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NOTES

PENDING SUITS IN THE MAGISTRATES' COURTS — THE EFFECT OF THE LACK OF TRANSITIONAL PROVISIONS IN THE NEW RULES OF COURT

DANIE VAN LOGGERENBERG
Extraordinary Professor of Law, University of Pretoria
Member of the Pretoria Society of Advocates

On 15 October 2010 the rules regulating the conduct of the proceedings of magistrates' courts were repealed and replaced by a comprehensive set of new rules (GN 888 *GG* 33620 of 8 October 2010). The new rules were made, and the old rules repealed, by the Rules Board for Courts of Law in the exercise of its power under s 6 of the Rules Board for Courts of Law Act 107 of 1985. The new rules do not contain any transitional provisions. A question therefore arises whether suits that were pending in the magistrates' courts on 15 October 2010 are governed by the old or new rules.

Hitherto in our law a general distinction between substantive law and procedural law has been recognised as one of the factors to take into consideration in determining whether a law (the word 'law' is used in a wide sense as meaning an enactment having the force of law and, therefore, includes rules of procedure) has retrospective effect; in other words, whether it applies, inter alia, to suits that were pending on the date of its coming into operation. As a general rule, the law applies retrospectively if it is merely procedural in nature. If it is of a substantive nature, it does not apply retrospectively (see, for example, *Curtis v Johannesburg Municipality* 1906 TS 308 at 312; *Euromarine International of Mauren v The Ship* Berg *& others* 1986 (2) SA 700 (A) at 702D–F; *Transnet Ltd v Ngcezula* 1995 (3) SA 538 (A) at 549C–I and *Minister of Public Works v Haffejee NO* 1996 (3) SA 745 (A) at 752G–753B).

The fundamental and decisive enquiry in determining whether a law operates retrospectively is that of ascertaining the intention of the legislature (see, for example, *Adampol (Pty) Ltd v Administrator, Transvaal* 1989 (3) SA 800 (A) at 809F–J; *Swanepoel v Johannesburg City Council; President Insurance Co Ltd v Kruger* 1994 (3) SA 789 (A) at 794A–C; *Euromarine International of Mauren v*

The Ship Berg (supra) at 709I–710E and *Transnet Ltd v Ngcezula* (supra) at 549D–F). The reason for this is that, to place the categorisation of the statute (ie law) as being either one of substantive or one of procedural law in the forefront of the enquiry as to the retrospectivity of the statute, may lead one astray (*Transnet Ltd v Ngcezula* (supra) at 549E).

The problem with the new rules is that they simply do not contain any transitional provisions or any other provisions from which the intention of the Rules Board as to their effect on pending suits can be ascertained. It is therefore not possible to direct an enquiry into the language of the rules and the purpose and intent disclosed by such language.

As the primary rule cannot be applied, resort must be had to the rule based on the distinction between substantive law and procedural law. The effect of this rule has been summarised as follows by Marais JA in *Minister of Public Works v Haffejee NO* (supra) at 753B–C:

> 'In other words, 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.'

In the course of his judgment, Marais JA referred to the following statement in the English case of *Yew Bon Tew v Kenderaan Bas Mara* [1982] 3 All ER 833 (PC) at 839d–f:

> 'Whether a statute has a retrospective effect cannot in all cases safely be decided by classifying the statute as procedural or substantive. . . . Their Lordships consider that the proper approach to the construction of . . . (an Act) . . . is not to decide what label to apply to it, procedural or otherwise, but to see whether the statute, if applied retrospectively to a particular type of case, would impair existing rights and obligations.'

It is submitted that in determining whether the new rules, if applied retrospectively to a suit that was pending on 15 October 2010, would impair a litigant's existing 'rights and obligations' it must be recognised that (a) procedural law is based upon a set of independent fundamental principles constituting rights and obligations (see, in general, Wouter de Vos *Grondslae van die Siviele Prosesreg*, unpublished LLD thesis, Randse Afrikaanse Universiteit, 1987; Danie van Loggerenberg *Hofbeheer en Partybeheer in die Burgerlike Prosesreg: 'n Regshervormingsondersoek*, unpublished LLD thesis, University of Port Elizabeth, 1987; Corlia van Heerden *Voorbereiding vir Verhoor ter Verwesenliking van die Waarborg van 'n Billike Siviele Verhoor*, unpublished LLD thesis, University of Pretoria, 2004), and (b) s 34 of the Constitution of the Republic of South Africa, 1996, affords everyone the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before, inter alia, a court.

The fundamental principles of civil procedure include:

(i) Nemo iudex sine actore, which implies that a party has full control over his substantive law and procedural rights involved in the cause and

denotes his power of free election as to the exercise or non-exercise of these rights (Arthur Engelmann (tr and ed by Robert Wyness Millar) *History of Continental Civil Procedure* (1996 revised ed);

(ii) Ne eat iudex ultra petita partium: '[I]t is for the parties alone to determine the ambit of the litigation; it is upon them that the opening, object and close of the litigation depend' (Engelmann op cit at 27–8; Robert Wyness Millar 'The formative principles of civil procedure' (1923) 18 *Illinois LR* 1–36, 94–117 and 150–68; and see, in general, M Cappelletti & D Tallon *Fundamental Guarantees of the Parties in Civil Litigation* (1973));

(iii) The principle of procedural economy, which entails that (a) the litigation process should be finalised within a reasonable time, and (b) the costs involved in the litigation process should be reasonable (see, for example, Cappelletti & Tallon op cit at 736; J H Jacob 'Accelerating the process of law' in M Storme & H Casman (eds) *Towards a Justice with a Human Face. The First International Congress on Law of Civil Procedure* (1977) at 303 and 308; M Zander *Cases and Materials on the English Legal System* (1974) at 320; V Z Estey 'The changing role of the judiciary' (1985) 59 *Law Institute Journal* 1071 at 1076);

(iv) The principle of an independent and objective court (De Vos op cit at 31–6).

