# Civil procedure: access to justice

**Chris Marnewick SC**
***Durban Bar***

## The challenge

Did Professor Hennie Erasmus[1] throw down a challenge at the feet of practising lawyers, advocates in particular, when he wrote, '*We need in South Africa a body or agency endowed with adequate funds and sufficient skilled, professional research staff to conduct (or support) civil justice policy research and analysis.*'?[2]

The English experience in the run-up to the introduction of the Civil Procedure Rules 1999 which came into effect on 26 April, 1999 may provide some light on the way forward for the profession. It is unlikely that the State will be able to undertake or fund the necessary work. The universities are underfunded and struggling to make ends meet. It may also be suggested that changes to our civil procedure rules require a more concerted contribution from practising lawyers. Who is left standing but the advocates and attorneys? Are we, together, not '*endowed with adequate funds and sufficient skilled, professional research staff*' to take the lead? If we are not, who is?

## Change in England and Wales

The most comprehensive changes in English civil procedure since 1875 came into effect on 26 April, 1999. After years of agitation for change, the two branches of the profession took the lead by appointing a committee under the leadership of Hilary Heilbron QC. There were 21 barristers, 18 solicitors and a number of co-opted members on the committee. The committee produced its report in June 1993, reviewing the business of the courts and making recommendations for change[3]. Its stated aim was '*to awaken consciousness, shake the complaisant, provoke change of culture in the legal system and some urgency into those responsible for the administration of civil justice.*'[4]

It seems that the Heilbron Report led, in March 1994 to the Lord Chancellor's appointment of Lord Woolf to lead a committee of six plus one consultant to undertake a comprehensive review of the civil justice system. The aims of the committee covered three main areas: Firstly, to improve access to civil justice, reduce the cost of litigation, reduce the complexity of the existing rules and modernise the terminology, and remove unnecessary distinctions of practice and procedure; secondly, to produce a single set of rules for application in both the High Court and the County Courts[5], with special provision for specialist jurisdiction in each; thirdly, to consider the role of judges in the handling of cases, the methods used to resolve factual issues and different ways of handling disputes and to make recommendations with regard thereto[6].

The Woolf Reforms are being introduced in phases with the first, the Civil Procedure Rules 1999, referred to as the CPR, coming into force on 26 April 1999. The CPR are accompanied and supplemented by Practice Directions which came into force on the same day. Some teething problems are anticipated, but a number of publications have already appeared to assist the legal practitioner through the transition period of change and unfamiliar procedures and terminology.[7] A number of these have been produced by practising lawyers and even sets of chambers[8].

The changes brought about by the Woolf Reforms are too many and too far reaching to be able to be analysed in a single article[9]. In this article I propose to discuss only three of the many aspects of the Woolf Reforms, the others will simply have to wait. These are, firstly, the new ethos in civil procedure, including the overriding objective of the CPR and active case management; secondly, the multi-track system and thirdly, the introduction of a uniform set of rules for the High Court and the County Courts.

*Chris Marnewick SC*

## The ethos of the CPR

In an interim report Lord Woolf identified defects in the existing system. He said it was too expensive, too slow, too unequal, too uncertain and too fragmented in the way it was organised.[10] He identified a number of principles which he considered the civil justice system should meet in order to ensure access to justice, namely, that it should be just in the result it delivers; be fair in the way it treats litigants; offer appropriate procedures at a reasonable cost; deal with cases expeditiously; be understandable to those who use it; provide reasonable certainty and be effective, by adequate resourcing and organisation.[11]

These principles have developed into the ethos now underlying the CPR. According to the authors of a leading textbook the following principles have emerged from the CPR: '*(a) Litigation should be avoided wherever possible. (b) Litigation should be less adversarial and more cooperative. (c) Litigation should be less complex. (d) The timescale of litigation should be shorter, and more certain. (e) The cost of litigation should be more affordable, more predictable and more proportional to the value, or the complexity, of individual cases. (f) There should be clear lines of judicial and administrative responsibility for the civil justice system. (g) The structure of the courts and the deployment of judges should be designed and allocated to meet the needs of litigants. (h) Judges should be deployed effectively so that they can manage litigation in accordance with the new rules and protocols.*'[12]

## The overriding objective

The CPR expressly provide that the new rules have '*the overriding objective of enabling the court to deal with cases justly.*'[13] The court is

obliged to give effect to the overriding objective whenever it '*exercises any power given to it by the Rules or interprets any rule.*'[14] Previously the courts used the ordinary principles of interpretation in order to determine the meaning and content of the rules of civil procedure. No longer is that the way as the courts are now obliged to interpret the rules in such a way that the overriding objective will be served. This does not mean, however, that all the old precedents automatically lose their force as some of the new rules repeat old principles. The parties are also '*required to help the court to further the overriding objective*'[15], so a different approach is expected of them too. Out go the old tactics and in comes a new mind set, less confrontational and more subtle perhaps.

