GM Co Ltd 1925 AD 173*

the amount tendered to be paid into court. Unless otherwise stated, a tender in the plea implies that the costs until the date of such tender shall be borne by the tenderer.

Should the defendant fail to comply with the provisions of sub-rules (2), (3) and (5) of r17, then it shall be an irregular step and the plaintiff may act in terms of r60A.

19. Offer to settle (r18)

The previous heading to this rule was 'Payment into Court'. It should be noted that here as well as elsewhere in the rules there is no longer any provision for payment into court. Clearly this would ease the administrative burden on the clerk of the court, registrar and other court support staff. As with the deletion of provisions requiring payment of certain court fees and stamp duties, it would seem that the effort and expense related to the giving of effect to such provisions from an administration perspective is not worth the amount recovered or the need for the continued existence of such provisions. Rule 18, as per the August 2010 amendments, mirrors Rule 34 of the Uniform Rules of the High Courts.

The benefit in making an offer of settlement or a tender is that the tenderer may be protected from further litigation, or, at the very least, the tenderer is protected against costs which may be awarded for the period after the date of the offer or tender. Indeed a plaintiff who rejects a tender and insists on proceeding further runs the risk of an adverse order for costs. Careful consideration should therefore be given to any tender and a court should ensure that awards or orders do not dilute or negate the provisions of the rules relating to such tenders.

Rule 17(5) provides for a tender that is pleaded in the defendant's plea, i.e. the tender is part of the record. Rule 18 contemplates a tender which does not form part of the formal pleadings; in fact the rule makes strict provision for non-disclosure of the tender until after judgment has been granted[51], so that a court trying the matter may not be influenced by the tender in arriving at its decision on the merits. The previous Rule 18(9) provided for non-disclosure where the claim was for damages or compensation but the new rule refers to all offers or tenders made without prejudice in terms of the rule.

[51] 18(10) and 18(13)

A tender in terms of rule 18 may be either unconditional or without prejudice. An unconditional tender is one where the defendant admits liability to either the whole or part of the claim. In the event of the latter the plaintiff may accept the tender in respect of that part of the claim to which the tender relates and proceed with litigation in respect of the remainder of the claim which is disputed. In the event that the defendant succeeds in its defence in respect of the remainder it will be entitled to a costs order in its favour for costs incurred during the period after the date of the tender.

A without prejudice tender is a tender which is made with the disavowal of liability, as an offer of compromise, and very often stated to be "…for the sake of settlement without further / unnecessary costs being incurred". Should the plaintiff reject the tender and proceed to trial and is unable to prove more than the amount tendered then the defendant would be entitled to an award of costs in respect of the costs incurred during the period after the tender was made.

Rule 18 differentiates between tenders made in actions where money is claimed and tenders made in actions where the claim is for performance of some act by the defendant. Where the tender relates to a money claim, the tender must be in writing and signed by the defendant or his or her attorney who must be duly authorised in writing. Where the claim relates to the performance of an act, the tender may indicate that the defendant tenders to perform the act personally, or, where the tender indicates that another person will perform the act on behalf of the defendant then the tender must be accompanied by the delivery to the registrar of an irrevocable power of attorney authorizing the performance of such act. Although sub-rule (2) does not state that the tender must be in writing where the claim relates to performance of some act by the defendant, it is clear from a proper reading of sub-rule (5) that the tender must be in writing whatever the nature of the claim.

Sub-rule (3) provides for an offer of settlement by any party to the action who may be ordered to contribute towards an amount for which any other party may be held liable, and includes an offer of settlement by any third party from whom relief is claimed in terms of Rule 28A. Thus a joint wrongdoer,[52] who has been joined in the action by the defendant, may make an offer to a defendant against whom a plaintiff seeks payment of the full

[52] E.g. in terms of the Apportionment of Damages Act 34 of 1956

amount of damages. The offer may be unconditional or without prejudice and may be an offer to pay a specific amount or in a specific proportion, or the offer may constitute an indemnity with the full terms thereof being set out in the offer. Sub-rule (4) makes provision for one of several defendants as well as any third party from whom relief is claimed, to make an offer to settle the plaintiff's or defendant's claim.

Sub-rule (5) provides that notice of any offer or tender shall be given to all the parties and shall state whether the tender is unconditional or without prejudice, whether the amount of the tender includes both claim and costs or the claim only, whether it includes an offer to pay costs and if not then reasons for such disclaimer, and whether the tender is subject to any conditions which must be stated in the notice. Where the costs only are in dispute sub-rule (5) (d) provides that the action may be set down on the question of costs alone. Sub-rule (9) deals with the situation where the tender which has been accepted by the plaintiff does not specifically state that it is in satisfaction of both claim and costs; i.e. it does not comply with the requirements of sub-rule (5) with regard to the costs in that it does not state whether the amount tendered includes costs and claim, whether it includes an offer to pay costs separately from the claim, or whether liability for costs is disavowed and the reasons therefor. In such an instance application may be made on notice of not less than 5 days for an order for costs.

The party may accept the offer within 15 days or thereafter with the consent of the defendant or third party or by order of court. In the event that, within 10 days after acceptance, the tenderer fails to pay or to perform in accordance with the tender then application may be made for judgment on 5 days' notice to the party who has failed to perform.

A tender which has not been disclosed, the secret tender, may be brought to the attention of the court when considering the costs and after judgment on the claim. Even after the court, in ignorance of the tender, has granted judgment on costs the court may consider the question of costs afresh.[53] It should be noted that the court's discretion remains unfettered and it always has overriding discretion as to the apportionment of costs.[54] The court may

[53] 18(12)
[54] Naylor ANO v Jansen 2007 (1) SA 16 (SCA)

also penalize with a costs order a party who has caused a secret tender to be disclosed to the court prior to judgement even if that party is the successful party.

An offer of settlement in terms of Rule 18 may also be made in motion proceedings, or to a claim in reconvention.[55]

Neither Rule 17 nor Rule 18 precludes a common-law tender. The normal rules relating to offer and acceptance apply to such a tender. A common-law tender when pleaded may protect the defendant against costs if the plaintiff is unable to prove more than the amount of such tender.

20. Interim Payments (r18A)

Claims for damages arising from personal injuries or out of the death of a person notoriously take considerable periods of time to be resolved, very often taking many years before the claimant may actually receive any compensation. The unfairness to the claimant is frequently exacerbated by the fact that the liability of the defendant has been confirmed, yet payment is delayed through lack of agreement on the actual quantum of damages to be paid to the claimant. In 1987 Rule 34A of the Uniform Rules introduced a procedure in the High Court which allows for interim payment or payments to be made by certain defendants to certain claimants under certain circumstances and strict conditions. Rule 18A is substantively identical to Rule 34A of the Uniform Rules.

It is a pre-requisite that either the defendant must have admitted liability in writing for the plaintiff's damages or that the plaintiff must have obtained judgment against the defendant on the issue of liability for damages to be determined. A letter confirming admission of liability is sufficient proof and no formal document is necessary.

An order for interim payment may only be made against a defendant who is insured in respect of the plaintiff's claim or has the means available to enable such payment to be made.

[55] 18(14)

It should be noted that interim payment may only be claimed in respect of claims for medical costs and loss of income. Interim payment cannot be ordered in respect of general damages. Although it has been held[56] that the rule does not prohibit interim payment in respect of future medical costs and future loss of earnings it must be borne in mind that the Road Accident Fund Act 56 of 1996[57] limits the liability of the Fund to interim payments only for medical costs and loss of earnings already incurred or suffered. In actions against the Fund therefore the Act prohibits any order for future amounts. It has also been held that the Rule also allows interim payment for maintenance arising out of the death of a breadwinner[58].

