

REPORT TO THE SABFS: (REPORT DATING THE PERIOD JULY 2020 TO 30 DECEMBER 2020 (AUDIO VISUAL MEETING (MS TEAMS)

DATE:23 OCTOBER 2020

THE RULES BOARD FOR COURTS OF LAW

1 INTRODUCTION

It is with a high degree of satisfaction and pride to submit hereby my last report to the SABFS as its nominee to the Rules Board. I will be attaining the age of **65 on the 28th October 2020** which signifies the end of my appointment as a permanent and fulltime sheriff and consequently as a member of the Rules Board for Courts of Law. .

This report represents the last meeting of the board which was held on the **16 September 2020** via Teams. I have mentioned in my previous reports that the Rules Board's sub-committees' deliberations, recommendations and resolutions feed into the Rules Board where final and binding decisions are taken. There might however be instances in this report where reference is specifically made to a particular committee's decision for more clarity and emphasis.

(A) THE COST COMMITTEE - Matters before the Rules Board

(i) FEES AND TRAVELLING EXPENSES OF SHERIFFS: PART II OF ANNEXURE 2 TO THE SMALL CLAIMS COURTS RULES:

I have reported on this matter in my previous report. These are expenses incurred by sheriffs when travelling to serve documents on matters pertaining to the Small Claims Courts. The Board noted that the tariff amendments have been finalized and will be submitted to the Office of the Chief State Law Adviser (OCSLA) for scrutiny and checking.

The Board noted that the memorandum to the Minister with the tariff amendments has been submitted to the Chairperson of the Rules Board for her consideration and signature

(ii) NECESSARY EXPENDITURE WHERE A SHERIFF INCURS FURTHER COSTS: UNIFORM RULE 68(3) (a) / MAGISTRATES' COURTS RULE 34(2):

In essence this matter seeks to ensure that sheriffs are adequately remunerated for interpleaders. Role player comments were sought and were generally supportive. SASS motivated for a much higher fee in the high court as the procedure is much more complex. The Board noted that a memorandum has been sent to the Minister for approval of the proposed amendments. .

(iii) ANNUAL REVIEW OF TARIFFS FOR PURPOSES OF INCREASES: RULE 18 OF THE SUPREME COURT OF APPEAL, UNIFORM RULE 68 AND 70, TABLE A, B AND C OF ANNEXURE 2 TO THE MAGISTRATES' COURTS RULES

This matter relates to the annual review of tariffs for purposes of increases and addresses the question whether there is a better methodology and criteria other than the Consumer Price Index that may be considered for tariff increases. The matter was put before the Board as follows:

(a) The tariffs in Supreme Court of Appeal Rule 18, Uniform Rule 68 and 70, Tables A and B and Table C (Part II) of Annexure 2 to the Magistrates' Courts Rules and Annexure 2 to the Small Claims Courts Rules should be increased;

(b) For the short term, the Consumer Price Index for the tariffs in paragraph (a) together with and adjustment of the indices identified by Professor Bloom in respect of the tariffs for sheriff would be the benchmark for the increases covering the period **May 2018 to April 2020**;

(c) For the long term the Secretariat is to investigate and research the criteria, factors and methodology used by other institutions and organizations to effect increases to tariffs (consider for example Nersa);

(d) That role-players be informed of the proposed benchmark and methodology for the next increase and be requested to provide alternative factors, criteria or methodologies that are well motivated for the Board to consider for its review of increases for the period May 2020 to April 2022. Role-players are to be given a period of 6 months to submit motivated submissions;

(e) The aforesaid recommendations should be made to the Board in **September 2020**.

The Board noted that the Minister approved the proposed tariff amendments on 27 February 2020.