## Case management by the court

Another novel idea of the CPR is that '*the court must further the overriding objective by actively managing cases.*'[16] Active case management, as defined, includes matters of such drastic nature that one cannot help thinking that an American approach has been introduced[17]. Active case management is defined to include:[18] '*(a) encouraging the parties to co-operate with each other in the conduct of the proceedings; (b) identifying the issues at an early stage; (c) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of others; (d) deciding the order in which the issues are to be resolved; (e) encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such a procedure; (f) helping the parties to settle the whole or part of the case; (g) fixing timetables or otherwise controlling the progress of the case; (h) considering whether the likely benefits of taking a particular step justify the cost of taking it; (I) dealing with as many aspects of the case as it can on the same occasion; (j) dealing with the case without the parties needing to attend at court; (k) making use of technology; (l) giving directions to ensure that the trial of a case proceeds quickly and efficiently.*'[19] The court has extensive powers of management, too numerous to mention here, in order to give effect to the overriding objective.[20] Now consider these aspects of active case management in the light of their likely impact on the pre-trial and trial procedures as we know them. The question is whether we could benefit from similar changes to our own civil procedure.

## The three new '*tracks*'

Three new tracks are created by the CPR. Cases will be allocated to the appropriate track by the court at the outset once the parties have completed the Allocation Questionnaire which is required to be completed by the parties in a process involving consultation and co-operation between them after the defendant has filed his defence.[21] The three tracks are the small claims track, the fast track and the multi-track.[22] The primary factor determining to which track a case will be allocated is the financial value of the claim. Where the value does not exceed £5 000 it will ordinarily be allocated to the small claims track. Between £5 000 and £15 000 the case goes to the fast track. Cases over that value go to the multi-track. There is a discretionary power to allocate cases outside the track indicated by the value of the claim.[23] Each track will have its own procedures which are designed to do justice to the case concerned by a process that takes into account what amount of effort, cost and other resources it would be appropriate to allocate to the resolution of a dispute of that scale.

Cases allocated to the small claims track will be dealt with informally. Hearings will be informal, the strict rules of evidence do not apply, the court need not take evidence on oath and may limit cross-examination.[24] The court may even dispose of the matter without a hearing, if all the parties agree.[25] Reasons must still be given for the decision.[26] The right to appeal is preserved but is limited to the grounds that there was a serious irregularity affecting the proceedings or that the court made a mistake of law.[27] The court on appeal may dismiss the appeal without a hearing.[28] There are also restrictions on the legal costs which may be awarded.[29]

Cases allocated to the fast track will be dealt with on the basis of a thirty week timetable before the trial date.[30] Standard directions will in general apply; no, or very few, hearings will be required before the trial; and the trial should be limited to one day in duration. A typical timetable for a fast track case is as follows: Disclosure – 4 weeks; Exchange of witness statements – 10 weeks; Exchange of experts' reports – 14 weeks; Sending of listing questionnaires by the court – 20 weeks; Filing of completed listing questionnaires – 22 weeks; Hearing – 30 weeks. Time runs from the date of allocation to the fast track.[31] Postponements will be allowed only as a last resort, and then for the shortest possible time.[32] The judge will have read the documents in the trial bundle and may dispense with an opening address.[33] If the trial is not finished on the allocated day, the judge will normally sit the next court day to complete it.[34] For these cases the essence appears to be cost effectiveness and speed.

Multi-track cases are essentially those for which the small claims and fast tracks are inappropriate. These cases will involve values above £15 000, and cases where the value is lower but the trial is likely to exceed one day. Cases where the value of the claim is less than £50 000 will generally be transferred to a county court.[35] The general principles of active trial management will apply to these cases, in both the County Court and the High Court. A comprehensive Practice Direction deals with the aspects of case management relevant to multi-track cases.[36] The court may fix a case management or a pre-trial conference at any time after allocation. If a party has a legal representative, that person must be familiar with the case and must have authority to deal with any issues likely to arise.[37] The court will give directions for the management of the case, including a trial timetable and directions for the conduct of the trial itself.[38] The trial runs continuously until it is completed.[39] The emphasis with regard to multi-track cases seems to be that they should be dealt with according to the new ethos nevertheless.