An application, in accordance with Rule 55, may be made at any time after entry of appearance to defend. The supporting affidavit shall set out the grounds for the application and all documentary proof or certified copies thereof should accompany the affidavit. It has been held however that substantial compliance is sufficient and where documents previously supplied to the defendant are not annexed it would not be fatal to the application[59]. Although the court, in exercising its discretion, is not required to make a preliminary finding on the quantum of the actual damages it would nevertheless be essential to have regard to the plaintiff's prospects in the final award to be made to enable the court to award a suitable proportion as an interim award. The amount awarded as an interim payment should not exceed a reasonable portion of the amount likely to be finally recovered by the plaintiff and any contributory negligence, set off or counterclaim should be taken into account. The amount of the interim payment shall be paid in full unless the court otherwise orders.

More than one application for interim payment may be made. Good cause must be shown in each instance, and any subsequent application must also indicate how the previous payment had been utilised.

The interim award may not be pleaded and may not be disclosed to the court dealing with the trial of the matter until the trial court has determined the issues before it.

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[56] *Karpakis v Mutual & Federal Insurance Co Ltd* 1991(3) SA 489 (O)
[57] Section 17(6)
[58] *Nel v Federated Versekeringsmaatskappy Bpk* 1991(2) SA 422 (T)
[59] See *Karpakis*, and *Nel*

In view of the potential prejudice which may be suffered by the defendant the further conduct of the matter is strictly regulated by Rule 18A. If the plaintiff fails to prove its damages at the trial then the defendant would be entitled to a full refund from the plaintiff. Thus the court hearing the application for the interim payment may give directions as to the further conduct of the action, and the court may also order the early trial of the matter. The action may also not be discontinued or withdrawn without the consent of the court. The trial court in making its final order, or when granting leave to discontinue or withdraw the action, or at any stage upon application, may make an order which is just and equitable in respect of the interim payment. It may order the plaintiff to refund all or any portion, order that the payment be varied or discharged, or order a co-defendant to make a payment to the defendant who is entitled to recover such portion as a contribution or indemnity from the co-defendant.

21. Claims in reconvention (r20)

Rule 20 provides a convenient mechanism for a defendant to claim in reconvention, or counterclaim, in the same action rather than instituting a separate action against the plaintiff. However, it should be borne in mind that the main action and the counterclaim are separate and distinct actions, each with its own pleadings and each capable of standing on its own in the event of either the main claim or the counterclaim falling away for some reason. The counterclaim need not be related in any way to the main cause of action and may be in respect of a completely different matter.

The counterclaim may be contained in the plea itself, in a distinctly headed portion of the plea, or, it may be contained in a separate document. The title of the matter will remain the same, i.e. it will follow the original action, with reference being made in the counterclaim to the fact that the defendant in convention is the plaintiff in reconvention and the plaintiff in convention is the defendant in reconvention.

The counterclaim must be delivered together with the plea. If the plaintiff agrees, or if the court allows, it may be delivered later.[60] It is not proper to lodge a counterclaim subsequent to the delivery of the plea by amending the plea so as to introduce the counterclaim.[61]

Sub-rule (2), following rule 24(2) of the Uniform Rules, introduces a new procedure in the magistrates' court, subject to the leave of the court. It allows a defendant to proceed, in the counterclaim, against the plaintiff as well as against any other person in the event of the defendant being entitled to proceed against both, whether jointly, jointly and severally, separately or in the alternative. The procedure therefore allows a new party to be brought into the matter although the plaintiff had no intention of joining such party in the matter when the action was initiated. The rule requires a prior application to court for leave to counterclaim in this manner and on such terms as the court may direct. In such application the defendant will only be required to show that he is entitled to take action, and it is not necessary to make out a *prima facie* case for the relief claimed in the counterclaim.[62] It must be noted that sub-rule 3 provides for the addition of a further title in respect of the counterclaim, corresponding to what would be the title of any action instituted by the defendant against the parties in the counterclaim. All subsequent pleadings would therefore reflect both titles relating to the claim and the counterclaim. This is subject to the use of any reasonable abbreviation in terms of the provisions of rule 6(2).

A conditional counterclaim, provisional on the result of the claim or the defence is competent.[63]

If the counterclaim exceeds the jurisdiction of the magistrates' court then Rule 20, and in particular sub-rules (5), (6) and (7), must be considered together with section 47 of the Magistrates Court Act. Section 47 provides for the stay of an action where the counterclaim exceeds the jurisdiction of the court. This gives the defendant an opportunity to institute an action in the competent court and to which the plaintiff may counterclaim notwithstanding the fact that the plaintiff has an action pending in the magistrates' court. That competent court would then deal with all the issues including the awarding of a costs order in respect

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[60] Sub-rule (1)

[61] *Shell SA Marketing (Pty) Ltd V Wasserman T/A Wasserman Transport* 2009 (5) SA 212 (O)

[62] *Hosch-Fömrdertechnik SA (Pty) Ltd V Brelko Cc And Others* 1990 (1) SA 393 (W)

[63] Sub-rule (4). Also see *Suid-Afrikaanse Onderlinge Brand- En Algemene Versekeringsmaatskappy Bpk V Van Den Berg En 'N Ander* 1976 (1) SA 602 (A)

of the costs incurred in the magistrates' court. Should the defendant fail to take the opportunity to launch proceedings in the appropriate court within the time limits given, or any further period allowed by the court, or if the action in the competent court by defendant is stayed, dismissed, withdrawn or abandoned, or absolution has been ordered, then the magistrates court may in the original action, upon application, dismiss the counterclaim and proceed to determine the main action.

A counterclaim which does not comply with rule 20 is an irregular step and subject to the sanction of rule 60A.[64]

22. Replication and plea in reconvention (r21)

The plaintiff is required to deliver any replication (previously called the reply in the magistrates court, and the new terminology being consistent with that of Uniform Rule 25) which might be necessary within 15 days of receipt of the plea. Where a counterclaim has been delivered then the plaintiff must also deliver the plea to the counterclaim within the same period.[65]

It is not necessary to deliver a replication which is simply a denial or an indication that the issues must be tried by the court.[66] Failure to replicate in respect of any of the issues raised in the plea does not amount to an admission[67]; it will be noted that with regard to the drafting of a plea the position is somewhat different in that in the absence of the specific denial of any allegation in the declaration such allegation will be deemed to be admitted.[68]

A plaintiff is not entitled to raise a new cause of action in the replication. This must be done by way of amendment of the declaration.

Previously the reply was the final pleading before close of pleadings in the magistrates' court. Sub-rule (5) now provides for the delivery of further pleadings where necessary

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[64] Sub-rule (8)
[65] Sub-rule (1)
[66] Sub-rule (2)
[67] Sub-rule (3)
[68] Rule 17(3)(a)

"under the names by which they are customarily known". The practice in the High Courts will give guidance as to the nomenclature.

23. Close of pleadings (r21A)

Close of pleadings has certain important consequences, e.g. a claim for general damages arising out of personal injury is transmissible on the death of the injured person if the death occurs after pleadings have closed. The parties may also set down the matter for trial and pre-trial procedures may commence.

Where it is clear that a replication is not necessary the matter may be set down without waiting for the 15 days in terms of rule 21 to lapse.[69] Otherwise pleadings will generally close upon expiry of the period for the delivery of the replication or any subsequent pleading without such delivery being made. The parties may also agree in writing that pleadings have closed. If the parties are unable to agree that pleadings have closed then the court may upon application declare pleadings to be closed.

