

Houston, we have a problem! Gaps, glitches and gremlins in recent amendments to the law of civil procedure pertaining to the magistrates' courts

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OPSOMMING

Houston, ons het 'n probleem! Gapings, glipsies en goggas in onlangse wysigings aan die siviele prosesreg in landdroshowe

Die tempo van verandering op die gebied van siviele prosesreg het onlangs toegeneem. Grootse veranderinge gaan egter dikwels gepaard met verwarring en ontwirring. Merkwaaardige veranderinge aan die struktuur en funksionering van die land se landdroshowe het onlangs 'n reeks "gapings, glipsies en goggas" tot gevolg gehad. Die aard en omvang van hierdie "gapings, glipsies en goggas" dui op 'n kommerwekkende ontwikkeling, naamlik dat onvoldoende sorg en aandag geskenk blyk te word gedurende die proses van wetsontwerp en opstel van regulasies. Indien dit nie aangespreek word nie, mag die verskeie probleme waarop hierdie artikel dui, selfs die toekomstige vlot transformasie van die Suid-Afrikaanse regsstelsel verhinder.

1 Introduction

For a decade and a half following the demise of Apartheid, with a few significant exceptions, the law relating to civil procedure seemed relatively unaffected by the momentous developments in South African society.¹ Recent years, however, have seen accelerating changes within

¹ Significant changes in this area of the law during the early years following the demise of apartheid included: the revamping of the s 65 debt collection procedure in the wake of the decision of the Constitutional Court in *Coetzee v Government of the Republic of South Africa; Matiso v Commanding Officer, Port Elizabeth Prison* 1995 4 SA 631 (CC); the scrapping and reconfiguration of notice and prescription periods required for taking legal proceedings against certain state bodies, following cases such as *Mohlomi v Minister of Defence* 1997 1 SA 124 (CC) and *Moise v Greater Germiston Transitional Local Council* 2001 4 SA 491 (CC), as well as the enactment of The Institution of Legal Proceedings Against Certain Organs of the State Act 40 of 2002; the broader approach of the courts to *locus standi* when

the field of civil procedure, sometimes accompanied by a degree of turmoil and confusion. These changes include the renaming of the high courts in order to dispense with the names of the provinces which existed during the Apartheid era,² the proposed major reconfiguration of the superior court system in terms of the Superior Courts Bill,³ as read with the Constitution Seventeenth Amendment Bill,⁴ both tabled in parliament on 2 June 2011,⁵ the establishment of an entirely new tier of civil magistrates' courts with greatly increased civil jurisdiction, including the power to grant divorces and deal with matters related thereto,⁶ and major changes to the Magistrates' Courts Rules brought about by the Rules Board.⁷

Significant change, however, often brings with it a degree of dislocation, resulting in some difficulties (what we have termed "gaps, glitches and gremlins"), which can lead to problems in the smooth functioning of the legal system. Due to the nature of their work, lawyers are averse to any lack of clarity and precision within their field of operation. When this lack of clarity and precision affects civil procedure, the engine of legal practice, it touches on an area of particular sensitivity to the broader legal profession. The purpose of this short article is to point to certain difficulties which have become apparent in the field of civil procedure in recent years. The article will focus specifically on the difficulties that pertain to the functioning of the magistrates' courts, since many of the proposed changes to the superior court system have yet to be effected. It is hoped that the focus of this article will assist in the process of eliminating some of the more serious difficulties, in order that

enforcing the Bill of Rights (and as set out in s 38 of the Constitution) in cases such as *Coetzee v Comitis* 2001 1 SA 1254 (C) and *Independent Electoral Commission v Langeberg Municipality* 2001 3 SA 925 (CC) par 15.

- 2 The changes were brought about in terms of the Renaming of High Courts Act 30 of 2008, and took effect from 2009-05-01.
- 3 B 7-2011: An explanatory summary of the Bill was published in *GG* 33216, 2010-05-21.
- 4 B 6-2011: Particulars of the proposed amendments were published in *GG* 33216, 2012-05-21.
- 5 Ss 3, 4 Constitution Seventeenth Amendment Bill, which is currently before parliament, propose amending the Constitution in such a way as to make the Constitutional Court the final court of appeal in constitutional and in other matters in respect of which the Constitutional Court has granted leave to appeal on the grounds that the interests of justice require that the matter be decided by it. See *GG* 33216, 2012-05-21, not 414 of 2010.
- 6 These significant changes were brought about by the Regional Courts Amendment Act 31 of 2008, which was brought into operation on 2010-08-09 in terms of Proc R41 *GG* 33448, 2010-08-06.
- 7 The Rules Board was established by s 2 Rules Board for Courts of Law Act 107 of 1985. The Board was acting in compliance with a direction set out in section 9(6)(a) Jurisdiction of Regional Courts Amendment Act 31 of 2008, which required the Board to review and amend the existing rules of magistrates' courts, so as to ensure that the new courts of regional divisions could exercise jurisdiction effectively and efficiently. The Rules Board used this opportunity to bring the Magistrates' Courts Rules closer to the high court rules (ie to the Uniform Rules of Court).

the continued transformation of the South African legal system proceeds as efficiently as possible.

2 Establishment of the Magistrates' Courts for Regional Divisions

As noted in the introduction, one of the major recent changes in the field of civil procedure has been the introduction of an entirely new tier of civil magistrates' courts – in addition to civil magistrates' courts for districts which have always existed, a number of civil magistrates' courts for regional divisions have been established.⁸ This is a significant development and it is useful to focus briefly on the process in terms of which this new tier of magistrates' courts was established, in order to identify potential problems.

Government Notice 670 of 29 July 2010 purports to establish the following magistrates' courts for regional divisions: Eastern Cape Regional Division, Free State Regional Division, Gauteng Regional Division, KwaZulu-Natal Regional Division, Limpopo Regional Division, Mpumalanga Regional Division, Northern Cape Regional Division, North West Regional Division and Western Cape Regional Division. In the notice, the minister of justice purports to act in terms of sections 2(1)(d), 2(1)(g)(ii), 2(1)(iA) and 29(1A) of the Magistrates' Courts Act,⁹ as substituted by sections 2 and 7 of the Jurisdiction of Regional Courts Amendment Act.¹⁰ Apart from section 2(1)(d), all the other sections mentioned by the minister were introduced into the Magistrates' Courts Act¹¹ by sections 2 and 7 of the Jurisdiction of Regional Courts Amendment Act.¹²

The potential problem which arises from the above, is that the Jurisdiction of Regional Courts Amendment Act¹³ only came into operation on 9 August 2010.¹⁴ In other words, almost all of the sections in terms of which the minister of justice and constitutional development purported to act when establishing the magistrates' courts for regional divisions in his notice of 29 July 2010, were not yet in operation when he so acted. Although he stated in his notice that the establishment of the said courts were to be with effect from 9 August 2010, the fact remains that when he acted, the sections in terms of which he was acting had not yet come into operation. Taken at face value, these facts might seem to

8 See the definition of "court" in s 1 Magistrates' Courts Act 32 of 1944 (MCA) as amended by the Jurisdiction of Regional Courts Amendment Act 31 of 2008, which came into operation on 2010-08-09, read with *GN 670 GG 33418*, 2010-07-29.

