Waiving the rules…or not?

Judge Monus Flemming, who was Deputy Judge President of the Witwatersrand Local Division from 1990 to 2002, and intimately involved in the development of the first 'Practice Manual', offers a personal perspective on the issues raised in the article 'The supremacy of the Constitution and the rule of law in theory and practice (manual/directive)'

THE BOTTOM LINE of the article by John Peter SC ('Peter') in *Advocate* of December 2014 at 32 is that the adoption and 'enforcement' of practice directives are in breach of the judicial oath to uphold the Constitution.

Nobody denies that inherent jurisdiction, which can be relevant for justice in a particular dispute, can be used to prescribe how 'proceedings' should routinely be handled. Peter, correctly, states that after 1985 [1] judges president could make rules only, in a nutshell, about the set down of cases. No other judge could create a court rule. But judges have for many decades employed practice directives.

Judges who created directives, or who created systematic expositions of directives, have never sought justification for this in some power of rule-making. They often emphasised that Manuals did not alter the role of the judge. Surely the announcement [2] of something that does not have the force of law does not endow that something with such force.

There are basic differences. A court rule is law. It, therefore, binds a judge except insofar as a rule or other law permits deviation. It also binds parties subject to deviation as provided for under the court rules. That normally requires a deliberate formal decision to condone, extend or rescind even when the procedure is allowed to be informal. Deviation from a directive is allowed on a discretionary ad hoc basis whenever it is sufficiently advisable, maybe without initiative necessarily emanating from a party.

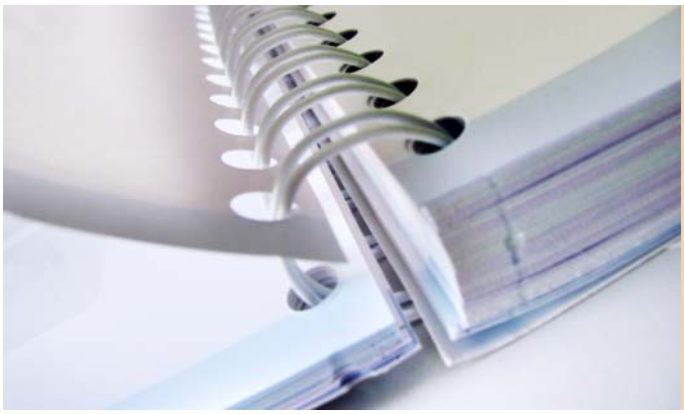
Peter provides no proof of a practice, formally announced or not, acquiring the nature of a legal rule. If rule and directive conflicted with respect to motion court enrolment for Tuesdays, the remedy was that the directive was held as pro non scripto. Peter's article shows that judges have not held back on considering validity issues relating to rules or practices. [3]

I think Peter makes a leap in logic. He equates a practice directive with a rule for the mere reason that the there is some similarity between the two in respect of routine operation. That similarity is that a judge will in the case of each require compliance and that some deviations may lead to costs orders. That does not imply that they are legally of the same nature and binding effect. The reason in each case for requiring complying, and also for adhering, differs. Compliance with a rule is because the law binds you. Against this an attorney will honour a practice (unless convinced that circumstances call for deviation) in the interests of his client and in the context that predictability, certainty and effectiveness are in everyone's interest. When his deviation causes harm or prejudice to another party, an order relating to costs may be justified. That occurs because of such harm and not because the judge thinks a directive is law in the abstract. The possibility of review or appeal tends to discourage overstepping the bounds of propriety when it comes to cost orders.

I mention one other matter of logic. I do not kill my six cows because one of them has terminal cancer. Peter states at p.34 that never mind the initial intentions, 'the Practice Manual has morphed into detailed, complex and *hard rules* of procedure' (My emphasis. I think he has one of the recent Gauteng Manuals in mind (he speaks in the singular). But even if Peter's view is correct in this one instance, it does not follow that each application of directives through the decades and in all Divisions is now in breach of the judicial oath).

PETER RAISES non-constitutional matters, mainly the causing of surprise and bewilderment, intricacy, and overmuch detail. At least some of his unhappiness may arise from being wrong about history and other facts. Let me start with personal notes. In the six years from the Supreme Court Act, 1959 to the 1965 uniform rules, I was the lecturer at university inter alia on procedure and on contracts including hire-purchase. Therefore, and at the Bar, I participated in representations preceding the adoption of the rules and in the final Pretoria conference under the chairmanship of Judge Hiemstra. By 1965 the first edition of my *Huurkoopreg* was published.

For those three activities I needed to know what courts were doing, in particular in respect of applying section 12(b) of the Hire Purchase Act, 1942 when the creditor did not have possession of the goods. There was more than one judgment from north of the river and I suspected that each was given unaware of the other. For that reason and because things may have changed with the lapse of time, I 'phoned acquaintances at the Johannesburg and Pretoria bars, competent men with good practices. They phoned back saying that despite enquiries they did not know whether any specific practice was being followed and if so what the practice was. So, how does one find out? I was briefed in a criminal appeal and did not file heads of argument as no rule required heads, but the Transvaal Bench was insistent that it must strike the matter from the roll. Eventually, as reported in Prentice Hall reports, they relented 'in view of counsel's membership of another Bar'. [4] More to the point were lack of communication, of knowledge and of system.