(iv) EXECUTION AGAINST MOVABLE PROPERTY: MAGISTRATES' COURTS RULE 41(7)(f)(i) ITEM 10 AND 11 OF PART II OF TABLE C OF ANNEXURE 2 TO THE MAGISTRATES' COURTS RULES (TARIFF FOR SHERIFFS)

This matter relates to the review of tariffs for purposes of increases in so far as execution against movable property is concerned. The Board noted that the amendments have been combined with the amendments dealt with under *Annual review of tariffs for purposes of increases (discussed under A iii)* above. It also noted that translation and gazetting of these amendments were underway.

(v) URGENT REQUEST FOR AN INCREASE IN THE TRAVELLING ALLOWANCE OF SHERIFFS BY THE SOUTH AFRICAN NATIONAL ASSOCIATION OF PROGRESSIVE SHERIFFS (SANAPS) – ITEM 3(a) OF UNIFORM RULE 68 AND ITEM 4(a) OF PART II OF TABLE C

The Board considered and deliberated on the memorandum by the Cost Committee whose purpose was basically to recommend to the Rules Board that a tariff charge for time spent travelling by sheriffs for service and execution should not be introduced in the tariffs for sheriffs in the high court.

The board approved the committee's recommendation that a tariff charge for travelling time for sheriffs for service or execution process should not be introduced in the High Court and Magistrates' Courts' tariff

and further approved that the SABFS should be advised in writing of the Board's decision.

(vi) SHERIFF OBERHOLZER, MS M M MSIMANGO'S REPRESENTATION RELATING TO ATTACHMENT COMMISSION PERTAINING TO INTERPLEADERS: ITEM 11 OF TABLE C OF ANNEXURE 2 TO THE MAGISTRATES' COURTS RULES –

The Board considered and deliberated on the memorandum by the cost committee whose purpose was basically to recommend to the Rules Board that the Board approve (final) the proposed draft rule amendment subject to the proposed amendments. The final provision of this amendment reads as follows:

"11(a) Where property is released from attachment in terms of rule 41(7)(f)(i), or the warrant of execution is withdrawn or stayed, or the judgment debtor's estate is sequestrated after the attachment, but before the sale, 2.3 per cent of the value of the goods attached, subject to a maximum of R186.00: Provided that if a sale subsequently takes place in consequence of the said attachment, the amount so paid shall be deducted from the commission payable under item 12.

(b) Commission referred to in item 11(a) shall not be chargeable against a judgment debtor on the value of movable property attached and subsequently released pursuant to a claim by a third party, unless notwithstanding a claim by a third party, the removal of such property is done at the express direction of the judgment creditor, in writing, in which event the judgment creditor shall be liable to the sheriff for commission at a rate of 2.3% of the value of the goods and costs."

(viii) SHERIFF OBERHOLZER, MS M M MSIMANGO'S REPRESENTATION RELATING TO TAXATION OF SHERIFFS FEES: ITEM 33(a) OF PART II OF TABLE C OF ANNEXURE 2 TO THE MAGISTRATES' COURTS RULES –

The Board noted that a memorandum to the Minister approving (final) the proposed draft tariff amendments, subject to the period of **15 days being changed to 20 days** has been submitted to the Chairperson of the Rules Board for her consideration and signature

(Xi) UNIFORM RULE 17: SUMMONS

This matter is occasioned by the fact that the Rules Board deemed it appropriate to amend Rule 17 (2) and Form 9 and Form 10 due to the amendment of Uniform Rule 1 but also to remove outdated terminology contained in the Rule. The Board considered whether Forms 9 and 10 should be amended to require the sheriff to return the summons to the plaintiff/practitioner instead of the registrar.

The Board concluded that court processes should be returned to the registrar and not the parties.

(x) REVIEW OF 15KM DISTANCE IN THE RULES FOR APPOINTMENT OF SERVICE ADDRESS

I reported on this aspect in my previous report. I indicated that the Board had resolved to obtain role-player comments on the principle of the appointment of an address for service.

The Board however considered and deliberated on this matter and concluded that in the light of unrepresented litigants in particular, often not residing within close proximity of the court and likely to suffer the most should the requirement of an address within 15 km of the court be retained.