9 32 of 1944.

10 31 of 2008.

11 32 of 1944.

12 31 of 2008.

13 *Idem*.

14 See Proc R41 *GG 33448*, 2010-08-06.

bring into question the legal validity of the process in terms of which the new tier of magistrates' courts referred to above was established.

Fortunately, this problem appears more apparent than real when considered in light of the provisions of section 14 the Interpretation Act.¹⁵ The said section deals with the exercise of conferred powers during the period between the passing and the commencement of a law. Of particular interest is section 14(e), which reads, *inter alia*, as follows:

Where a law confers a power to do any ... act or thing for the purpose of the law, that power may, unless the contrary intention appears, be exercised at any time after the passing of the law so far as may be necessary for the purpose of bringing the law into operation at the commencement thereof ...¹⁶

What emerges from the above, is that the central issue to be addressed in the matter under consideration is whether or not the actions of the minister in establishing the Magistrates' Courts for Regional Divisions (as set out in Government Notice 670 of 29 July 2010)¹⁷ were necessary for bringing the Jurisdiction of Regional Courts Amendment Act¹⁸ "into operation" at the time of the commencement of the law.

Our courts have attached a broad meaning to the important phrase "necessary for bringing the law into operation at the commencement thereof" contained in section 14 of the Interpretation Act.¹⁹ For example in *R v Magana*²⁰ Trollip J states as follows:

... I do not think that 'bringing the law into operation' means only 'effecting its commencement'; it also includes 'rendering it operative' from and after the time it commences. In other words the whole object of s 14 is to enable the authorised official to take such of the enumerated steps before the enactment commences as are necessary to render it operative immediately it commences.²¹

When considered in this light, it would seem clear that the actions of the minister in establishing the magistrates' courts for regional divisions in

15 Act 33 of 1957.

16 Section 14(e) Interpretation Act 33 of 1957.

17 See *GG 33418 2010-07-29*.

18 Act 31 of 2008

19 Act 33 of 1957.

20 1961 2 SA 654 (T) 656.

21 Further, note the following analysis of Rumpff JA in *Cresto Machines (Edms) Bpk v Die Afdeling Speur-Offisier SA Polisie Noord-Transvaal* 1972 1 SA 376 (A) 391: "Die bedoeling skyn duidelik te wees dat *Kennisgewings* uitgereik kan word en ander handelinge verrig kan word ná aanname van die Wet vir sover dit nodig is om die Wet by sy inwerkingtreding te laat funksioneer. Dit gebeur gereeld dat artikels van 'n Wet voorsiening maak vir die aanstelling van persone in sekere ampte, vir die uitvaardiging van regulasies en reëls en die doen van ander handelinge. Indien so 'n Wet in werking gestel sou word sonder voorafgaande aanstellings, uitvaardiging van regulasies of kennisgewings sou die Wet of sekere artikels daarvan wesenlik nie funksioneer nie totdat die nodige aanstellings gedoen is en die regulasies en kennisgewings uitgevaardig is. Klaarblyklik sou dit 'n ondoeltreffende proses

terms of Government Notice 670 of 29 July 2010 (with effect from 9 August 2010), were indeed necessary in order to render the Jurisdiction of Regional Courts Amendment Act²² “fully operational” from the time the Act was put into effect on 9 August 2010. The establishment of the magistrates’ courts for regional divisions would therefore appear to be legally valid. Unfortunately, as one examines the said Act, further legal problems arise which appear more difficult to resolve.

3 Uncertainty Surrounding the Jurisdiction of the Magistrates’ Courts for Regional Divisions

There are a range of potential problems relating to the jurisdiction of the new magistrates’ courts for regional divisions.

The first potential problem arises from the fact that in *Government Notice* 670 of 29 July 2010, the minister of justice and constitutional development purported to act, *inter alia*, in terms of section 29(1A) of the Magistrates’ Courts Act when he determined certain monetary jurisdictional limits for the new magistrates’ courts for regional divisions, in respect of various causes of action.²³ Section 29(1A) must be read with section 29(1C), which states as follows:

Jurisdiction conferred on a court for a regional division in terms of this section shall be subject to a notice having been issued under section 2(1)(iA) in respect of the place for the holding, and the extent of the civil adjudication, of such court.²⁴

The problem is that section 2(1)(iA) – which is referred to in section 29(1C) quoted above – only empowers the minister to “appoint one or more places ... for the holding of a court” and to “prescribe the local limits within which such courts shall have jurisdiction ...”²⁵ The words “the local limits within which such courts shall have jurisdiction” in section 2(1)(iA), seem much narrower than the words “the extent of the civil adjudication, of such court” in section 29(1C). The words in section 2(1)(iA) seem to refer to the designation of a particular geographical area within which a court shall exercise jurisdiction, whereas the words in section 29(1C) seem to refer to the much wider concept of civil

wees om die Wet in werking te stel terwyl die geheel of dele daarvan nie funksioneer nie en daar gewag moet word op toekomstige administratiewe handeling. Dit is dus te verstaan dat die Interpretasiewet voorsiening maak om 'n Wet behoorlik te laat funksioneer wanneer dit in werking tree.” See also *S v Manelis* 1965 1 SA 748 (A); *S v Van der Horst* 1991 1 SA 552 (C); *Cats Entertainment CC v Minister of Justice, Van der Merwe v Minister of Justice, Lucksters CC v Minister of Justice* 1995 1 SA 869 (T); and *Harksen v Director of Public Prosecutions, Cape* 1999 4 SA 1201 (C).

22 Act 31 of 2008

23 The various causes of action were set out in ss 29(1)(a)-(g) MCA. The monetary jurisdictional limits were set out in Sch 2 GN 670 GG 33418, 2010-07-29.