24. Set-down of trial (r22)

A matter may be set down for trial by the plaintiff[70] after the pleadings have closed by delivery of a notice of trial at least 20 days before the date of trial. The date must be approved by the registrar or the clerk of the court. If the plaintiff does not do so within 15 days of the pleadings having closed then the defendant may do so. The former rule 27(5) gave the defendant the option of making application to dismiss the action if the plaintiff had failed to set down the matter within 15 days after pleadings had closed; however, this provision has now been deleted.

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[69] *Milne NO v Shield Insurance Co Ltd* 1969(3) SA 352 (A)

[70] 'plaintiff' does not include 'plaintiff in reconvention'

Sub-rule (4) now provides for the intervention of the magistrate before a trial date is allocated by the registrar or the clerk of the court. The rule ostensibly is for the magistrate to determine whether a pre-trial conference is necessary, which is in itself a commendable amendment. However, it also enables the magistrate to ensure that the court file is in order and that the matter is indeed ripe for trial. Together with, inter alia, the provisions of rule 63(3)[71] and rule 1(3)[72] the danger of matters unnecessarily clogging the court rolls is now much reduced. It should be noted that a prompt determination by the magistrate is necessary since the trial date shall be allocated within 10 days of the receipt of the application for trial date.

25. Discovery of documents (r23)

The heading of Uniform Rule 35, 'Discovery, inspection and production of documents', would have been more appropriate since rule 23 deals with all of these aspects rather than just discovery. The use of the word 'documents' is also restrictive since the rule in fact deals with the discovery, inspection and production of 'documents and tape, electronic, digital or other forms of recordings'. The old rule 23 has been replaced by the entire rule 35 of the Uniform Rules with certain amendments.

It is noteworthy that it is not compulsory for a party to utilize the discovery procedures.[73] However, failure to do so may result in unnecessary delay at the trial, and also additional costs being incurred where a matter needs to be postponed as a result of inadequate preparation. Legal representatives run the risk of costs orders *de bonis propriis* where satisfactory explanation is not forthcoming as to why the rule was not properly utilised. Timeous and adequate discovery assists the parties as well as the court and promotes the 'expeditious handling of disputes and the minimization of costs involved'.[74]

For practical purposes much of the practice under the old rule 23 remains, but with certain important additions:

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[71] Indexing and paginating the court file not later than 10 days prior to the hearing
[72] Dispensing with court rules and giving directions at the pre-trial conference
[73] The word 'may' is used in 23(1), 23(3), 23(5), 23(6), etc.
[74] 1(2)

1. The discovery procedure is the same but it is no longer restricted to either the plaintiff or defendant delivering notice to discover to the other. Sub-rule (1) refers to 'any party to any action' and therefore plaintiff and defendant may now require discovery also from co-plaintiffs and co-defendants.[75]

2. Sub-rule 5 provides for obtaining of discovery against certain persons who are, strictly speaking, not parties to the action:

    a. In matters where the Road Accident Fund is a party, discovery may be obtained against the driver or owner of the insured vehicle covered by the RAF Act.

    b. Similarly, if the 'insured' vehicle is owned by the state, government, or a person or body of persons entitled in terms of the RAF Act to arrange its own cover, then discovery may be obtained against the driver of such vehicle.

    c. In a matter where a plaintiff sues as a cessionary, the defendant may obtain discovery against the cedent.

    d. Form 14 is the appropriate form to be used for the notice.

3. The discovery procedure may also be utilised in applications subject to the direction of the court.[76]

4. The notice to discover is given after close of pleadings, but may be given before the close of pleadings, with the leave of the court.[77]

5. A procedure for 'further and better discovery' is provided by sub-rule (3) in the event that a party is not satisfied with the discovery that has been made by the other party under sub-rule (2). A notice is given requiring the party to make the documents or recordings available for inspection in accordance with sub-rule (6). Although the documents or recordings which are required to be inspected need not be specified with very great accuracy they must nevertheless be described with sufficient accuracy in order to be identified. If the documents or recordings are not in that

[75] 23(1)
[76] 23(14)
[77] 23(1)(b)

party's possession then this must be stated on affidavit, and, if known, the whereabouts of the documents or recordings must be stated.

6. Sub-rule (6) allows a party to give notice[78] to a party who has made discovery for the inspection of the discovered documents and recordings. The response would be by way of a Form 15A notice which would give the necessary arrangements for the inspection either at the office of the attorney or such other convenient place. The party receiving the Form 15A notice will be entitled to inspect and take copies or transcripts of the documents and recordings.[79] A party who fails to produce any document or recording for the inspection will not be able to use it at the trial except with the leave of the court.[80]

7. A party who has failed to disclose a document or recording in its discovery affidavit will not be allowed to use it at the trial except with the leave of the court, although any other party may use such document or recording at the trial.[81] A party who has failed to discover, or, has failed to give a time for inspection, or, has failed to give inspection, may upon application by the other party be ordered to comply, and should he fail to comply with the order of the court, then the court may dismiss the claim or strike out the defence.[82]

8. It will be noted that in terms of rule 23(1)(a) discovery may be required in respect of any documents or recordings 'relating to any matter in question in such action' and 'which are or have at any time been in the possession or control of such other party'. Whether or not the document or recording will be used at the trial is not crucial at that stage, nor may discovery be required of documents or recordings which have not been in the control or possession of the other party. Rule 23(9) on the other hand relates to documents or recordings intended to be used at the trial of the action, in whosoever's control or possession it might be, and provides for the giving of notice by one party to any other party to specify in writing particulars of the dates and parties of or to any such document or recording. The notice is given after the

[78] Form 15
[79] 23(7)(a)
[80] 23(7)(b)
[81] 23(4)
[82] 23(8), See also rule (60).

close of pleadings and the party receiving such notice shall not less than 15 days before the trial date deliver a notice giving the dates of and parties to and the general nature of such documents and recordings as are in his possession, or giving identifying particulars of any document or recording not in his possession and also giving the name and address of the person in whose possession such document or recording is.

9. Sub-rule (10) is in a sense, the reverse of sub-rule (9). A party who intends to prove any document or recording at the trial may give notice in accordance with rule 23(10)(a) to any other party requiring that other party to admit that such document or recording was properly executed and is what it purports to be. Should there be no response from the other party then the document or recording may be produced without proof at the trial of the matter as against such other party.[83] Of course if it is disputed that the document or recording produced at the trial is any different from that referred to in the notice then it would be necessary to prove that the document or recording is in fact the same. If the other party responds by giving notice that the document or recording is not admitted then the document or recording will need to be proved but the other party may be ordered to pay the costs of such proof.

10. In order for any party to 'subpoena'[84] any documents or recordings in the possession of any other party who has made discovery, a notice in terms of rule 23(11)(a) is necessary, requiring the other party to produce at the hearing the original of such document or recording provided that it is not privileged. The notice must be given not less than 5 days before the trial date but may even be given during the course of the trial if the court allows.[85] This procedure has the benefit that the document or recording shall be receivable in evidence without calling any witness.[86] During the course of any proceeding, the court has the power to order a party under oath to produce any document or recording 'in his or her power or control relating to any matter in question in such proceeding as the court may deem fit'.[87]

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[83] 23(10)(b)
[84] A party is not a 'witness' and cannot be subpoenaed in the way that a witness may be subpoenaed.
[85] 23(11)(b)
[86] 23(11)(c)
[87] 23(12)

11. The discovery procedure is generally regarded as pre-trial procedure which is appropriate only after pleadings have closed and for the purpose of preparing for trial. The previous rule 15 allowed a defendant to obtain copies of documents on which the plaintiff's action was founded, and the previous rule 16 enabled a defendant to request for further particulars for the purposes of pleading. In terms of the new rules there is no longer provision for a request for further particulars for the purposes of pleading. The new rule 16 instead makes provision for a request by any party, after close of pleadings, for further particulars as are strictly necessary to prepare for trial. The new rule 23, in line with the Uniform Rule 35, introduces certain procedures in terms of which a party may obtain inspection and copies of documents at any time before the hearing; these provisions are analogous though much wider[88] than the provisions of the previous rule 15, and expand the scope of the discovery procedures to much more than only pre-trial procedures:

    a. Where a pleading or affidavit refers to any document or recording, then any party may, at any time before the hearing, give notice for the inspection and making of copies or transcripts of such document or recording.[89] A party who fails to comply would not be able to use the document or recording at any proceeding, without leave of the court, but the other party will be entitled to do so.[90]

    b. After appearance and for purposes of pleading, a party may require any other party to make available for inspection and to make a copy or transcript of any clearly specified document or recording.[91] The document or recording must be relevant to a reasonably anticipated issue in the action.