The Board accepted the recommendation that an address within the jurisdiction of the court and an electronic address should substitute for the 15km address provision. It noted further that the proposed

amendment would be sent to role-players for comment. (Kindly see my previous report in this regard.)

(B) PRESENTATION FROM GLOVER KANIAPAN INC RELATING TO THE PROPOSED AMENDMENT TO RULES AND LEGISLATION REGULATING EXECUTION AGAINST IMMOVABLE PROPERTY:

The Board noted that on **20 May 2020** one of its committees, the Superior Courts Committee, considered the representation and referred it to the Joint Committees for joint consideration with the Magistrates' Courts Committee. The Joint Committees had deliberated on the representation and the board approved its recommendations as follows:

Ad paragraph 1.1

To facilitate the completion of the attachment Uniform Rule 46(1) (b) (ii) should be amended to state “the description of the property to comply with the requirements of the Deeds Registry”.

Ad paragraph 1.2

Uniform Rule 46(3) (a) should not be amended to include the writ of execution as the representor has provided no detail on the problem with the rule.

Ad paragraph 1.3.1, 1.3.2, 1.3.3 and 1.3.4

(a) There is no need to amend Uniform Rule 46(11) to comply with the practice directive for the following reasons:

(i) The Sheriff High Court, Hlabisa & Nongoma v Shobede 2009 (6) SA 272 (KZN) case, KZN (later followed in Gauteng) stated that the cancellation

should be a simple/cost effective application. It should be in chambers unless a court refers it to open court if opposed.

(ii) The Rules should not bend to Practice Directives as they change.

(b) In the light of the issues pertaining to practice directives, such as inter alia there being no conformity with the practice directives and the expectation that the rules must be in line with practice directives, a meeting should be urgently convened with the Judge Presidents to discuss the practice directives.

Ad paragraph 1.3.5

Paragraph (b) of Uniform Rule 46 (11) should be amended by deleting the words “whose name appears on the sheriff’s distribution account” and replacing such words with the following words “referred to in Rule 46(14) (c)” on the basis that a distribution account is only prepared after the registration of the transfer.

Ad paragraph 1.3.6

There is no need to amend clause 10(b) in Form 21 as the existing clause is of generic application. Parties are at liberty to stipulate the conditions that suit their specific circumstances.

Ad paragraphs 1.4 and 1.5

The representor is not interpreting section 45 of the Consumer Protection Act, 2008 (Act No. 68 of 2008) correctly. Uniform Rule 46A(9)€ deals with the position which must occur pursuant to judicial oversight, ordering the setting of a reserve price to prevent deprivation of property. The Committees also considered that the Consumer Protection Act, 2008 (Act No. 68 of 2008) came into operation before the Gundwana decision. Based on the aforesaid the Committees do not agree with the

representor and recommend to the Board that the representor be advised of this.

Ad paragraph 1.6 and 1.6.1

There is no impossibility of performance in Uniform Rule 46A (9) (d) (iii) as there can be bids or offers below the reserve price.

Ad paragraph 1.6.2

Uniform Rule 46A (9) (c) and (d) do not need to be amended as it is the function of the sheriff (who puts up a report) to take the matter back to court and not the function of the execution creditor, much the same as with the cancellation of a sale.

Ad paragraph 1.7

It is not necessary to state the procedure in the rules (Uniform Rule 46(5) (b)) pertaining to preferent claims in the Superior Courts Act, 2013 as proposed by the representor.

Ad paragraph 2.2 and 2.2.1

The representor should be notified that the Committees do not agree with the submission that there is no conflict between section 66(2) (c) and (d) and Magistrates' Courts Rule 43(5) (a) and (b) as the Magistrates' Courts Rules accommodate the provisions of section 66 of the Magistrates' Courts Act, 1944.