24 S 29(1C) MCA.

25 See s 2(1)(iA) MCA.

jurisdiction itself. Were a court to find section 29(1C) to be incompatible with section 2(1)(iA) in this respect, it is difficult to predict the result. In order to make sense of the apparent conflict in meaning, the court might interpret the words “the extent of the civil adjudication, of such court” in section 29(1C) to mean the same as the words “the local limits within which such courts shall have jurisdiction” in section 2(1)(iA). Van Loggerenberg,²⁶ however, seems to believe that the above-mentioned conflict in meaning makes it impossible for section 29(1C), in its present form, to be complied with. This, in turn, makes it impossible for the Minister to confer jurisdiction on the new magistrates’ courts for regional divisions. Van Loggerenberg states as follows:

The words ‘the extent of the civil adjudication’ [in section 29(1C)] are nonsensical and in conflict with the wording of this subsection [subsection 2(1)(iA)]. It is submitted that [section] 29(1C) should be amended by the substitution of the words ‘the extent of the local limits’ for the words ‘the extent of the civil adjudication’ before a valid notice, conferring jurisdiction on courts for regional divisions, can be issued by the Minister.

The second potential problem relating to the jurisdiction of the new magistrates’ courts for regional divisions arises from the specific wording of subsections 29(1)(a), (b), (d), (f) and (g) of the Magistrates’ Courts Act.²⁷ These subsections give the Minister of Justice and Constitutional Development the power, *inter alia*, to set monetary limits in respect of the jurisdiction of the new magistrates’ courts for regional divisions, for various causes of action. Indeed, in *Government Notice 670* of 29 July 2010, the minister purported to act in terms of these subsections when setting monetary limits for the new courts, in respect of each of the causes of action referred to in each of the said subsections. In each case, the monetary limit set by the minister was worded as follows: “Above R100 000 to R300 000”.²⁸ The problem with this wording is that the minister purports to set both a lower and an upper monetary limit for civil claims to be brought in the new courts. If one examines the wording of subsections 29(1)(a), (b), (d), (f) and (g) of the Magistrates’ Courts Act,²⁹ however, it would seem that they only empower the minister to set an upper monetary limit for such claims, and not a lower limit. Each of the subsections refers to a single “amount” to be determined by the minister, which shall not be exceeded.³⁰ This implies that the minister was acting *ultra vires* when he purported to set a lower monetary limit (R100 000 in each case) for claims to be brought in the new magistrates’ courts for regional divisions in terms of subsections 29(1)(a), (b), (d), (f) and (g) of the Magistrates’ Courts Act. Clearly, this creates much

26 Van Loggerenberg *Jones and Buckle: The Civil Practice of the Magistrates’ Courts in South Africa: Volume 1 – The Act* (2011) 11.

27 32 of 1944.

28 See Col B Sch 2 GN 670 GG 33418, 2010-07-29.

29 32 of 1944.

30 S 29(1)(a) MCA employs the words “not exceeding in value the amount determined by the Minister” whereas s 29(1)(b), (d), (f), (g) MCA employ the words “not exceed the amount determined by the Minister”.

uncertainty in relation to the jurisdiction of the new courts. Van Loggerenberg sums up as follows:

[T]he Minister created the impression that courts for regional divisions have jurisdiction *only* in respect of amounts above R100 000 and up to R300 000, which clearly cannot be the case - if the maximum amount in respect of such courts is properly and *intra vires* fixed at R300 000, these courts will have jurisdiction *up to* R300 000 (i.e. also, for example, in respect of a claim for R50 000).³¹

Unfortunately, confusion in relation to the jurisdiction of the new magistrates' courts for regional divisions does not end there. A third potential problem arises in relation to subsection 29(1)(e) of the Magistrates' Courts Act.³² The said subsection does not mention an "amount" which shall not be exceeded, as do the other subsections of section 29(1) discussed in the previous paragraph. In the first place, this seems to make a nonsense of the wording of section 29(1A), which purports to empower the Minister to "determine different amounts contemplated in subsection (1)(a), (b), (d), (e), (f) and (g) ..." Since subsection 29(1)(e) does not "contemplate" an "amount" or "amounts", it is submitted that it should not have been included in the list of subsections set out in section 29(1A). But further problems arise in relation to subsection 29(1)(e). When read with section 172(2) of the National Credit Act,³³ subsection 29(1)(e) gives the magistrates' courts unlimited monetary jurisdiction in relation to matters falling under the National Credit Act.³⁴ However, in terms of Schedule 2 of *Government Notice 670* of 29 July 2010,³⁵ the Minister of Justice and Constitutional Development purported to limit the jurisdiction of the regional magistrates' courts under subsection 29(1)(e), as follows: "Above R100 000 to R300 000".³⁶ It would seem, therefore, that the minister was acting *ultra vires* when he purported to set these limits. To cap it all, if one looks at Column A of Schedule 2 to *Government Notice 670* of 29 July 2010, one cannot help noticing that the National Credit Act is cited as "Act No 35 of 2005" whereas the said Act is, in fact, Act No 34 of 2005. All this creates uncertainty in relation to the jurisdiction of the new magistrates' courts for regional divisions, and leaves an impression of legislation and regulation being drafted and passed without due care and attention.³⁷

31 Van Loggerenberg *Jones and Buckle 1* 119.

32 32 of 1944.

33 34 of 2005.

34 See *Nedbank Ltd v Mateman; Nedbank Ltd v Stringer* 2008 4 SA 276 (T) 284B-C.

35 See *GG 33418*, 2010-07-29.

36 See Col B Sch 2 GN 670 *GG 33418*, 2010-07-29.

37 It is not possible to discuss in detail all the anomalies which now exist in relation to the jurisdiction of the magistrates' courts. The following anomaly, however, deserves brief mention. In terms of s 46(2)(c) MCA, the magistrates' courts shall have no jurisdiction in matters in which is sought specific performance without an alternative of payment of damages, except in: (i) the rendering of an account in respect of which the claim does not