There are many informative aspects of these provisions which invite some reconsideration of our own system. Some cases need to be dealt with informally, others quickly, and yet others require to be allowed to run their course. Why not distinguish between them at an early stage and deal with them accordingly? Our court rolls are continuously clogged up with relatively small cases which tend to take far more than their fair share of the available resources, including the court and its staff's time. Divorce cases are a good example where aggressive case management by the court could result in large scale savings with regard to the cost of such actions, the time set aside for the resolution of such disputes, and even, hopefully, the early settlement of the case. This will make more of the court's resources available for other pressing matters, including the backlog of serious criminal cases waiting for a hearing.

Another area where the court's resources may be more evenly distributed is the allocation of a date for the hearing of opposed applications. These tend to drift onto a separate roll, where it is almost impossible to get a hearing

without a delay of four or five months[40], and that after the parties have completed the exchange of affidavits. Many of the cases put on this roll are actually hopeless, or could be decided rather promptly, but the judge allocating them to the opposed roll does not know that because he or she is not required to read the papers in matters which have become opposed. The allocation to the opposed roll is made mechanically, without consideration of the question whether the case actually deserves to be dealt with on the opposed roll. There should perhaps be a screening process whereby the Deputy Judge President or the senior judge on civil duty vets these cases before they are placed on the opposed roll and directs the bad or indifferent ones to an early hearing before a judge who can cope with ten or fifteen such cases in a day. The backlog will soon disappear.

## A uniform set of rules

There are two respects in which the CPR can be said to be uniform. Each constitutes an advantage over the system we have in South Africa. In the first place, the CPR with its accompanying Practice Directions applies to all claims commenced after 26 April 1999 in any County Court, in the High Court and the Civil Division of the Court of Appeal.[41] Where special procedures are called for, they are to be provided for under Rule 49 and include such business as admiralty, arbitration, commercial and mercantile actions, intellectual property and the like.[42] In the second place, the procedures of the County Courts have been synchronised with those of the High Court.

Each rule of the CPR is accompanied by a comprehensive Practice Direction which sets out additional principles which will be applied in pursuit of the overriding objective to deal with cases justly. These principles are the same for all the areas of England and Wales. In South Africa there is Babylonic confusion, to put it mildly, in the different approaches followed in the different divisions of the High Court and also in the different magistrates' courts. No single set of practice directions has been adopted and it is not even known whether the various judges president collaborate with one another when they lay down practice directives. The result is that attorneys and counsel litigating outside their home jurisdiction often find themselves stymied by some obscure practice or directive. Uniformity, it seems, is not actively pursued, nor even advocated by the profession.

Examples abound, but a few need to be mentioned. In Cape Town judges sit only four days of the week in trials when judges elsewhere in the Republic seem to manage five. The result is that a trial in Cape Town may take longer and may be more expensive than elsewhere and may involve the legal representatives in greater inconvenience, especially when they come from other provinces. The awaiting trial list is also longer than it should be, by about 20%, one should imagine. In Johannesburg and even Pretoria there are special rules, or so its seems to the outsider, with regard to the allocation of trial dates and judges to hear cases. Even if the parties were to think that their case is ready to proceed, they may find to their horror and expense that the allocating judge disagrees on the evidence of the date when the Rule 37 conference was held. What seems to matter is not what the parties achieved in getting ready for the trial but when they did so. Durban has its own problems, as it is a notoriously tough jurisdiction to get an urgent shipping trial heard, especially if it were to require more than two or three days of court time. The fact that the coastal jurisdictions of the High Court have been favoured, or cursed, depending on one's point of view, with almost exclusive jurisdiction under the Admiralty Jurisdiction Regulation Act 105 of 1983, coupled with the fact that Durban is the busiest port in Africa, some say the Southern Hemisphere, merely increases the clients' frustration and their lawyers' embarrassment when faced with their inability to speed things up. Umtata has a different problem. Local advocates are allowed to accept multiple briefs for the same day, apparently because there are so few of them. The result is that their second and third cases stand down while they run the first, to the obvious detriment to their out of town opponents and the latter's clients.