Ad paragraph 2.2.2

The representor should be notified that the Committees do not agree with the submission and that there is no conflict between Magistrates' Courts Rule 43A (8) (e) and section 66(2) of the Magistrates' Courts Act, 1944.

Ad paragraph 2.2.3

The representor should be notified that the Committees do not agree with the submission and that the deletion of paragraph (d) of section 66 of the Magistrates' Courts Act is not necessary.

(C) LITIGATION MATTERS

These matters are matters which have been referred to the courts for adjudication. Only those relating to sheriffs are outlined below:

**(i) CHALLENGE AGAINST URC 43: (TEREZAKIS V TEREZAKIS)
WESTERN CAPE COURT CASE NO. 10825/2014**

The Board noted that:

On **29 January 2020** the Western Cape High Court dismissed the application in which the Constitutional challenge against Uniform Rule 43 was raised;

An update on the status of the Constitutional Court appeal has been requested, and is awaited from Law Enforcement and the State Attorney.

**(ii) CHALLENGE AGAINST UNIFORM RULE 46(12): GIVEN JUA
NKWANE v KELEBOGILE YVONNE NKWANE & OTHERS,
NORTH GAUTENG HIGH COURT CASE NO. 36700/2016**

The Board noted an email from the State Attorney advising that it is not aware of the settlement of this matter and resolved that further development should be requested from the State Attorney.

**(iii) CHALLENGE AGAINST UNIFORM RULE 46(12): MK SIBIYA v
NEDBANK LIMITED & OTHERS, SOUTH GAUTENG HIGH
COURT, JOHANNESBURG CASE NO. 269953/2016**

The Board noted that the applicant challenges the constitutional validity of Uniform Rule 46(12). An update has been requested and is awaited from Law Enforcement.

(iv) CHALLENGE AGAINST UNIFORM RULE 48: ML STUART AND ANOTHER v MINISTER OF JUSTICE AND CORRECTIONAL SERVICES AND SEVEN OTHERS, PRETORIA HIGH COURT CASE NO. 44039/18

The Board noted that the applicant challenges the constitutionality of Uniform Rule 48: (Review of Taxation) An update has been requested and is awaited from the State Attorney.

(v) CHALLENGE AGAINST UNIFORM RULE 4(10) (a): ZE SIBANYONI V MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT AND 8 OTHERS, CONSTITUTIONAL COURT CASE NO. 218/19

The Board noted that the applicant challenges the constitutionality of Uniform Rule 4(1) (a): (Service by the sheriff); and the matter was dismissed by the Constitutional Court on 18 September 2019.

(vi) CHALLENGE AGAINST UNIFORM RULE 46: MAPHOFO ESTHER NTUMBA (GLADYS LIMAKATSO KHASIBE, ESTATE NO. 00760/2019) WESTERN CAPE HIGH COURT CASE NO. 8150/2006

The Board considered a summary of the development in the matter. The applicant had raised a constitutional challenge against Uniform Rule 46 (1) (a) (ii). She sought relief that the Rule be declared inconsistent with the Constitution of SA, 1996 and invalid, to the extent that it does not make sufficient provision for the protection of the applicant's rights in

terms of sec 25 and 26 of the Constitution and to the extent that it does not provide for adequate judicial oversight.

The Board approved the Committee's recommendation that the State Attorney should be instructed to inquire from the applicant's legal representatives as to what became of the abandonment of the challenge against Uniform Rule 46, as per her counsel's intimation and resolved to abide the decision of the court and not to challenge the joining of the Rules Board in view of the decision to abide and since the Rule Board is an interested party, but no relief is being sought against the Board.

(vii) CHALLENGE AGAINST UNIFORM RULE 46(12): GWISAI INNOCENT V NEDBANK LTD AND OTHERS, GAUTENG, JOHANNESBURG HIGH COURT CASE NO. 4042/2020

The Board considered a brief description of the issues which were that applicant sought amongst others, the relief that

(a) The matter be referred to the full bench for hearing in terms of section 14(1) (b) of the Superior Courts Act 2013.