4 Amendments to the Magistrates' Courts Rules

One of the most profound areas of change in the field of civil procedure has been the large-scale amendment of the Magistrates' Courts Rules, which came into effect on 15 October 2010.³⁸ The amendments are clearly intended to make the high and Magistrates' Courts Rules more uniform and have employed high courts' usage wherever amendments have occurred.³⁹ This has resulted in the near substitution of the relevant high courts' "Uniform Rules of court" rule for the former magistrates' courts rule in nearly every case.⁴⁰ The new features include the demise of further particulars for the purpose of pleading; a new set of summonses replicating the high courts' types, including simple and combined summonses; the introduction of a general rule for pleadings modelled on but not identical to rule 18 of the Uniform Rules; the introduction of further particulars for the purpose of trial and irregular proceedings; and the adoption of high courts' discovery rules.⁴¹ Other minor changes include the elimination of the small differences that formerly existed between the magistrates' courts and high courts' rules relating to summary judgment.⁴²

In addition, the new Magistrates' Courts Rules have introduced some innovations such as provision for service by electronic means of communication, and an extension of the distance from the court house

exceed R100 000; (ii) the delivery or transfer of property, movable or immovable, not exceeding R100 000 in value; (iii) the delivery or transfer of property, movable or immovable, exceeding R100 000 in value, where the consent of the parties has been obtained in terms of s 45 MCA (see s 46(2)(c) MCA read with GN R1411, 1998-10-30). All this seems simple enough. It is anomalous, however, that the monetary limits referred to above remain fixed at R100 000 for both district and regional magistrates' courts. Since the general monetary jurisdiction for the new regional magistrates' courts is only capped at R500 000, it is odd that the monetary limits referred to above were not set at this level for these courts, when they were brought into existence.

38 In terms of GN 888, 2010-10-08

39 One possible reason is to make provision for the wider and higher jurisdiction that the regional magistrates' courts now enjoy, including jurisdiction over divorce matters and an extension of the monetary value of claims that can be dealt with by these courts. Another reason is apparently the notion that eventually there will be more frequent promotion from the magistracy to the judiciary as suggested in the preamble to the Jurisdiction of Regional Courts Amendment Act 31 of 2008, and that the courts should therefore align more closely in their practices. An interesting feature on this particular head is the introduction for the first time, if in somewhat in limited form, of inherent jurisdiction to the magistracy.

40 The correct title for the high court rules is the 'Uniform Rules of Court' – of course, reflecting this particular set of rules' history as a replacement for the individual sets of rules for the former provincial divisions, which still exist and may be used in the case of a *lacuna*. We shall refer to the "Uniform Rules" where the context involves the name of the rule set and the "high court rules" where a description of the type of rule is involved.

41 See rr 5, 6, 16, 60A, 23 Magistrates' Courts Rules.

42 Compare r 32 Uniform Rules and r 14 Magistrates' Courts Rules.

of the address one may appoint for service of pleadings and notices.⁴³ Furthermore, the rules have been modified to conform with the Constitution and current jurisprudence, so as to eliminate reference to gender in citations.⁴⁴ Finally, the rules have been updated with minor amendments to the odd word or phrase, to bring the language in line with current English usage.⁴⁵ It is likely that any innovations and modifications that have created slight differences between the new Magistrates' Courts Rules and the high courts' rules on which they were styled, will be incorporated into the Uniform Rules of court in due course.⁴⁶ However, the introduction of the recent innovations to the civil courts, including nomenclature, jurisdiction and procedure, has been somewhat haphazard, and it is difficult to know when any such amendments may occur.

Furthermore, the substitution of high court rules has not been wholesale. Certain Magistrates' Courts Rules that have historically been different from the corresponding high courts' rule remain distinct, including for instance, the respective procedures for drafting and taxing bills of costs.⁴⁷ In some cases, however, the procedure has been amended and improved, notwithstanding the fact that it remains distinct from the high courts' rule and practice. An example of this is the pre-trial conference which still remains optional in the magistrates' courts and is not really the equivalent of rule 37 of the Uniform Rules, but has been

43 See r 5(3)(a)(i), 5(3)(b), 5(3)(c) Magistrates' Courts Rules.

44 For instance, compare the provision for citation in r 17(4)(a) Uniform Rules with that contained in the otherwise similar r 5(4)(a) Magistrates' Courts Rules.

45 Thus, for instance, "seems meet" has been amended to "seems fit" where it appears in r 60A Magistrates' Courts Rules. Another example is r 24(7)(b) Magistrates' Courts Rules, which provides that either party may bring an application to the court and the court may make such order as it may deem "fit", replacing the word "just", which is employed in the otherwise similarly worded r 36(7) Uniform Rules.

46 This may include, for instance, the departure from high court practice in the amended r 5(2)(b) Magistrates' Courts Rules, which provides for simple summonses, but unlike the corresponding r 17(2)(a) Uniform Rules, permits the choice of using a combined summons in the case of a debt or liquidated demand. A guide to the new rules issued by the Department of Justice suggested that the reason for the discrepancy was the preference of many attorneys for having the choice to use a combined summons in these circumstances. Indeed, there are situations in which the use of a combined summons in the case of a debt or liquidated demand is justified, and provision for choice in the Magistrates' Courts Rules would suggest that the Uniform Rules will be amended to provide for the same choice in due course.

47 Common law rules apply to the granting of costs in the high courts, with r 70 Uniform Rules providing for taxation, whilst r 33 Magistrates' Courts Rules provides both substantive regulation for costs' orders and the procedure for taxation in the magistrates' courts. Whilst previously similar in operation, recent amendments to r 70 have made the procedures for taxation in each court quite different. Given that no attempt was made to bring r 33 Magistrates' Courts Rules into alignment with the Uniform Rules during the 2010 amendments, it would seem that the intention is for taxation procedures in each court to remain dissimilar.

improved by providing magistrates with a procedural opportunity to use the discretionary powers to call such a conference, a serious *lacuna* in the old rules.⁴⁸

Whilst our general impression of the rule amendments is positive, questions and concerns remain. Among the broad questions arising is the extent to which it is still possible for the traditionally more lenient approach to pleadings in the magistrates' courts, to continue to exist in the context of the new rules.⁴⁹ Another question is the significance of the imbuing of inherent jurisdiction to the magistracy for the first time, albeit in a limited form, and whether it is possible to achieve this with a set of rules rather than legislation.⁵⁰ Furthermore, the specific limits of this power needs to be considered.

None of the broad questions just discussed fall within the scope of this article. Rather, the concerns under consideration on this occasion are specific *lacunae* and other potential problems created by the mechanics of some of the new rules. The first category of problems under this head relate to those caused by the replacement of specific provisions in the Magistrates' Courts Rules with the nearest corresponding high courts rules' provisions – without a wholesale amendment of the rules. In some instances the amendments have failed to take into account the differing overall structure which has always existed between the two sets of rules. The Magistrates' Courts Rules have tended to make provision for the enforcement of a particular procedure or exceptions relating to it, within the ambit of the rule that deals with the procedure in question. By contrast, the Uniform Rules tend to feature general rules that make provision for enforcement or exceptions. Therefore, the replacement of particular Magistrates' Courts Rules with their nearest high courts' counterpart, without similarly replicating the generic enforcement rule, has led to *lacunae*, the first of which relates to special pleas.

