

Rules Board

What is needed is a body to conduct civil justice policy research and analysis

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The background*

The rules of the higher courts in South Africa ultimately derive from the rules of the Supreme Court of the Colony of the Cape of Good Hope which were made under authority conferred by the First Charter of Justice, constituted by Letters Patent of 24 August 1827, and the Second Charter of Justice, constituted by Letters Patent of 4 May 1832. Section 46 of the Second Charter conferred upon the Supreme Court a very extensive rule-making power. This section remained for the next ninety years the foundation of most statutory grants of rule-making power in Southern Africa.

With the establishment of the Union of South Africa, sections 107 and 108 South Africa Act of 1909 conferred power, subject only to approval by the Governor-General-in-Council, on the judges to make rules for the conduct of the proceedings of the various divisions of the Supreme Court of South Africa. This power was confirmed in 1959 by section 43 of the Supreme Court Act 59 of 1959.

The judges of the superior courts were at one time also given the power to make rules for the lower courts. In the Cape Colony the power to make rules for the lower courts was originally, by section 49 of the Charter of Justice, vested in the Governor acting "by and with the advice" of the Chief Justice and other judges of the Supreme Court. The idea of a statutory "Rules Board" for lower courts seems to have originated in Natal. Section 80 of the Magistrates' Courts Act 22 of 1896 (Natal) provided for the establishment of a Rules Board consisting of the Crown Solicitor, a magistrate appointed by the Governor and a person appointed by the Committee of the Natal Law Society.

In 1917 the position of the lower courts in the Union of South Africa was re-organised by the consolidation of the various provincial ordinances and Acts into the Magis-

trates' Courts Act 32 of 1917. The Act followed the Natal example and vested the power to make rules for the lower courts in a Rules Board and not in the judges. The Rules Board was retained as the rulemaking body for lower courts in section 25 of the Magistrates' Courts Act 32 of 1944.

The Rules Board

In 1983, in its Fifth and Final Report, the *Commission of Inquiry into the Structure and Functioning of the Courts* (RP 78/1983) supported the establishment of a "single rules board... for both the Supreme Court and the lower courts". As a result the Rules Board for Courts of Law Act 107 of 1985 ("the Act") was enacted. The Act repealed section 25 of the Magistrates' Courts Act 32 of 1944 and parts of section 43 of the Supreme Court Act 59 of 1959, and brought into being a new body called the Rules Board for Courts of Law. The Act came into operation on 20 February 1987. According to its long title, the purpose of the Act is to establish a Rules Board for Courts of Law "For the making of rules for the efficient, expeditious and uniform administration of justice in the Supreme Court and the lower courts". All the matters on which the Rules Board may make rules are set out in great detail in paragraphs (a) to

(t) of section 6(1) of the Act. Initially "Supreme Court" was defined in such a way as to exclude the Appellate Division of the Supreme Court, i.e. the Chief Justice and the judges of appeal were not deprived of the power to make rules for the Appellate Division. The definition was changed by the Judicial Matters Amendment Act 77 of 1989 so as to include the Appellate Division. In the result the judges were deprived of "ancient" powers conferred upon them as long ago as 1827 and the rule-making power for both superior and inferior courts now vests in a body appointed by the executive.

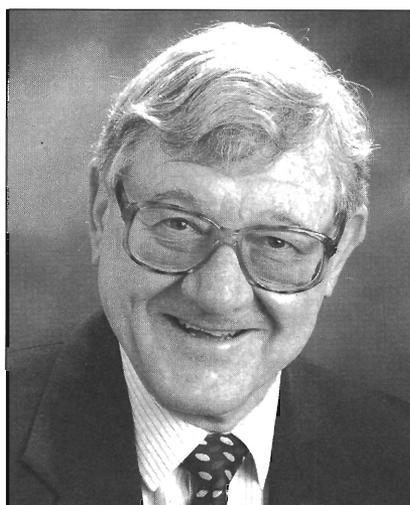
Section 6(1) of the Act provides that the Board may

"... from time to time on a regular basis review existing rules of court and, subject to the approval of the minister, make, amend or repeal rules for the Supreme Court and the lower courts..."

Section 6(8) of the Act provides that the Rules Board may also make rules in relation to the application of the Admiralty Jurisdiction Regulation Act 105 of 1983. The result of these provisions is that there are any number of specialist courts with their own rules which differ from those of the regular courts and which are not made by the Rules Board (for example, the rules of the Small Claims Courts; the rules of the Income Tax Appeal Court; the rules for the conduct of proceedings in the Labour Court and the Labour Appeal Court; the rules of the Land Claims Court and the Constitutional Court rules.)