[88] There is no longer any restriction to documents 'upon which the action is founded' and 'any party', not only the defendant, may require inspection and copies.
[89] 23(13)
[90] 23(13)(b)
[91] 23(15)

> Rules 23(13) and 23(15) may also operate to save a defective pleading to which a written contract has not been annexed as required by rule 6(6): the other party may call for such document before pleading.[92]

An important difference in the High Court discovery procedure is that Uniform Rule 37(1) makes it compulsory for a party who receives notice of the trial date to deliver a discovery affidavit which complies with rule 35(2). The effect of this rule is that even if a party had not been given notice to deliver a discovery affidavit he would nevertheless be required to do so prior to the trial date. There is no similar rule in the magistrates' court.

26. Medical examinations, inspection of things, expert testimony and tendering in evidence any plan, diagram, model or photograph (rule 24)

The only amendment is the addition of rule 24(5A) which provides that any party claiming damages arising from the death of another person may be requested to undergo a medical examination to determine his state of health if it is alleged that his state of health is relevant for the purpose of determining the damages. The claimant's own state of health would be relevant insofar as his ability to work and life expectancy are factors to be taken into account in determining the quantum of damages.

27. Pre-trial procedure for formulating issues (rule 25)

There are important changes relating to the pre-trial conference procedure affected by rule 1(3) and rule 22(4).

Rule 1(3) provides that at the pre-trial conference the court may dispense with any provisions of the rules and give directions as to further procedure to be followed in order to dispose of the matter in the most expeditious and least costly manner. This must be done in order to promote access to the courts or when it is in the interest of justice to do so.

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[92] *Dass And Others NNO V Lowewest Trading (Pty) Ltd* 2011 (1) SA 48 (KZD)

In terms of rule 22(4) the registrar or clerk of the court shall, prior to allocating a trial date, take the court file to the magistrate for the purpose of considering whether a pre-trial conference is necessary.

28. Withdrawal, dismissal and settlement

The provisions regarding withdrawal of a matter[93] and abandonment[94]remain unchanged. The previous rule 27(5) provided the defendant with an option to make application for the dismissal of plaintiff's claim where the plaintiff had failed to give notice of trial within 15 days of the pleadings having closed. In terms of rule 22(1) the defendant could have chosen to give notice of trial himself. Now the latter provision only remains, i.e. the defendant no longer has the option of making application to dismiss the plaintiff's claim.

The new rule 27(5) provides that the applicant or plaintiff shall inform the registrar and the clerk of the court as well as other parties, by delivering notice, if a matter has been settled, or if there is an agreement to postpone or to withdraw.

Sub-rules (6) to (9) deal with the recording of a settlement, making such settlement an order of court, and for application to court for entry of judgement where the recorded settlement has not been complied with. The previous sub-rule (9) provided that application to court for entry of judgment had to be made within 12 months of the failure to comply. The new rule provides that the application may be made 'at any time' and the restriction of 12 months has been removed.

29. Intervention, joinder and consolidation of actions (rule 28)

Sub-rules (1) and (2) relating to application to intervene and the joinder of an additional party remain unchanged. Sub-rules (3), (4) and (5) have been added.

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[93] 27(1), (2) and (3)
[94] 27(4)

Sub-rule (3) provides that a plaintiff may join several causes of action in the same action. Uniform Rule 10(2), being the equivalent rule in the High Court, has been interpreted as meaning that substantially the same relief must be claimed against each of the defendants where there has also been joinder of defendants, i.e. causes of action ought not to be joined where different relief, having nothing to do with each other, is claimed against different defendants.[95]

The court may, on application, order separate trials either in respect of the causes of action or in respect of the parties.[96]

Sub-rule (5) provides for the consolidation of actions on the ground of convenience where separate actions have been instituted. The matters may then proceed as one action and one judgment may be given disposing of all matters in dispute.[97] This is a welcome addition to the rules since there was previously much uncertainty as to whether consolidation was permissible in the magistrates' courts in the absence of a specific rule.

30. Third party procedure (Rule 28A)

This rule has been adopted from the Uniform Rules (rule 13) with one important difference: the rule in the High Court **does not** specifically provide for an executable judgment to be entered against the third party defendant.

It has been held[98] in the High Court that where the third party was alleged to be a joint wrongdoer, no judgment sounding in money could be sought against such third party but only an apportionment of fault in the form of a declaratory order; however, where the third party was not alleged to be a joint wrongdoer, i.e. the notice was served on some other basis, then there was no reason in principle why a judgment sounding in money could not be issued against a third party. 'Joint wrongdoers', in the sense it is used here, refers to two

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[95] Erasmus, *Superior Court Practice*, pB1-96A
[96] 28(4)
[97] 28(5) (a) and (c)
[98] *IPF Nominees (Pty) Ltd V Nedcor Bank Ltd (Basfour 130 (Pty) Ltd, Third Party)* 2002 (5) SA 101 (W), see also *Shield Insurance Co Ltd v Zervoudakis* 1967 (4) SA 735 (E).

or more persons who are allegedly jointly or severally liable in delict to a third person (referred to as the plaintiff) for the same damage.[99]

Rule 28A(10) in the magistrates' court goes much further than UR 13 and provides that where a court makes a decision as to the respective liabilities of a defendant and a third party defendant, in respect of the claim of the plaintiff, then either the defendant or the third party defendant who pays the full amount of the plaintiff's claim or more than its fair share, will be entitled to execute against the other defendant for the amount as decided by the court. In other words, it is no longer necessary to sue the other defendant for a contribution in a separate and subsequent action.

The third party notice therefore has the effect of adding a further action to the proceedings: in addition to the judgement in the action between the plaintiff and the original defendant, the notice now has the effect that judgment is granted in the claim by the original defendant against the third party defendant as well as in any possible counterclaim by the third party defendant in terms of rule 28A(6). In this respect rule 28A achieves the same purpose as a consolidation of actions and thereby avoids a multiplicity of actions.

Registrars and clerks of the court must be wary of the fact that more than one execution process may be issued by more than one judgment creditor and against more than one judgment debtor in a matter, arising out of the multiplicity of orders which might be given in such matters. Care must be taken to ensure that the process which may be issued against a particular judgment debtor reflects the correct amount which may be recoverable from such debtor. Likewise, judicial officers should endorse court files with sufficient detail, clarity and precision.

Rule 28A(10) also seems to resolve the difficulty which would be caused by a counterclaim by the third party defendant against the original defendant: it would not be fair to grant judgment on the counterclaim while not being able to grant judgment on the third party claim by the original defendant against the third party defendant.