5 Separate Hearings for Special Pleas

Rule 17 of the Magistrates' Courts Rules, which now deals with pleas, has been amended to conform to rule 22 of the Uniform Rules.⁵¹ This has led

48 S 54 MCA; r 25 Magistrates' Courts Rules.

49 *Liquidators Wapejo Shipping Co Ltd v Lurie Bros* 1924 AD 69 76. Nevertheless, there is authority to the effect that the rules of pleading ought to be observed within the magistrates' courts also; see *Matambanadzo Bus Service (Pty) Ltd v Magner* 1972 1 SA 198 (RA) 199H–200A.

50 See r 1(3) which empowers the courts at a pre-trial conference held in terms of s 54(1) MCA, to “dispense with any provision of these rules and give directions as to the procedure to be followed by the parties so as to dispose of the action in the most expeditious and least costly manner.”

51 R 17 previously dealt with exceptions and applications to strike out, whilst rather confusingly, r 19, which now deals with exceptions and applications to strike out, previously dealt with pleas.

to a uniformity of practice which has eliminated some of the anomalies that previously existed between the practice of the two types of court.⁵²

Less positively, however, the virtual replacement of the former Magistrates' Courts Rule 19 with its high court counterpart, has failed to take into account the systemic difference between the rules referred to above, resulting in a lacuna in respect of the hearing of special pleas. The previous rule 19(12) provided that:

any defence which can be adjudicated upon without the necessity of going into the main case may be set down by either party for a separate hearing upon 10 days' notice at any time after such defence has been raised.

This sub-rule was of particular importance for special pleas, which are raised not on the merits of a matter, but on a legal point, and if successful can be decisive in the resolution of a case. It is clearly in the interests of all the parties that any matter should be dealt with as speedily and cost effectively as possible. Therefore, in circumstances where such a special plea is raised, the potential should exist for the special plea to be heard and adjudicated upon, so as to resolve the case at an early stage, without the need to proceed to trial. However, this option has been removed as a result of the elimination of rule 19(12).

Although rule 22 of the Uniform Rules is virtually identical to the new rule 17 and similarly makes no provision for a separate hearing in these circumstances, this does not present a problem in high court practice, as rule 33 of the Uniform Rules makes general provision for this kind of situation. Rule 33(4) provides that:

If, in any pending action, it appears to the court *mero motu* that there is a question of law or fact which may be decided conveniently either before any evidence is led or separately from any other question, the court may make an order directing the disposal of such question in such manner as it may deem fit and may order that all further proceedings be stayed until such question has been disposed of, and the court shall on the application of any party make such order unless it appears that the questions cannot conveniently be decided separately.

A request for such a hearing should be made by application on notice at any time prior to the trial, but may also be made orally at the commencement of a trial or at any time thereafter before judgment.⁵³ The rule allows for a broad range of issues to be heard, both of fact and

52 For instance, r 19(10) of the former Magistrates' Courts Rules, provided that every allegation of fact made by the plaintiff that was inconsistent with the defendant's plea, would be presumed to be denied and all allegations consistent with the plea were presumed to be admitted. The new r 17(3) conforms to high court practice and r 22(3) Uniform Rules, however, by providing that all allegations not specifically denied or admitted will be taken to be admitted.

53 *Sibeka v Minister of Police* 1984 1 SA 792 (W) 795G-H; *McLelland v Hulett* 1992 (1) SA 456 (D) 463B-H; *Harvey Tiling Co (Pty) Ltd v Rodomac (Pty) Ltd* 1977 1 SA 316 (T) 329D; *Sibeka v Minister of Police* 1984 1 SA 792 (W) 794H.

law, although a court will only agree to deal with issues under this rule, if their resolution would be likely to save costs or finally determine the matter.⁵⁴ Nevertheless, a special plea is an issue of law which fits these requisites and may be heard separately in terms of this provision.⁵⁵

Unfortunately, it seems that no real equivalent to rule 33 of the Uniform Rules exists in the Magistrates' Courts Rules. This may seem to be an odd assertion to make in the light of the fact that rule 29(4) of the Magistrates' Courts Rules is identically worded to rule 33(4) of the Uniform Rules. Both sub-rules were substituted and brought into conformity in 1992.⁵⁶ Furthermore, from a substantive if not procedural point of view, any case law relevant to rule 33(4) is relevant to rule 29(4) also. The difficulty, however, is created by the context of their location within each rule set. In submission, this difference in "geography" so to speak, alters the meaning of each sub-rule in relation to the stage of proceedings at which each sub-rule may be invoked.

Rule 33(4) of the Uniform Rules is situated within a general rule, which is not located in or associated with any particular procedural stage of a matter. That is to say it is not set within the context of pleadings, preparation for trial, or trial. Furthermore, in contrast to the corresponding situation in the Magistrates' Courts Rules, rule 39 of the Uniform Rules provides for the conduct of the trial separately, without any reference to rule 33.

A "pending action" in the context of rule 33(4) is "one in which the issues between the parties have not yet been finally decided or disposed of."⁵⁷ This means in the context of a "stand alone" rule such as rule 33, that the rule applies at any time prior to judgment. The court *mero motu* or one of the parties on application, can therefore invoke this provision at any stage of the proceedings, which may include the period before close of pleadings, or after *litis contestatio* but prior to trial, or during the trial itself but prior to judgment.

The identically worded rule 29(4) of the Magistrates' Courts Rules is quite differently situated, however. Rule 29 deals with trial proceedings and in submission, sub-rule (4) needs to be read in that context. This would seem to indicate that whether by the court *mero motu* or on application by one of the parties, rule 29(4) is intended to be invoked at trial, from trial commencement, and any time thereafter until judgment.

Supporting this proposition is the fact that from 1992 until 2010, rule 29(4) coexisted with the former rule 19(12) – the implication being that

54 *Groenewald v Minister van Justisie* 1972 4 SA 223 (O) 225E.

55 *Imprefed (Pty) Ltd v National Transport Commission* 1990 3 SA 324 (T) 325F-G.