Over the years the various divisions of the High Court have slowly drifted apart in the practice directions which have been introduced in individual courts. Some of these have statutory force, for example, Rule 37A which introduced special pre-trial procedures for cases in the High Court sitting in Cape Town. In Johannesburg practice directions cover a host of subjects, including Rule 37 conferences. The expedient of a rule nisi has also been banned from the precincts of that court when it is alive and well elsewhere in the Republic, including, it appears, in Pretoria. How does one explain these differences to a student, or even a pupil? A further problem arose during the apartheid years when '*independent*' homelands promulgated their own amendments to the Uniform Rules and more often than not did not follow suit when the Uniform Rules were amended in the rest of the country. Until earlier this year the Umtata High Court ran on a different set of rules from those applicable to the rest of the courts in the Republic. This little problem took five years to fix.

A uniform set of practice rules is long overdue in South Africa. The CPR is a good example of what could be done to achieve uniformity. The CPR has also done away with the dichotomy which previously existed in England and Wales between the procedures of the High Court and those of the County Courts. The County Courts, like the South African magistrates' courts, are creatures of statute. They were originally created by the County Courts Act 1846.[43] The Rules of the Supreme Court 1965 and the County Court Rules 1981 were replaced by the CPR. Apart from the fact that students and legal practitioners will no longer have to learn and apply two slightly different sets of procedures, they no longer have to buy and manage two sets of rules, each with its monthly or quarterly revisions. And one textbook on the subject suffices. We could do with a bit of that medicine here.

Harmonising the procedures of the magistrates' courts with those of the High Court may have other advantages too. Consider how long it took for the common law procedure of *namptissement* to be introduced in the magistrate's court. (It took until 1994.[44]) It is perhaps also time to reconsider the removal of the jurisdiction of the magistrate's court over maritime claims. This occurred, unannounced[45], if not by oversight, when the Admiralty Jurisdiction Regulation Act 105 of 1983 came into effect. A large number of causes of action which previously fell within the jurisdiction of the magistrate's court thenceforth fell within the definition of a maritime claim, with the result that the High Court sitting as an admiralty court now has exclusive jurisdiction[46] over such claims even if the value and subject-matter of the claim should otherwise be within the jurisdiction of the magistrate's court.[47] The problem is exacerbated by the favoured status of the coastal divisions of the High Court. Perhaps the answer is to give the magistrate's court jurisdiction over maritime claims which are pursued *in personam* and which are within their ordinary territorial and monetary limits, with a special provision synchronising the ranking of claims.

Until that is done, collisions between boats on the Vaal dam or Limpopo river will have to be litigated in one of the coastal divisions of the High Court even if the claims are small, with all the expense and inconvenience that may entail.

## Conclusion

The last comprehensive review of the rules of civil procedure in the High Court took place in the 1960s and resulted in the Uniform Rules of Court being introduced in 1965. The first efforts to create a uniform set of rules had been made in 1924. Various attempts thereafter '*fizzled out*', as the Minister of Justice in 1965 wrote.[48] The purpose of the Uniform Rules was to introduce a set of rules which would be applied uniformly throughout South Africa. However, since their promulgation the procedures which are applied in the various courts have diverged to some extent. There is less uniformity now than before, although some problems have been resolved recently. A comprehensive review seems to be required, but who is going to take up Professor Erasmus' challenge? Who is going to lead our Heilbron committee? The two branches of the organised profession appear to be the only bodies endowed with the funds and the skills to do the job. They also have a direct interest in the matter at hand. The question is whether we have the will to accept the challenge. Do we?