It must be borne in mind that the rule does not alter the fact that as regards the claim by the plaintiff judgment may only be granted against the defendant/s against which the

[99] S2 of Apportionment of Damages Act 34 of 1956

plaintiff has instituted the action and the court cannot grant judgment for plaintiff *vis-a-vis* the third party who has been joined by the original defendant[100]. All that the rule does is to address the relationship between the defendants *inter se*: the decision by the court on the respective amounts of liability of the defendants results in a judgment which may be executable. It is no longer necessary for a defendant to institute a further action in order to recover a contribution. It is submitted that the decision of the court must be in respect of the actual amount (quantum) of the plaintiff's claim as well as the respective amounts payable by each of the defendants. A finding only on the respective degrees of negligence of the defendants, without any decision on the quantum of a claim, is an incomplete resolution of the matter and cannot be executable except possibly in respect of costs.

Rule 28A(10), while it may be regarded as being complementary to the procedure in the Apportionment of Damages Act 34 of 1956[101], goes even further. That Act provides the procedure for a joint wrongdoer, who has paid the plaintiff's damages in full or in excess of his responsibility as determined by the court, to 'recover from any other joint wrongdoer a contribution'.[102] The recovery takes place through a subsequent action. Pre-requisites are a decision by a court on the respective degrees of responsibility for the damages, and the fact that payment has been to the plaintiff of the full amount of the claim or an amount in excess of the payer's responsibility for the damages. The Act does not provide for an executable judgment to be granted in the original action as against the third party defendant; all that is contemplated is a declaratory order.

Rule 28A(1) provides two alternative bases upon which a litigant may join a third party. Sub-rule (1)(a) relates to a claim for a contribution or indemnification from the third party in respect of the relief which is claimed in the action, and sub-rule (1)(b) allows a third party notice for the reason that a question or issue which has arisen between the party and the intended third party is substantially the same as any question or issue in the action and it is proper that such question or issue be determined at the same time in respect of all the parties.

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[100] *Shield Insurance Co Ltd v Zervoudakis* 1967 (4) SA 735 (E)
[101] *Shield Insurance Co Ltd v Zervoudakis* 1967 (4) SA 735 (E)
[102] Sections 2(4), 2(6), 2(7), 2(8)(b), of the Apportionment of Damages Act 34 of 1956

Although it is more commonly a defendant who issues a third party notice, the rule does not preclude a plaintiff from doing so. The notice must be served by the sheriff. The notice must be similar to Form 43 and must state the nature and grounds of the claim, the question or issue to be determined and state what relief or remedy is claimed. Details of the claim, following the rules of pleading relating to summonses, must be set out in an annexure to the notice and copies of all the pleadings filed in the matter up to the date of the notice must be attached to the notice which is served on the third party. Copies of the notice, without copies of the pleadings, must be filed with the registrar or clerk of the court and served on all other parties. If the third party notice is to be served after pleadings have closed then prior leave of the court is necessary. Unless a court is satisfied that the applicant's case is clearly without merit, factual and legal issues raised in an application for leave to issue the third party notice are rather to be determined at the trial or to be addressed in the pleadings which the third party is entitled to file in terms of Rule 13 and where it cannot be said that the applicant's claims are so patently unfounded that the application should be refused, the application for leave should be granted.[103]

31. Non-appearance of a party – withdrawal and dismissal (rule 32)

Sub-rule (2) has been amended in order to provide that, in the event that a defendant or respondent does not appear at the trial or hearing, then the court may grant judgment against the defaulting party 'after consideration of such evidence, either oral or by affidavit, as the court deems necessary'. This simply formalises an existing practice for a court would be unable to grant judgment in a claim for damages without evidence as to the quantum of such damages. The addition confirms the presentment of evidence both by way of affidavit and orally is acceptable.

Sub-rule (3), though not a new rule, is worthy of mention for two reasons. Firstly, in action proceedings it equates the dismissal thereof to a decree of absolution from the instance. This is of significance since res judicata does not follow upon such an order. Note however that in an application the dismissal thereof is equivalent to refusal. Secondly, the sub-rule

[103] *Pitsiladi And Others V Absa Bank And Others* 2007 (4) SA 478 (SE)

provides for a court, upon application, to stay a subsequent action based on substantially the same cause of action if the costs of the first action have not been paid.

32. Costs (r33)

This rule has two significant amendments to it. The balance of the subrules remain the same. Rule 33(5)(c) refers to civil regional court matters including divorce or matrimonial matters. It sets out that on a party and party basis an attorney is entitled to fees contained under scale C that are set out in Table A of Annexure 2. In addition the attorney is entitled to necessary expenses. However where a civil matter in the regional court whose monetary value falls within the jurisdiction of the district court, on a party and party basis, will attract fees similar to the district court provisions under subrule 5(a) even though such a claim has been instituted in the regional court.

A further inclusion is found in r33(8)(d). It provides for the situation where there is no specific provision in the rules for costs which have been reasonably incurred, the court may give direction as to the manner of taxation of such costs as may be necessary.

33. Fees of the Sheriff (r34)

This rule deals exclusively with the fees of the sheriff of court and not with the clerk of court. The former rule 34(4) has been deleted which referred to fees of the clerk of court that referred to Table E of Annexure 2. It is noteworthy that Table E is completely deleted that contained fees for copies, stamps etc.

34. Review of Taxation (r35)

Unfortunately there are no changes to this rule although it urgently requires an update. This rule ought to be aligned with the similar rule in the high court dealing with review of taxation.

35.Representation of Parties (r52)

There are no changes to rule 52, however it is highlighted in respect of costs recoverable by practitioners and non practitioners. In terms of rule 52(1) no persons other than a practitioner shall be entitled to recover any costs other than necessary disbursements. Only attorney and advocates are entitled to fees contained in annexure 2 of the rules. It is noteworthy that debt collector are in terms of the Debt Collector's Act also entitled to fees that are prescribed in the debt collectors tariff and not those contained in annexure 2 of the rules.

36.Applications (r55)

The old rule has been substituted in its entirety and although the new rule is not constructed identically to UR rule 6 much of the latter is reflected therein. The authorities on the UR rule might therefore be more appropriate rather than those pertaining to the old rule 55 of the MC.

At the outset it must be borne in mind that Rule 55 is of general application and there are other rules dealing with specific types of applications, e.g. rule 14 deals specifically with summary judgment applications. In ***Chelsea Estates & Contractors CC v Speed-O-Rama*** 1993 (1) SA 198 (E), Mullins J stated at 202C:

> 'Where there are specific provisions in the Rules which provide for a particular form of application, such specific provisions must be followed, and not more general provisions.'

Rule 55(1)(a) states that 'Every application shall be brought on notice of motion supported by an affidavit … '. This might be misleading in that a supporting affidavit may not be essential in every application. Sub-rule (3)(e) provides for service of an order made ex parte and of 'the affidavit, if any, on which it was made' and clearly contemplates that such an order may be made without there being a supporting affidavit to the application. Sub-rule (4)(a) provides for interlocutory applications to be 'supported by affidavits if facts need to be placed before the court'. Although sub-rule (5)(b) provides that an urgent application

must be supported by an affidavit explaining the urgency, sub-rule (5)(a) states that a court may 'make an order dispensing with the forms and service' and dispose of a matter 'in accordance with such procedure … as the court deems appropriate'. It is noteworthy that the old rule 55(2) provided that 'except where otherwise provided, an application need not be supported by affidavit …' and the old rule 55(6) stated that 'except where otherwise provided, an *ex parte* application shall not, unless required by the court in any case, be supported by affidavit or other evidence'.