56 In terms of GN R1882 and GN R1883 respectively.

57 See Van Loggerenberg *et al Erasmus Superior Court Practice* [Revision Service 37] Rule 33 and the authorities cited there; *King v King* 1971 2 SA 630 (O) 634G; *Groenewald v Minister van Justisie* 1972 4 SA 223 (O) 225B; *Harvey Tiling Co (Pty) Ltd v Rodomac (Pty) Ltd* 1977 1 SA 316 (T) 329D.

rule 29(4) was not intended to replace it, and that rule 29(4) was intended for use in a trial situation only. It would seem that the drafters did not take any of this into account when replacing the former rule 19 and its internal provision for a special plea hearing, with its high court equivalent.

Other possibilities for arranging the pre-trial hearing of a special plea do exist. For instance, the parties may make use of a section 54 conference in order to raise the possibility of such a hearing with a magistrate. The magistrate may use the powers afforded by section 54(1)(e) or alternatively by the new rule 1(3) – to order such a hearing. This is a somewhat more cumbersome procedure to use than was hitherto the case, however, given that the former rule 19(12) merely required one of the parties to set the matter down for hearing on 10 days' notice. Furthermore, a hearing which successfully disposes of a matter on the basis of a special plea, would obviate the need and added cost of a section 54 conference.

6 Barring a Plea in Reconviction in the Magistrates' Courts

A similar *lacuna* relating to the barring of pleas in reconviction has been created by the manner in which the new rule 20 of the Magistrates' Courts Rules has been amended. This amendment also fails to take into account the systemic differences in Uniform Rules and Magistrates' Courts Rules structures. Rule 20 continues to deal with counter-claims in the magistrates' courts as it always has, but has been amended to harmonise it with rule 24 of the Uniform Rules and is identical in almost every respect, apart from special provision for a counter-claim which exceeds the jurisdiction of the magistrates' courts.

Before proceeding any further, it is worth discussing “barring” as a concept, starting with its use in high court practice where it is found in its most developed form. “Barring” is a procedure designed to deal with dilatory pleadings. All pleadings have to be delivered within time limits prescribed by each set of rules, in order to keep the action process in motion, and to resolve matters as quickly as possible. Barring serves to enforce these time limits.

The average action is unlikely to employ more than the “main” pleadings, which include the plaintiff's declaration, the defendant's plea and the plaintiff's plea in reconviction to any counter-claim. Given the potential complexity of high court matters, however, the rules also provide for exchanges of pleadings which extend beyond the norm, commencing with replication, rejoinder, surrejoinder, rebutter and surrebutter.⁵⁸ It is highly unusual for any of the above pleadings to be

58 Other than the replication, these additional pleadings are referred to only in abstract fashion in r 25 Uniform Rules. R 25(5) provides: “Further pleadings

used, however, as replication will only be necessary where the defendant has raised fresh averments in his plea, which the plaintiff cannot leave unchallenged.⁵⁹

Rule 26 of the Uniform Rules of Court provides a general rule for barring dilatory pleadings. There are two methods of barring, namely “automatic” barring and barring on notice, which of the two, is the method with the more serious consequences. Barring on notice is used in respect of the main pleadings including the plaintiff’s declaration, the defendant’s plea and the plaintiff’s plea in reconvention to any counter-claim. “Automatic” barring occurs in respect of replication and any pleadings that may occur thereafter.

Barring on notice simply requires the delivery of a “notice of bar” (or “notice to plead”) to the dilatory party, warning them that their pleading is late and should they fail to deliver the pleading within five court days after receipt of the notice, they will be *ipso facto* barred from doing so thereafter, and default judgment may be applied for against them. The inability to serve one of the main pleadings is destructive to the dilatory party’s case, of course, and in our experience, notices of bar most commonly relate to the defendant’s plea, although they may also be used in default of declaration in the case of a simple summons. The fact that default judgment can be taken, makes a notice of bar a serious threat to one’s case and is a potent tool for preventing a party from using action proceedings to play for time.

The harmonisation of rule 20 of the Magistrates’ Courts Rules with rule 24 of the Uniform Rules, has had the effect of removing any provision for barring a dilatory plea in reconvention. The Magistrates’ Courts Rules have never included a general rule dealing with barring, such as rule 26 of the Uniform Rules of Court, and neither has one been provided with the new amendments. Previously, however, this was not problematic, as provision was made by the former rule 19, which previously dealt with pleas, when read with rule 12, which deals with default judgment and the former rule 20, which dealt with claims in reconvention, albeit in somewhat different terms from the current rules. Although the

may, subject to the provisions *mutatis mutandis* of sub-rule (2) be delivered by the respective parties within ten days after the previous pleading delivered by the opposite party. Such pleadings shall be designated by the names by which they are customarily known”.

59 The pleadings that follow a plea are relatively rare, as replication cannot be used for introducing a fresh cause of action or adding averments that ought to have been included in the plaintiff’s declaration, and to do so is known as a “departure” (see *Broad v Bloom* 1903 TH 427; *Butler v Swain* 1960 1 SA 527 (N)). Usually, a replication followed by any of the subsequent pleadings will be prompted by the defendant pleading “confession and avoidance”, by admitting the truth of the plaintiff’s averments but adding further information which shows the plaintiff’s averments in a different light. A slightly different kind of example would be a special plea of prescription, which would require the plaintiff to resist the special plea by averring in a replication that prescription had been interrupted in some fashion.

interaction between these three rules sounds complicated, it is not that difficult to unscramble.

Rule 12 is unchanged and rule 12(1)(b) continues to provide for the barring of the defendant's plea specifically. The rule allows for barring on notice in a manner which is identical to barring on notice in high court practice. It is the only provision dealing with barring in the Magistrates' Courts Rules, however, and makes no mention of pleas in reconvention or any other pleading, for that matter. This did not pose a problem before, however, because rule 20(1) provided that "the provisions of these rules shall *mutatis mutandis* apply to all claims in reconvention".⁶⁰ The effect was that any provision that rule 12(1)(b) made in respect of barring for pleas in convention and the time limits set out in rule 19, also applied to pleas in reconvention.

In the absence of a general rule for barring such as rule 26 of the Uniform Rules of Court, and with the amendment of rule 20 having eliminated any provision for rule 12(1)(b) to apply to pleas in reconvention, there is no longer any method for barring pleas in reconvention in the magistrates' courts. This potentially leaves a matter in limbo until and if ever the plea in reconvention is received.