The most important and fundamental principle of civil procedure is, however, that of audi alteram partem. In this regard W B Habscheid ('The fundamental principles of the law of civil procedure' (1984) 17 *CILSA* 1 at 25) stated that '[t]he right to be heard is a procedural principle of eternal value . . . which is not confined to any particular legal system . . .'.

The principle of audi alteram partem is undoubtedly also fundamental to a fair trial as contemplated by s 34 of the Constitution. The principle of audi alteram partem entails that:

- each of the parties in the litigation process informs the other exactly about its case (Habscheid op cit at 25);
- each party is granted a proper and reasonable opportunity to present its case by means of evidence and argument in court (M Cappelletti & J A Jolowicz *Public Interest, Parties and the Active Role of the Judge in Civil Litigation* (1975));
- the court, by means of appropriately applying its mind to the matter, considers the evidence and argument independently and objectively, and gives judgment accordingly (Habscheid op cit at 27).

It is submitted that if the new rules apply retrospectively to a suit that was pending on 15 October 2010, situations such as the following could arise:

(a) The plaintiff has issued a summons under the old rules merely stating his cause of action as 'goods sold and delivered at the special instance and request of the defendant'. Under the old rules the defendant was, before the delivery of a plea, entitled not only to request a copy of each

document upon which the claim was founded, but also to request such further particulars as were reasonably necessary to enable the defendant to plead. The purpose of the fundamental principle underlying the old rules relating to further particulars is obvious: audi alteram partem. In framing the new rules, the Rules Board abolished requests for further particulars for purposes of pleading. If a defendant, having been served with a summons such as the aforesaid before 15 October 2010, wanted to request further particulars for purposes of pleading, such defendant could simply not do so as from 15 October 2010. It is clear that such a defendant's existing procedural rights (and the plaintiff's procedural obligations) have been materially impaired by the new rules.

(b) In addition, the defendant may be forced into noting an exception to the particulars, (also in terms of amended rules) even though at the time of issue and service the particulars were not excipiable.

(c) Under the old rules a summons lapsed if it was not served within twelve months of the date of its issue or if, having been served, the plaintiff had not within that time after service taken further steps in the prosecution of the action. But a plaintiff could, by filing an affidavit with the clerk of the court before the expiration of the twelve month period (and setting out certain minimum facts as provided for in the old rules, including the period of extension), prevent the summons from lapsing before the expiration of the period of extension. In *Manyash v Minister of Law and Order* 1999 (2) SA 179 (SCA) at 188I–191B it was held that rule 60(5) of the old rules could be invoked, if necessary by means of an order of court, to revive a summons which had lapsed. The new rules do not contain any provision regarding the lapsing of summonses or the revival of lapsed summonses. If, on 15 October 2010, a plaintiff wanted to avail himself of the procedures under the old rules for the extension of time or the revival of a lapsed summons, and there was still sufficient time to do so even after that date, the Rules Board has now excised this right in framing the new rules. The plaintiff's rights have thus been materially impaired.

(d) Another example experienced in practice is that different magistrates' courts are adopting different approaches. (Durban applies the rules retrospectively, but 20 kilometres away, Pinetown does not, and there are practitioners who work in both courts.) This inconsistency in application arguably undermines the notion that the law should be evenly applied. Thus guidance is needed, even if only to ensure consistency. There are even absurd occasions where magistrates have 'constructed' solutions, for example instructing attorneys to 'remove' and 'redo' old summonses in the new form.

In situations like the aforementioned, the new rules would therefore not apply retrospectively. It could also be argued that the new rules do not apply retrospectively in such instances for the following reasons (see 2006 (January/February) *De Rebus* 36):

(i) Section 12(2)*(c)* and *(e)* of the Interpretation Act 33 of 1957 reads as follows:

> '(2) Where a law repeals any other law, then unless the contrary intention appears, the repeal shall not —
>
> (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under 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 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.'

(ii) In terms of s 2 of the Interpretation Act, the word 'law', means 'any law, proclamation, ordinance, Act of Parliament or other enactment having the force of law'. This definition includes the old rules.

(iii) There is nothing in the new rules that affects proceedings that were pending at the commencement thereof, and no contrary intention is reflected in these rules.

(iv) In terms of the old rules, a litigant had a right, and an obligation, to enforce a claim in a magistrate's court in the manner provided for in these rules; in other words, the rules provided the remedy for the exercise of such right and the legal proceedings in connection therewith. The other party to the litigation had a corresponding right and obligation in terms of these rules.

(v) The legal proceedings pursuant to the enforcement of such right and obligation (ie remedy) may, in terms of the provisions of section 12(2), be 'continued . . . as if the repealing law had not been passed'.

There may be more examples of cases pending as at 15 October 2010 where the application of the new rules to such cases will impair the rights and obligations of the parties that existed on that date. Each case will have to be evaluated and determined on its own facts. The solution, however, does not lie in applying the principles set out above in each and every case with the concomitant impairment of the principle of procedural economy but in an appropriate amendment of the new rules to make the situation clear. The Rules Board for Courts of Law should therefore attend to an appropriate amendment of the new rules without delay.