There are two forms for the notice of motion, referred to as the short form (Form 1) and the long form (Form 1A). Except for ex parte applications, every notice of motion must be similar to Form 1A.[104] The main difference between the old form and Form 1A is that the latter now makes provision for notifying the respondent of the need to deliver notice of intention to defend and the answering affidavits, as well as stating the service address of the applicant and requiring the respondent to state its service address.

Although Form 1A makes provision for a date when the matter will be heard if the matter is unopposed the applicant is nevertheless required to file a notice of set down 5 days before the matter is to be heard. Only then will the matter be enrolled by the registrar or the clerk of the court. It is fairly common for attorneys to overlook this requirement, or for the set down to be mislaid, resulting in unnecessary exchanges on motion court days. It may be advisable for a notice in bold writing to be placed in the general office or for registrars and clerks of the court to, in some other manner, specifically draw this requirement to the attention of attorneys where this problem is experienced. When inserting the date for the hearing of the matter the applicant must choose a suitable date, bearing in mind that the respondent will have 5 days to give notice of intention to oppose[105], the date of hearing must be not less than 10 days after service of the notice of motion on the respondent[106], and the applicant is required to set down the matter 5 days before the date when it is to be heard[107].

If the application is opposed then a notice of set down is not filed, the matter will not be enrolled, and the date for the hearing given in the notice of motion will simply fall away. If

[104] 55(1)(d)
[105] 55(1)(e)(iii)
[106] 55(1)(e)(iii)
[107] 55(1)(f)

for some reason the matter does come up on the motion court roll on the stated date, nothing needs to be done and the court file must simply be re-filed and the matter deleted on the roll as it has been incorrectly placed on the roll.

The respondent is required to deliver its answering affidavit within 10 days of delivery of the notice of opposition.[108] Alternatively, within the same 10 day period, the respondent may give notice of intention to raise questions of law only.[109] If no answering affidavit or notice to raise questions of law is delivered then within 5 days of the expiry of the 10 day period for delivery of the affidavit or notice the applicant may apply for a date for the hearing of the application.

Within 10 days after delivery of the answering affidavit the applicant may deliver a replying affidavit [110] and the court may permit the filing of further affidavits[111]. After all the affidavits have been filed, or upon expiry of the 10 day period for delivery of the replying affidavit where such affidavit was not delivered, the applicant may within 5 days apply for a date for the hearing of the matter[112] and if he does not do so then the respondent may do so immediately upon expiry of the 5 day period[113]. The 5 day period for the applicant to set down the matter is not peremptory and the applicant is not precluded from setting down the matter outside of the 5 day period should respondent fail to do so[114]. Once the date has been allocated by the registrar or the clerk of the court notice of set down must be delivered to the other party not less than 10 days before the hearing date. Note however, that in terms of rule 55(6) the notice period for the set down of applications and for the return date of a *rule nisi* against any Minister, Deputy Minister, Premier, officer or servant of the state, or the State or the administration of any province shall be not less than 15 days after service of the notice of motion, or the *rule nisi*, as the case may be, unless the court has authorised a shorter period.

Form 1 (short form) is substantially similar to the old form. Form 1 makes provision for the set down of the matter for hearing without the need for a separate request for allocation of

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[108] 55(1)(g)(ii)
[109] 55(1)(g)(iii)
[110] 55(1)(h)
[111] 55(1)(i)
[112] 55(1)(j)(ii)
[113] 55(1)(j)(iii)
[114] *Anthony Johnson Contractors (Pty) Ltd V D'Oliveira And Others* 1999 (4) SA 728 (C)

a date and for a separate notice of set down to be delivered to the respondent. In order to maintain manageable court rolls it is suggested that, at least in the busier centres, arrangements be put in place for the date for the hearing to be inserted in consultation with the registrar or the clerk of the court. Bearing in mind the intended usage of Form 1, it does not make provision for stating the respective addresses for service and for notifying the respondent to give notice of opposition and any opposing affidavit.

The draft order must be prepared by the applicant and once granted by the court it must be signed by the registrar or the clerk of the court. A signed copy must be retained in the court file and a signed copy must also be served on the respondent in the case of an *ex parte* order.

Rule 55(2) introduces the novel procedure in the magistrates' court of allowing, as has been the practice in the High Court, 'any party' to any application proceedings to bring a counter-application and also to join any party to the same extent allowed to a defendant in action proceedings. The periods prescribed for applications also apply to counter-applications. If good cause is shown, the court may order that the application be postponed and that the counter-application be heard first as is competent with the claim and the counter-claim in action proceedings.

36.1 *Ex parte* applications

The notice of motion in *ex parte* applications shall be similar to Form 1. No notice is given to anyone either because notice is not necessary or because the relief claimed is not of a final nature. Rule 55(3)(a) specifies that an *ex parte* application shall not be considered by the court unless the giving of notice will defeat the purpose of the application or the matter is so urgent that the giving of notice may be dispensed with.

As indicated above, rule 55(3)(e) contemplates that it is competent for certain *ex parte* applications to be made without supporting affidavit. A copy of any affidavit must be served together with a copy of the order on the party against whom the order was made. The order granted against any person and which shall be in the form of *rule nisi* may be anticipated on 24 hours' notice (previously 12 hours' notice). Where the order is not granted against any

person, such as order for directions as to service under the PIE Act, then such an order although granted *ex parte* may be of a final nature.

An *ex parte* application may be heard in chambers. On the return day the court may order any of the parties or deponents to any affidavits to give oral evidence and be subject to cross-examination.

Rule 55(4)(b) makes specific provision for applications for directions as to service or authority to institute proceedings to be made *ex parte.* The application for directions as to service under PIE may therefore be made *ex parte* and in chambers.

It should be noted that in terms of section 35 of the General Law Amendment Act 62 of 1955 it is not proper for an application to be brought *ex parte* against the State or State organs or officials.

36.2 Interlocutory applications / applications incidental to pending proceedings

These applications must be brought on notice. The application may be supported by affidavits if facts need to be placed before the court. Clearly, the rule contemplates that there may be situations where affidavits would not be necessary. The application must be set down with 'appropriate notice'. Note that the practice in the High Court allows for interlocutory applications to be heard on short notice.[115] However, it would seem that the difference in wording between the new rule 55(4)(a) and Uniform Rule 6(11) is deliberately calculated to enforce the proper notice periods in the magistrates' courts. The differences in wording must be borne in mind when having regard to the case law in respect of the High Court practice. Rule 55(4)(a) provides:

> "Interlocutory and other applications incidental to pending proceedings must be brought on notice, supported by affidavits if facts need to be placed before the court, and set down with appropriate notice."

Uniform Rule 6(11) states that:

[115] *Eloff V Road Accident Fund* 2009 (3) SA 27 (C)

> "Notwithstanding the aforegoing subrules, 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 registrar or as directed by a judge."

Rule 55(1)(d) provides that the notice of motion shall be similar to Form 1A in every application except for *ex parte* applications and rule 55(4)(a) provides for interlocutory and incidental applications to be brought on 'notice' but the latter does not state 'notwithstanding the aforegoing rules, nor does rule 55(1)(d) provide for any exceptions. In ***Swartz v Van Der Walt T/ A Sentraten*** 1998 (1) SA 53 (W), Claassen J, in dealing with the equivalent UR 6(11), stated that:

> 'The Rule 6 motion procedure has always been interpreted as referring to the initiation of 'fresh proceedings'. The words 'on notice of motion' used in the Rule have been interpreted as referring to such fresh legal proceedings… An application to amend pleadings is interlocutory and not a fresh legal proceeding. The parties are already engaged in litigation and have already complied with the formalities of appointing attorneys and supplying addresses for the service of documents. It is not therefore necessary to repeat all of these formalities when seeking leave to amend pleadings which have already been filed in accordance with these formalities……
>
> An application for leave to amend pleadings is indeed an interlocutory application which is 'incidental to pending proceedings' as contemplated in Rule 6(11)… Thus the application for leave to amend a pleading … must of necessity be an interlocutory application falling within the meaning of Rule 6(11). In terms of the latter Rule, such applications are brought 'on notice' and not on 'notice of motion'. The difference between these two concepts has been set out clearly in the past… An application brought on notice does not require a supporting affidavit unless the particular circumstances so require. That is why Rule 6(11) expressly uses the words, '. . . supported by such affidavits as the case may require . . .'. Not all applications for amendments will require affidavits as I have already set out above.'