7 Barring a Declaration in the Magistrates' Courts

As indicated above, the 2010 amendments to the Magistrates' Courts Rules introduced the high courts' type of simple summonses for debts and liquidated demands and combined summonses for the first time.⁶¹ Although they must disclose a cause of action, it is in the nature of simple summonses that they do not fully comply with the requirements for pleadings set out in rule 6 – the new magistrates' courts equivalent of rule 18 of the Uniform Rules. More particularly, simple summonses do not comply with rule 6(4) which requires "sufficient particularity to enable the opposite party to reply thereto" by way of a plea or subsequent pleading.⁶² This deficit is corrected in the same manner as is done in the high courts – by way of a "declaration" delivered by the plaintiff after receipt of an appearance to defend.⁶³ The declaration repeats the cause

60 The sub-rule also dispensed with the need for an appearance to defend, and provided that the time limits would run from the date of the delivery of the claim in reconvention. R 20(2) provided for the time in which a claim in reconvention should be served, which it indicated should be within the time limited by the former r 19 for the delivery of the defendant's plea, read with r 12(1)(b).

61 R 5(2)(b), (a).

62 R 18(4) Uniform Rules, the counterpart of the new r 6(4) Magistrates' Courts Rules, became necessary with the elimination of requests for further particulars to pleadings in high court practice during the 1980s, a process which has been repeated in the magistrates' courts as a result of the 2010 amendments.

63 R 15 Magistrates' Courts Rules.

of action originally set out in the simple summons, but insufficient particularity to comply with rule 6. As indicated above, the only provision dealing with barring in the Magistrates' Courts Rules is rule 12(1)(b), which refers exclusively to pleas. Needless to say, in the absence of a deeming provision such as the former rule 20(1) in respect of claims in reconvention, declarations also lack any means of being barred for dilatory delivery. Given that it is usually the plaintiff who has the motivation to pursue a matter with despatch rather than the defendant, this omission will not be endured that often. An omission it remains, however, and a defendant seeking finality or a tactical advantage, perhaps, will miss the ability to place the plaintiff under pressure of bar, particularly in the case of a plaintiff who has "knocked out" an ill-conceived simple summons without expecting it to be defended.

8 "Automatic" Barring for Pleadings Subsequent to the Plea

As was indicated above, "automatic" barring is provided for in rule 26 of the Uniform Rules, which provides that "any party who fails to deliver a replication or subsequent pleading within the time limit stated in rule 25 shall be *ipso facto* barred". This means that in the absence of the receipt of a timeous replication, the pleadings are deemed to be closed and the matter may be set down for trial.⁶⁴ "Automatic" barring also applies to all the pleadings that follow the replication. For example, if the plaintiff delivers his replication within the time limit, but the defendant fails to deliver his rejoinder within the time limit, the defendant will automatically be barred from further pleading. Unless there is a specific need to file a further pleading, failure on the part of either the plaintiff or defendant to file such further pleading, merely serves to close the pleadings and does not constitute an admission of the facts in the previous pleading.⁶⁵

A *lacuna* has been created, however, by the 2010 amendment of rule 21 of the Magistrates' Courts Rules, which deals with replications and subsequent pleadings. Previously, rule 21 provided only for a solitary pleading known as a "reply", which served as an equivalent to replication in the high courts. There was no provision for a defendant to respond to the reply, perhaps because it was not expected that magistrates' courts matters would be sufficiently complicated to warrant the extra pleadings. However, the amendment has resulted in rule 21 becoming an almost exact duplicate of rule 25 of the Uniform Rules, with the result that the entire repertoire of extra pleadings from replication to surrebutter are now available in magistrates' courts practice.

Nonetheless, as indicated above, the sole Magistrates' Courts Rule dealing with barring remains rule 12(1)(b), which relates specifically to

⁶⁴ See *Moghambaram v Travagaimmal* 1963 3 SA 61 (D).

⁶⁵ R 25(2) Uniform Rules, read with r 29(b).

the defendant's plea, and requires notice for enforcement. In the absence of any general rule for barring equivalent to rule 26 of the Uniform Rules, there is no method of automatic barring available, should the extra pleadings become necessary, but are not served on time.⁶⁶ This creates uncertainty, as it is unclear whether a replication or other pleading received out of time can be safely ignored, the pleadings considered to be closed and the matter set down for trial.

The absence of provision for automatic barring in these circumstances may exist because the drafters of the rules felt that replications, rejoinders and subsequent pleadings are so seldom used. However, having made available the use of these pleadings, some provision for their enforcement might have been expected, other than an application in terms of rule 60(2). Furthermore, the provisions of rule 60(2),⁶⁷ apart from being more onerous as they require positive action in the form of an application, do not really lend themselves to this situation. It may be possible to use the newly-introduced irregular proceedings under rule 60A to have a late replication set aside, but this also requires positive action of the part of the party receiving the dilatory pleading. In any event, it is unlikely that these methods were intended for use in this situation, as the same or similar remedies feature in high court practice,⁶⁸ coexisting with a specialised form of enforcement in rule 26 of the Uniform Rules. The simple fact is that one might have expected the inclusion of additional high court pleadings to be accompanied by the requisite high courts' supporting provisions, and it would seem that the absence of a counterpart to rule 26 of the Uniform Rules is an unintended *lacuna* in the amended Magistrates' Courts Rules.

9 Provision for Jurisdictional Averments

Some difficulties are not caused by lacunas as much as the drafters' seeming obliviousness to the consequences of crafting the rules in a particular fashion. An example of this is found among the far-reaching amendments to rules 5 and 6 of the Magistrates' Courts Rules. These rules have been completely overhauled and apart from certain differences – that will not be discussed here – now more closely resemble rules 17 and 18 of the Uniform Rules of Court. The result is that

66 Before the 2010 amendment, r 21(4) provided that “where no reply to the plea is delivered, upon the expiration of the period limited for reply to the plea, the pleadings shall be deemed to be closed”. The practical effect was therefore identical to high court practice, as there was only provision for the solitary reply, and if that was not timeously delivered, pleadings would be deemed to be closed, whether or not the reply was necessary. R 21(2) together with r 21A(b), have a similar effect, except that the deeming provision in r 21(2) appears to be dependent on the further pleading not being necessary. This appears to clash with r 21A(b), which makes no such distinction.

67 R 60 Magistrates' Courts Rules is a general rule, in respect of non-compliance with rules, including time limits and errors.

68 Rr 30, 30A Uniform Rules.

rule 5 deals with the details which need to be included in the various types of summonses, while rule 6 has become a general rule setting out certain principles to be followed in all pleadings, together with certain averments that must be incorporated with specific causes of action in particulars of claim.