Peter's article should serve as a warning against non-Manual changes. It warns against frequent and hasty changes. And it warns that excessive content, even if it helps the 'new', contributes to what is described as bewilderment and making things intricate.

The other person-factor was Judge Coetzee. Even before he was appointed as DJP he was frustrated by the persistent lack of regard by practitioners for his rulings about compromises with creditors. Shortcomings led to postponements. Some parties merely re-enrolled before another judge who could not care about or, probably, was unaware of, these rulings. Others did make necessary rectifications, but a different attorney would in the next case be ignorant of Coetzee J's findings. The judge was a determined man who would not abide by what he believed was wrong and he had a very strong personal presence that made some people uncomfortable, yet he was open to an opposing view [5] When he once more complained, I suggested that he circulate a written example to practitioners. That explains why he included so much material about such compromises in the first *Practice Manual*.

Judge Coetzee and the Judge President were amenable to such a document that would increase access to knowledge of, and clearer definition of, other practices. [6] He dubbed his creation 'Practice Manual' instead of e.g. 'Current Directives'. After consultations the 1985 Manual saw the light. In 1993 I wrote a revised version, inspired mainly by the need to adapt to amended legislation and court rules, the computerisation that I was at the time 'writing', and new perspectives. During my last long leave in 2002 I 'wrote' a revised edition. The Judge President directed that Judge Joffe take over from me. Judge Joffe played his role up to the 2009 edition (January 2010) which was the 4th edition, not the 3rd.

PRETORIA drafted its own needs on the aspects now governed in chapter 9 of the Manual. But it also acted outside the Manual. One pre-2003 Pretoria DJP and, on at least one occasion, a puisne judge, issued directives for Pretoria. [7; 8] I did not attempt to make them part of the Manual but on getting to hear of them I took them to the usual process.

It is clearly undesirable that loose fragments again arise. That which arises with an own existence alongside a Manual destroys the reliability of the Manual as effective for ascertainable certainty. It contributes to what Peter describes as a 'maze of intricacies'. Fragments tend to arise, sometimes with a need soon to be withdrawn or to change, without full prior consultation or on short notification.

In the period up to the beginning of 2003 no change in the Manual was taken up without proper process. A formulated proposal, often with an explanation, was sent out to each judge, the attorneys general, the two Bars, two attorneys' associations, the Law Society, the registrars and, on occasion, to more. (About abolishing the now recognised as silly need to hand up the liquid document on which you seek provisional sentence, I telephonically consulted with every Judge President in the country.) Responses were taken up with the Judge President. Notice of implementation was given. [9]

I now confine my comments to the period between 1993 and 2002. The correspondence files of interested parties and instruction sheets of the publishers will show that the Manual underwent fewer than one announcement of change per year.

Peter does not argue that up to 2004 there was any rule-making or surprises in Johannesburg. The aforesaid process would have prevented that. Any surprises would have been because of inadequate communication by or within an advocates' group As to Pretoria, I believe Peter when he says that what he 'thought to be the procedure in Pretoria' had, as he was informed, been very recently changed by a missive of the DJP. That would have been the one pre 2003 Pretoria DJP. [10] I do not know about post 2002 Pretoria.

Peter's article should serve as a warning against non-Manual changes. It warns against frequent and hasty changes. And it warns that excessive content, even if it helps the 'new', contributes to what is described as bewilderment and making things intricate. Overregulation is when a step or process involves more than is necessary to have it work effectively. Overregulation sometimes manifests itself when it expands the number of steps to be taken or the bureaucratic steps of note-and-inform and report-and-mark-and-notify. The temptation is there to become a summariser of the law and/or a purported creator of law. [11 12]

Peter may be right in saying that at some places directives have currently become too detailed and difficult to handle and even go beyond the limits for a 'directive'. I have made no study. However, first, Peter's objection should not generalise. Secondly, those qualities are related to what a Judge President does and not to the nature of directives. Thirdly, a source of serious complexity comes from the need to comply with the Constitutional Court's new angles as embroidered by other courts, that lead to lists of considerations relating to discretion, proof of service, contents of summons and affidavits, and otherwise. The answer may be that we need legislation in any event to correct what the Constitutional Court has created. Until then a proper Practice Manual may just facilitate getting through some of that maze. Fourthly, he might call for more critical assessment whether, a Manual not being a forum to

educate, a particular directive-to-be is really necessary in the full sense of the word. Lastly, even if he does sit as a presiding judge to be closer to events, a judge president cannot be aware of what irritates or confuses in all other courts and beyond. Counsel must inform him also of wrong application of his Practice Manual. The Bar Council should assist him, when necessary by passing on 'complaints' without disclosing the identity of counsel, and certainly should not use an own assessment of what the JP ought to think as a reason to clog the information route. A

Endnotes

1 Before 1985 the basic rule-making power was vested in the Chief Justice.

2 At p.35 Peter takes umbrage at the fact that the Gauteng Manual was 'under authority' of (only) the DJP. Not so. Every manual was approved by the Judges President. The Transvaal DJPs were the active ingredients and communication channels. All DJP appointments were as DJP of the TPD, sometimes 'with main duties in' Johannesburg (not in the WLD'). Under the Supreme Court Act, 1959, the WLD was still the Circuit Local Division for the Witwatersrand. A circuit court of the TPD could not have judges of its own or a Division elsewhere. That is why plaintiffs suing Meyerton defendants had to go past Johannesburg to Pretoria as the court of area-jurisdiction, etc.