In ***Government of The Islamic Republic of Iran v Berends*** 1998 (4) SA 107 (NM), it was held (at 120H/I--I/J and 123E/F--F.) that in an application for the setting aside of a default

judgment, the procedure applicable was by way of notice pursuant to Rule 6(11), as read with Rule 6(4)(a) under which it was necessary to use Form 2(a) of the First Schedule (i.e. the short form), and not by means of notice of motion prescribed by Rule 6(5)(a), which required the use of Form 2(b) of the Schedule (i.e. the long form). All that was required in terms of Rule 6(11) was a notice advising the other party that an application would be brought on a date assigned by the Registrar.

It was also held, (at 123C--E), that the application was improperly launched by notice of motion in terms of Rule 6(5)(a) instead of being brought on 'notice' in compliance with Rule 6(11). The use of the wrong form of notice did not, however, result in a nullity, and as there was no indication that the respondent was embarrassed or prejudiced by the applicant's use of the wrong form, condonation of the use of the wrong form was granted.

36.3 Urgent applications

These applications must be distinguished from *ex parte* applications where no notice at all is given of the initial hearing in the matter. Urgent applications involve the hearing of applications on lesser notice periods than is prescribed by the rules. Such an application must be accompanied by an affidavit which clearly sets out the circumstances which render the matter urgent and why the applicant would suffer prejudice if the prescribed time periods were to be observed. Note that these allegations are necessary over and above any allegations which may be necessary in respect of the merits in the matter. Generally a single affidavit covers both aspects and the applicant sets out the reasons why the court should hear the matter on short notice and seeks condonation for non-compliance with the general rules as to notice and service.

36.4 Rescission Applications

The 20 day period as provided in rule 49(1) within which application for rescission must be made is not applicable to applications in terms of r49(5). Rule 49(5) deals with the situation where a plaintiff has agreed in writing to rescission or variation of the judgment. The

plaintiff or the defendant or any other person affected may make application (not request) at any time after the plaintiff has so agreed.

37. Arrests *tanquam suspectus de fuga*, interdicts, attachments to secure claims and *mandamenten van spolie* (r56)

Rule 56 has been restructured and provides specific rules for the types of application which may be made under section 30 of the MCA. These types of applications are generally made *ex parte*. Sub-rule (1) provides that the application must be made in terms of rule 55. Every application must be supported by an affidavit and before granting the order the court may require additional evidence and require the applicant to give security for potential damages which may be caused.

Rule 55(3) deals with *ex parte* applications. Rule 55(3)(d) provides generally that the return day of any order granted *ex parte* may be anticipated upon delivery of not less than 24 hours' notice. Rule 56(5) provides that specifically in respect of an *ex parte* order for arrest *tanquam suspectus de fuga* the return day may be anticipated on 12 hours' notice. Clearly therefore, following r55(3)(d), the return day for the other types of applications referred to in r56(1), namely, an interdict or attachment or *mandament van spolie*, may be anticipated on 24 hours' notice.

In ***Malachi v Cape Dance Academy Int (Pty) Ltd*** [2010] 3 All SA 86 (WCC), arrests *tanquam suspectus de fuga* under the common law, the words 'arrest *tanquam suspectus de fuga*' in s30(1) of the MC Act, and the whole of s30(3) of the Act have been declared unconstitutional and invalid. Accordingly, the exception created by r56(5) falls away, and the return day in respect of all orders granted *ex parte* in terms of rule 56 may be anticipated on 24 hours' notice.

38. Attachment of property to found or confirm jurisdiction (r57)

The previous rule provided for attachment of person as well as property under s30*bis* of the MCA. Attachment of the person was declared to be unconstitutional in ***Bid Industrial Holdings (Pty) Ltd v Strang & Another*** 2008 (3) SA 355 (SCA), and the new rule accordingly only deals with the attachment of property in order to found or confirm jurisdiction.

The application may be made *ex parte* and the supporting affidavit must contain certain information as specified in sub-rule (2)(a). The return date may be anticipated on 12 hours' notice and the copy of the court order served on the respondent must specifically state that the return date may be anticipated on 12 hours' notice.

Before granting the order the court may require additional evidence and for security to be furnished for any damages which may be caused.

39. Security for Costs (r62)

Security for costs have been changed considerably from the existing rule. A party entitled to and desiring security for costs will deliver a notice setting forth the grounds upon which such security is being claimed and the amount demand. Where only the amount demanded is contested the registrar or clerk of court shall determine the amount. His or her decision in this regard is final. Unless the court directs or the parties have agreed, the registrar or clerk of court will determine the amount for security as well as will direct the manner and form in which the security will be given. The registrar or clerk upon written notice may increase an amount for security if satisfied that the original amount is no longer sufficient. The registrar's or clerks decision in this regard is final and no review may lie to the court. However where a party contests liability to pay security, fails or refuses to give security, the relevant party may apply to court on notice within 10days of demand for an order. It would demand that security be given or proceedings be stayed until such order is complied with. The court may if security so demanded is not given within a reasonable time, dismiss any proceedings instituted or strike out any pleadings filed by the party in default or make a fit order.

40. Filing, preparation and inspection of documents (r63) (HC r62)

The requirements that all documents for filing must be legibly printed or typewritten on one side of good quality A4 paper are now contained in this rule. The rule also requires the use of concise paragraphs which must be consecutively numbered.

The plaintiff or applicant, in defended or opposed matters, is required to paginate, index and secure all pages in the matter and to deliver a complete index not later than 10 days before the hearing of the matter.

Copies of documents in a court file may be made by any person at the office of the registrar or the clerk of the court by prior arrangement. Note that it is unacceptable for files to be taken away for this purpose.

41. Miscellaneous provisions

Rules 39(2) and (6) have been amended in order to provide for notice of sale to be given to other sheriffs for the area and to allow for acceptance of certificates of attachments from those sheriffs. After a sale in execution, a copy of the distribution account must be given and payment, if any, made to other sheriffs who provided certificates.

Rule 39(4), dealing with a claim by any third party to attached goods or to the proceeds of sale in execution has been amended, and r39(6), relating to non-liability for further costs, where the creditor admits the claim, has been deleted and both 39(4) and (6) are incorporated in r44 so as to consolidate the rules relating to interpleader proceedings in r44.

Rule 40(2) has been amended to provide that the sheriff shall notify all other sheriffs in the area for which the sheriff has been appointed, of his appointment as receiver in respect of a partner's share.

Rule 41(7)(e)(iii) now provides for the suspension of the period of 4 months for sale of movables to take place, such suspension to be effective from the date on which a claimant

delivers an affidavit to the sheriff in respect of his claim, until final adjudication of the interpleader claim.

Rule 41(8)(c) provides that a sale in execution of movables must be advertised where the value of the goods is R5000,00 or more (increased from R3000,00). The advertisement must be placed in 'some local or other newspaper circulating in the district'. Note that for sale of immovable property rule 43(6)(c) provides that the advertisement must be placed in a newspaper 'registered with Audit Bureau of Circulations of SA'.