Rule 6(5)(f) of the previous rules required a certain averment to be made in the particulars of claim when the plaintiff was relying on jurisdiction based on the cause of action, conferred on the court in terms of section 28(1)(d) of the Magistrates' Courts Act.⁶⁹ This averment was to the effect that the whole cause of action arose within the district, although no further particulars were necessary to support the averment. Under the former Magistrates' Courts Rules, of course, further particulars if necessary could be obtained in due course.⁷⁰ Having adopted the high court summons and pleadings structure, further particulars are no longer an option and the rules have been amended to provide for this. Unfortunately, jurisdiction in terms of section 28(1)(d) of the Magistrates' Courts Act⁷¹ is not an issue in the high courts and the drafters could not find guidance for how it should be dealt with in the Uniform Rules. In the event, it appears that they have failed to take the difference between simple and combined summonses into account, and the result has been "overkill".

In similar fashion to the former rule 6(5)(f), the new rule 5(6)(a) provides that where the defendant is cited under the jurisdiction conferred upon the court by section 28(1)(d) of the Magistrates' Courts Act,⁷² the summons must contain the averment that the whole cause of action arose within the district or region (in the case of a regional court). The new rule also requires, however, that the summons should set out particulars in support of this averment. This means that the usual statement to the effect that "the cause of action arose wholly within the jurisdiction of the above honourable court" is no longer valid for the purpose of a magistrate's court summons.

The purpose of the additional requirement is clearly to deal with the fact that further particulars to pleadings may no longer be requested. It would have made more sense, however, had the additional requirement appeared in rule 6, as it would then have applied only to a combined summons or a declaration, where the particulars of claim require the full particularity envisioned in rule 6(4). Nonetheless, the requirement appears in rule 5, which means it applies to all summonses, including simple summonses, which are not required to comply with rule 6. In submission, requiring a simple summons to contain this kind of particularity misses the point of a simple summons, and there is no reason why this kind of particularity should be required here, particularly

69 32 of 1944.

70 R 16 of the Magistrates' Courts Rules prior to amendment.

71 32 of 1944.

72 *Idem*.

as any deficit can be made up by a declaration should the matter be defended.

10 Electronic Addresses

Some potential difficulties with the amendments do not relate to *lacunae*, omissions or possible mistakes – but to innovation which can increase the scope of misuse. This is the case with the 2010 amendments' provision for the use of electronic addresses by parties in magistrates' courts proceedings for the first time. In terms of rule 5(3)(a)(i), the plaintiff's attorney must – where available – include his electronic and facsimile address as well his postal address in the summons. Furthermore, in terms of rule 5(3)(b), the plaintiff may indicate in the summons whether he is prepared to accept service of all subsequent documents and notices in the suit through any manner other than the physical address or postal address and, if so, which manner of service would be preferred. There is also provision in rule 5(3)(c) for the defendant in response to the written request of the plaintiff, to deliver a consent in writing to the exchange or service by both parties of subsequent documents and notices in the suit by way of facsimile or electronic mail. Should the defendant refuse or fail to deliver the consent, the court may, on application by the plaintiff, grant such consent, on such terms as to costs and otherwise as may be just and appropriate in the circumstances. This provision would seem to go further than to merely allow the use of using electronic addresses, and actively encourages the use of electronic means for the exchange of documents.

There is nothing wrong with this intent; indeed it is progressive and in keeping with the manner in which the world currently communicates. Delivery by electronic means does carry potential hazards, however. The first hazard is a relatively simple organisational one for attorneys and their staff. Already in regard to correspondence as opposed to pleadings, many messages are being exchanged via e-mail, instead of traditional letters. There are dangers in the drafting and dispatch of messages in this fashion, including informality and more seriously, the immediacy of drafting and dispatch leading to drafting without proper consideration. From a file maintenance point of view, two methods of dispatch and storage are being used in every matter, and it becomes difficult to keep track of all the communications. Therefore, hard copies of all electronic documents need to be made with religious consistency, as soon as they are written or received. In an age of laptops and coffee-shop work spaces, this habit is not always as simple to follow, as is necessary.

The second difficulty associated with delivery by electronic means relates to the problem of proving the despatch or receipt of pleadings when performed electronically. In theory, proof of "fax" or facsimile transmissions should be reasonably easy to show, as a date is indicated on both the received document and despatching note. Covering e-mails may be printed out, and these may show the required details also.

However, the use of electronic means of communication is not completely reliable. Unserviceable machines do not always indicate that they are out of order to the sender of a document. Furthermore, merely running out of paper at a busy time can cause a fax machine to lose its memory of some of the received documents which are queued whilst waiting to be processed, notwithstanding the fact the paperless machine has electronically acknowledged receipt.

The truth is that digital communication devices are a mystery to almost all but the professionals who service them. The result is that a wide range of new excuses are now available to a dishonest and dilatory attorney, who can now allege that the computer or some other device “ate” his notice or pleading. Nothing is quite as certain as having a receptionist compare a copy of a document with its original, and then stamp the proof of service together with the date.

11 Conclusion

As stated in the introduction to this article, a period of significant change often brings with it a degree of dislocation. In an area of law as complex and exacting as civil procedure, this can result in what we have termed “gaps, glitches and gremlins”. What is of concern is the following: Firstly, certain of the gaps, glitches and gremlins which we have identified may be attributed to insufficient attention to detail and careless drafting – in short, lack of proper care and attention. It is submitted that the old adage “more haste less speed” should be applied to the process of transforming South Africa’s civil court system. Rushing through legislation meant to transform the system, without due care and attention and without a proper understanding of the full ramifications of the measures passed, will only serve to delay the process of transformation. Secondly, it is of concern that certain of the gaps, glitches and gremlins identified in this article are not trivial, but may negatively impact upon the rights of litigants. Certain issues – for example, uncertainty surrounding the very establishment of the new magistrates’ courts for regional divisions – lie at the heart of the system itself. Should the problems identified in this article not be rectified, it may lead to serious negative consequences for litigants making use of the system.

Although this short article cannot claim to have isolated each and every gap, glitch or gremlin, we hope to have at least pointed to most of the main problem areas as they relate to practice in the magistrates’ courts. It is submitted that due attention needs to be paid by both the executive and the legislature to the problems identified, in order that the ongoing transformation of South Africa’s legal system be accomplished without undue frustration on the part of those required to operate within that system.