3 In the *Harmony Caterers* case the Court was not dealing with a practice directive but with rule-making by a Judge President. The *National Pride* and *Several Matters* cases show differences in legal interpretation but both accept that a directive has no force if it conflicts with a Court Rule. (I note in passing that Peter's article shows that the Judge President did not in 1977 purport to decree deviation from a Rule. The Rule came 10 years later.)

4 *Zonda* v *Staat*, 1966 (1) H 206 illustrates striking off. Was the lawyer un-derinformed?

5 It is those qualities that enabled him to turn around the 1970s decision to raze the current Supreme Court Building in Johannesburg. Instead of a bust in the foyer in recognition, he suffered some responses akin to that bestowed upon judge L.C. Steyn.

6 Another main purpose of the Manual was to protect parties and practitioners against inconsistency and unpredictability among judges. Inter alia paragraph 5 of the Afrikaans introduction of the 2002/2003 Manual formulates '(dat) maklike bewys van 'n praktyk of die afwesigheid daarvan beskerming gee teen ongegronde aansprake'.

7 Own directives contributed to an unfortunate difference between the official position and what happened in practice. Up to 2003 Manuals were before judges and others as applying to both Pretoria and Johannesburg courts. The contents prove the intent. They were approved. Yet something went awry. Perhaps it was a sense of independence or it was sensed that the 'mining dump' court was an annexure to Pretoria and therefore should not be a (sole?) 'source', of directives; and judges 'knew how to do their work'. A rather sneering nickname, 'Oom Gert vertel' arose early.

8 A second reason for the divergence of uniformity is probably that the hearts of practitioners and judges were not fully behind all changes. In particular the insight of van Zyl (Judicial Practice) in 1893 that In South Africa rules nisi were really a series of little interdicts, was not for Pretoria in 1993. Practitioners apparently tried the old way and got away with it, presumably because in the circumstances of urgency the delay and hassle of amending pages were handled by judges as reason to deviate from the Manual. Deviation became the rule. But the reasons may lie deeper. History shows that directives do require a degree of 'hardening' (Peter's word) in particular against non-compliance with new methods. In time, after judge president Moll's retirement, the Manual to some became a game played on the Johannesburg course.

9 In the interests of accuracy, I admit that while I acted as Judge President I changed the Pretoria distribution of matters on motion court rolls immediately registrars were allowed to grant default judgment. There was another 'urgent' change. In the Manual we adopted a different way of handling urgent applications. We also changed the model of the Anton Piller order. Whereas the preceding set-up guaranteed an opposed anticipating of the 'return date' in an Anton Piller matter on the first court day after execution of the order, the new practice directives eliminated the come-backs except the one (reported) in which a weakness about the issue of legal costs became apparent. Judge van der Westhuizen, then a Pretoria judge sitting in Pretoria, honoured the Manual as in fact applying in Pretoria. Yet amendment of the standard order in the Practice Manual was held over to a routine annual check-up of the Manual.

10 Unfortunately Pretoria-specific directives outside the Manual made the statement in the Transvaal Manual sound hollow where it sought certainty and an end to 'my own practice has been', by proclaiming that if something is not taken up *in the Manual*, that something is not a practice or directive at all. The mere existence of those DJP missives and the divergence of practice that the Judge President could not or would not stop, had the effect that the promotion of Pretoria-Johannesburg uniformity started to fail towards 2000. From 1985 it was in fact hoped that the Manual would so prove its value that other Divisions would follow and so promote uniformity of practices. Some thirty years later some other Divisions have introduced Manuals but with limited attempt at uniformity and, unfortunately to my mind, with some 'lecturing' on court decisions and some reminding of selected court rules. Where Judges-President conform, someone else can publish with notes about law, rules, practices, court decisions and explanations and reasons.

11 When reading *Advocate* I had just written a draft article suggesting that the North Gauteng Practice Manual's defining of 'advantage to creditors' as requiring a 20c dividend is, if not wrong in law, not proper for a practice directive. Is that not a directive that has speedily morphed into the hardness of a rule?

12 I noticed a new thing: An explanation within a practice directive of a practice directive by stating its background can be seen in a Johannesburg directive of 2013. That adds to volume and is better left for others. And Peter might have added that even if a judge did not know that the Hague Convention had been made part of our law, it does not justify Johannesburg directive 1 of 2009 to state an exposition of law plus matters that should be dealt with by internal instructions. Requiring the practitioner to mark the matter as involving the Hague Convention is external but justifies comments. Without that marking staff will have to read the papers and know the law to be able to comply. It must also be remembered that a judge has no authority to issue orders to staff. Also not in a practice directive. It is the registrar's area.