Rule 43(2)(c) makes provision for the sheriff to notify all the interested parties when attachment of immovable property has lapsed in terms of s66(4) and (5) of the MCA, i.e. the sale has not taken place within one year or such extended period as may have been allowed by the court. Rule 43(11) provides for the sale of immovable property to take place at a venue deemed fit by the sheriff (no longer states in front of court-house). Rule 43(14)(a) provides for the purchase price to be paid to the sheriff who keeps it in trust until transfer of the immovable property; it is no longer required to be paid into court.

In respect of interpleader claims, rules 44(2) and (3) provide for a claimant to furnish an affidavit with certain specified information and if the creditor rejects the claim then interpleader summons is issued by the sheriff. There is no provision for filing of affidavits after summons and before the hearing and also no provision for the affidavit to be attached to the summons, although it would be good practice for the sheriff to attach the claimant's affidavit to the summons. At the hearing the court may order the claimant to state orally or in writing 'on oath or otherwise' the nature and particulars of his claim.

In r45, relating to s65 proceedings, reference to s19 of the Credit Agreements Act has been deleted and likewise in r47, relating to attachment of a debt by garnishee order reference to s18 of the HP Act has been deleted. The certificates filed in these proceedings therefore no longer need to confirm that s19 or s18, respectively, do not apply to the respective debts. The National Credit Act, which repealed the Credit Agreements Act, contains no similar provisions.

Rule 48(4) states that an Administrator of a debtor under administration under s74 of the MCA may retain an amount not exceeding 25% of the amount collected when making a

distribution in order to cover any costs that may be incurred if the debtor defaults or disappears. The maximum amount that may be retained is now R600,00 (increased from R30,00).

In civil appeals the requirement of payment of R70,00 when requesting for reasons for judgment, previously contained in rule 51(1), has been deleted. Note however, that the rule 51(4) requirement for payment of security of R1000,00 for respondent's costs of appeal has NOT been deleted.

Rule 53(8) makes provision for a court to refer a *pro Deo* litigant or applicant to a convenient legal aid centre or justice centre for assistance at any given time.

Rule 60A, identical to UR 30, provides for a party to apply to court to set aside an irregular step which has been taken by the other party. The rule overlaps in certain respects with what is covered by rule 60. It will be noted that in many instances the new rules provide specifically that certain non-compliance would be an irregular step. The application may only be made provided that the applicant himself has not taken any further step in the matter with knowledge of the irregularity, and provided also that the applicant has first given the other party an opportunity to remove the cause of the complaint and this has not been done. In granting any order against the party who is at fault the court may also give an opportunity to amend or make such other order as it may deem fit. The party against whom the order is made may not proceed further in the matter until the court order is complied with.

42. New Rules: Retrospective Application

Divorce matters

The Jurisdiction of Regional Courts Amendment Act 31 of 2008, came into operation on the 9 August 2010 in terms of Govt Gazette 33448 of 6 August 2010. Section 10 of Act 31/2008 repeals the Administration Amendment Act 9 of 1929, but Act 31/2008 provides in section 9(1) that:

> "Any proceedings instituted in a court established under section 10 of the Administration Amendment Act, 1929 (Act No. 9 of 1929), before the commencement of this section and which are not concluded before the commencement of this section must be continued and concluded in all respects as if this Act had not been passed."

Section 9(4) of Act 31/2008 states that:

> "The rules in force on the date of the commencement of this Act in respect of the courts established under section 10 of the Administration Amendment Act, 1929 (Act No. 9 of 1929), remain in force until they are repealed or amended by a competent authority."

Govt Gazette 33620 of 8 October 2010, repeals the rules of the Divorce Courts made under section 10(4) of the Administration Amendment Act of 1929 (Act No. 9 of 1929) with effect from 15 October 2010. Govt Gazette 33620 does not amend section 9(1) of Act 31 nor has any other amendment been affected to section 9(1).

It is submitted that section 9(1) of Act 31/2008 is clear that all proceedings instituted in terms of the now repealed divorce court rules must be continued and concluded in terms of the divorce court rules notwithstanding the repeal of such rules. The case law which suggests that legislation which regulates procedure is applicable retrospectively is clear that this is only the case in the absence of express provision to the contrary. Section 9(1) is such express provision and leaves no room for any other interpretation.

It must be noted that Act 31/2008 came into operation on the 9 August 2010 and the new rules came into operation on the 15 October 2010. The divorce court rules were only repealed on the 15 October 2010. The divorce court rules therefore continued to apply to matters instituted in the divorce court between the 9 August 2010 and 15 October 2010. However, section 9(1) of Act 31/2008 is not applicable to these matters since section 9(1) applies only to matters commenced before the 9 August 2010. These matters must be dealt with as with other matters below.

Other matters

The retrospective application of the new rules to other matters is debatable and argument may be advanced for both points of view. Section 12 of the Interpretation Act 33 of 1957 supports the presumption against retrospective application of law:

> "(1) Where a law repeals and re-enacts with or without modifications, any provision of a former law, references in any other law to the provision so repealed shall, unless the contrary intention appears, be construed as references to the provision so re-enacted.
>
> (2) Where a law repeals any other law, then unless the contrary intention appears, the repeal shall not-
>
> *(a)* revive anything not in force or existing at the time at which the repeal takes effect; or
>
> *(b)* affect the previous operation of any law so repealed or anything duly done or suffered under the law so repealed; or
>
> *(c)* affect any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed; or
>
> *(d)* affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any law so repealed; or
>
> *(e)* affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, forfeiture or punishment as is in this subsection mentioned, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing law had not been passed."

However, case law indicates that the presumption does not strictly apply when the legislation regulates purely procedural matters *(See* ***Curtis v Johannesburg Municpality*** *1906 TS 308, and,* ***Transnet Ltd v Ngcezula*** *1995 (3) SA 538 (A))*. Even so, the case law itself recognizes the divergent viewpoints, and perhaps all that may be said is that whether a particular rule is applicable retrospectively or not will depend on the circumstances of each

case. In ***Veldman v Director of Public Prosecutions, Witwatersrand Local Division*** 2007 (3) SA 210 (CC), it was held that:

> *"…* there was a presumption against retrospectivity. Unless otherwise provided, a statute was not to be interpreted to extinguish existing rights and obligations. This was basic to the notions of fairness and justice that were integral to the rule of law, a foundational principle of the Constitution. As to the argument that an increase in sentencing jurisdiction was merely a procedural change which did not trigger the presumption against retrospectivity, the distinction between procedural and substantive provisions could not always be decisive. The contradictory line of case law on the question demonstrated this. The correct approach was that a procedural law could apply retrospectively unless this would adversely affect an applicant's substantive rights. However, if new legislation affected a person in a manner detrimental to his or her substantive rights, the application of that law would not escape scrutiny simply on the grounds that it was procedural in nature. (Paragraphs [26], [28] and [34] at 224A - C, 224H and 226D.)"

In ***Minister of Public Works v Haffejee*** 1996 (3) SA 745 (A), at p753, the court stated that:

> ".. it does not follow that once an amending statute is characterised as regulating procedure it will always be interpreted as having retrospective effect. It will depend upon its impact upon existing substantive rights and obligations. If those substantive rights and obligations remain unimpaired and capable of enforcement by the invocation of the newly prescribed procedure, there is no reason to conclude that the new procedure was not intended to apply. *Aliter* if they are not."

See also ***Maharaj v National Horseracing Authority of Southern Africa*** 2008 (4) SA 59 (N).

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