In terms of section 3 of the Act the members of the Rules Board are appointed by the Minister of Justice. The Rules Board consists of the following members:

(a) a judge of the Supreme (High) Court, >



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* See H J Erasmus "The History of the Rule-Making Power of the Supreme Court of South Africa" (1991) 108 SALJ 476.

- whom the minister designates as the chairman;
- (b) a judge or retired judge of the Supreme (High) Court, whom the minister designates as the vice-chairman;
- (c) a magistrate appointed under section 9(1) of the Magistrates' Courts Act 32 of 1944;
- (d) two practising advocates, after consultation with the General Council of the Bar of South Africa;
- (e) two practising attorneys, after consultation with the Association of Law Societies of the Republic of South Africa [the name of the society should be amended in view of recent developments];
- (f) a lecturer in law at a university in the Republic;
- (g) an officer of the Department of Justice;
- (h) not more than three persons who, in the opinion of the Minister, have the necessary expertise to serve as members of the Board.

The members are appointed for five years and may be reappointed.

Section 9 of the Act makes provision for the appointment of a secretary and "such other officers and officers and employees as may be required" to do "the work incidental to the performance by the Board of its functions". The Board has always had the support of secretarial and administrative staff, but the provision of professional and research staff has been either inadequate or non-existent.

The chairman of the first Rules Board constituted in 1987 was Vivier JA. When the term of office of this Board expired in 1992 there was a gap of about two years before Zulman JA was appointed. The present Board is chaired by Ngcobo J.

Through the years the Rules Board has for the most time played a reactive role, i.e. it responded to representations made to it. The one pro-active step taken by the Board which stands out was the abolition with effect from 1 January 1988 of requests for further particulars for purpose of pleading. Perhaps too much of the time of the Board has been taken up through the years by representations regarding tariffs of fees for practitioners and sheriffs. A positive, pro-

active approach by the Board, initiating research, eliciting specialist reports and the like, will require time, funds and skilled manpower which are simply not at the disposal of the Rules Board.

The Future?

The lack in South Africa of a permanent entity dedicated to study and research to improve the machinery of civil justice is disturbing. The modern trend in common law jurisdictions (and as far as civil procedure is concerned we are a common law jurisdiction) is to establish bodies which keep the civil justice system under constant review and develop proposals for improvement by wide-ranging and penetrating research on every aspect of the civil process.

In the United States, the Federal Judicial Center was established in 1968, followed soon thereafter by the formation of entities such as the Institute for Court Management, the National Center for State Courts and the RAND Institute for Civil Justice. The mission of the latter is –

"to help make the civil justice system more efficient and more equitable by supplying policy-makers and the public with the results of objective, empirically based analytical research."

In Australia, two research institutes dedicated to the improvement of the operation of judicial system have been established: the Australian Institute of Judicial Administration in 1976, and the Civil Justice Research Centre in 1989. The latter was established by The Law Foundation of New South Wales, the impetus for its establishment being –

"a recognition that, while there was much debate on issues in the civil justice area, this debate was not based on factual information but rather on impressions and anecdotes. It was decided to establish the JCR to provide independent and objective empirical research to address the specific needs of policy-makers in the civil justice area."

In Canada, the Ontario Law Reform Commission has been involved in comprehensive research for the Ontario Civil Justice Review. Lord Woolf's appointment in 1994 to review the current rules and procedures of the civil courts in England and Wales was not an *ad hoc* measure but part of a

continuing process: the proposals contained in Lord Woolf's final report (which appeared in July 1996) have since been the subject of further study, research and development (by way of working groups, consultation papers and the like) in the Lord Chancellor's Department.

There must obviously be some statutory body which makes and implements policy decisions for the improvement of civil justice. In common law jurisdictions, it is today generally recognised that policy decisions for the improvement of civil justice should be underpinned by careful research and analysis, based on sound empirical data. Professor Robert Black of Edinburgh University has said in this regard that

"procedural reforms achieve nothing if they are simply conjured out of thin air (or out of the – perhaps atypical – experiences and prejudices of particular judges and practitioners)".

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.* 

* Readers are invited to comment and submit proposals on the improvement of the rules of court - Editor.

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