## Endnotes

1 Erasmus "Rules Board" 1999 March *Consultus* 29 at 30.
2 Why does it feel as if he is talking to us?
3 Jacob (ed) *The Supreme Court Practice* 1995 (the '*White Book*') Vol I viii-ix.
4 Why, again, does it feel as if they were talking to us?
5 The two courts were distinct and each had its own separate procedural systems in the Rules of the Supreme Court 1965 and the County Court Rules 1981 respectively.
6 Jacob *White Book* Vol I ix.
7 For example, The Lord Chancellor's Department *Civil Procedure Rules* (sold out and reprinted twice already since 29 January, 1999!); Grainger and Fealey *Introduction to the New Civil Procedure Rules*; Vincent and Stevens *Jordan's Civil Court Service*; Plant (ed) *Blackstone's Guide to the Civil Procedure Rules*; Di Mambro *Butterworths Civil Court Manual 1999*; the Sweet & Maxwell *Civil Procedure: The Civil Procedure Rules 1999*; Barnard, Galberg and Lonsdale *Woolf Reforms: A Practitioner's Guide*; Wilberforce Chambers *Essential Civil Procedure Rules*. Expected to be available shortly are Simons *Civil Courts Practice & Procedure Handbook 1999-2000 including Civil Courts Guidance Notes*; Green *New Civil Procedure Rules* and the Butterworths *Civil Court Practice 1999* (the new '*Green Book*').
8 What example are they setting for us here?
9 The changes include pre-trial protocols to encourage early exchanges of information, user friendly court forms, statements of case in plain English rather than the stilted form of current pleadings, limitations on the disclosure of documents and the limitation of the cost of disclosure, (previously called discovery), the joint appointment of experts to report in writing to the court, a new test for summary judgment, which either party may now apply for, new rules for payments into court and offers to settle, and increased efficiency through the use of modern information technology.
10 Plant (ed) *Blackstone's Guide to the Civil Procedure Rules* 3-4.
11 Plant (ed) *Blackstone's Guide to the Civil Procedure Rules* 4.
12 Plant (ed) *Blackstone's Guide to the Civil Procedure Rules* 4-5.
13 Rule 1.1.
14 Rule 1.2.
15 Rule 1.3.
16 Rule 1.4 (1).
17 There a case is assigned to a particular judge early on and that judge then keeps a tight rein on the procedures from beginning to end.
18 I quote this rule in full because its contents can hardly be improved upon by paraphrasing and because it is such a good example of the simplicity of language the CPR set out to achieve in the first place.
19 Rule 1.4 (2).
20 Rule 3. These powers include the power to give directions to the parties and their legal representatives, to extend or shorten time limits, to adjourn or bring forward hearings, to stay proceedings, to consolidate proceedings, (Rule 3.1 (1)), to exercise its powers *mero motu*, (Rule 3.3), to strike out a statement of case, (Rule 3.4), to impose sanctions on defaulting parties, (Rules 3.7 to 3.9), and to rectify errors of procedure, (Rule 3.10).
21 Rule 26.3 and Practice Direction 26.
22 Rule 26.1 (2).
23 Rule 26.8.
24 Rule 27.8.
25 Rule 27.10.
26 Rule 27.8 (6).
27 Rule 27.12 (1).
28 Rule 27.12 (3).
29 Rule 27.14.
30 Rule 28.2.
31 Practice Direction 28.3.12.
32 Practice Direction 28.5.4 (5) and (6).
33 Practice Direction 28.8.2.
34 Practice Direction 28.8.6.
35 Practice Direction 29.2.2.
36 Practice Direction 29.
37 Rule 29.3.
38 Rules 29.2 and 8.
39 Practice Direction 29.10.
40 In the Durban and Coast Local Division, for example.
41 There are excepted procedures such as insolvency proceedings, family proceedings, certain probate proceedings, Prize court proceedings and proceedings under Part VII of the Mental Health Act 1983; Rule 2.1 (2).
42 It is clear from the nature of the exceptions that the new ethos is principally to serve in the types of litigation in which ordinary people are likely to get involved and not so much the more esoteric and specialized litigation of admiralty and patent disputes, for example.
43 *Halsbury's Laws of England* 4th ed Vol 10 para 1.
44 GN R498 of 1994 as corrected by GN R625 and GN R710 of 1994.
45 The magistrate's court and its jurisdiction are not even mentioned in the Admiralty Jurisdiction Regulation Act 105 of 1983. It is not even stated in the Act that the jurisdiction of the High Court sitting as an admiralty court is exclusive.
46 In *The Wave Dancer: Nel v Toron Screen Corporation (Pty) Ltd and another* 1996 (4) SA 1167 A at 1176H Scott JA wrote that the '*intention underlying s 7(2) is undoubtedly that maritime claims are to be heard by the Court exercising its admiralty jurisdiction and by no other Court.*'
47 The reason for removing the jurisdiction of the magistrates's court over such claims is apparently that it was necessary to do so in order to overcome the problem of conflicting rankings of claims between admiralty law and the common law. See *Trivett & Co (Pty) Ltd and Others v WM Brandt's Sons & Co Ltd and Others* 1975 (3) SA 423 A for an example of that conflict.
48 See the Preface to the first edition of Nathan, Barnett & Brink *Uniform Rules of Court* (1965).