(b) Declaration of certain groups of persons as a "class" namely:

i "Property sold for too little class"

ii Not last resort class

iii "Shortfall debt class" and

iv "Overcharged class"

(c) The Minister of Justice be ordered to, within one year of the order, pass legislation to put into effect new law and rules which will ensure property is not sold for substantially less than it is worth.

The Board was informed that the Secretariat is working with Law Enforcement in attending to this matter and resolved to abide but to assist the Minister in so far as is required.

(D) MAGISTRATES COURT COMMITTEE

REVIEW OF EXECUTION RULES AGAINST MOVABLE PROPERTY

RULES 38, 39, 41 AND 42 AND RELATED FORMS:

- (i) Rule 38 and Form 37 – Security by judgment creditor: review of the Rule and Form, revolving around sheriffs’ demand for security for costs**

The Board noted that on **11 October 2019** the draft amendments to rules and forms concerning execution against movables (including rule 38 and form 37) were approved (final), and then transmitted to OCSLA for scrutiny. Further, the Board noted that OCSLA scrutiny and suggestions were received on 10 December 2019. Preparations are now being made towards transmission of the amendments to the minister for approval.

- (ii) (A) E-DISCOVERY (DOCUMENTS ON ELECTRONIC DEVICES/PLATFORMS)**

- (b) ELECTRONIC FILING; SIGNATURES; ISSUING; COURT ORDERS; EVIDENCE; ADVERTISING**

On **6 December 2019** the Rules Board approved the establishment of a sub-committee of the Joint Committees of the Board to consider the recommendations of the Task Team dealing with the above matters. The mandate of the Task Team is broadly to:

- (a) Confer with the Office of the Chief Justice and the Directorate: Court Services or any other entity considered necessary by the Board to provide policy/departmental guidance in the investigation and amendment of the rules;
- (b) Confer with experts to provide technical expertise that will guide the investigation and amendment of the Rules on the discovery and inspection of electronic documents;
- (c) Examine the provisions of the Superior Courts Act, 2013 (Act No. 10 of 2013), the Uniform Rules, the rules of the Supreme Court of Appeal, the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), the Magistrates' Courts Rules, the Small Claims Courts Act, 1984 (Act No. 61 of 1984) and the Small Claims Courts Rules to consider the effect of electronic developments thereon;
- (d) Consider other legislation that impacts upon rules incorporating provisions for electronic developments and propose amendments or new rules in accordance therewith;
- (e) Consider decided cases and extrapolate therefrom, principles and recommendations where those are considered necessary or desirable to guide the amendment of the rules;
- (f) Make recommendations for submission to the Branch, Legislative Development for the amendment or development of legislation which would impact upon or enhance the efficacy of the rules and access to justice arising from electronic developments;
- (g) Generally make recommendations to the Board on rule amendments that would advance electronic developments and;
- (h) Consider international best practices from other countries.

Progress in this regard will be given in the next report.

(E) REPRESENTATION BY MR T SEBOKA AND THE SOUTH AFRICAN BOARD FOR SHERIFFS TO CONSIDER RULES FOR ON-LINE AUCTIONS

This matter relates to auctions conducted by sheriffs which had been severely compromised in terms of the State of Disaster Management Act and its Regulations. Mr Seboka made a representation that this matter should be addressed by the Rules Board on an urgent basis.

Following this representation, the Rules Board was informed that an additional representation had been received from the South African Board for Sheriffs and that the latest representation contained proposals for amendments to the rules.

The Board considered that rule amendments will not provide the immediate solution requested by the sheriffs. Mr Seboka however raised a concern that if the matter is not addressed there would be negative consequences for both debtors and creditors and that the matter may require a special meeting. The Board therefore resolved that the matter be discussed and deliberated upon at the special Board meeting which was scheduled for **30 June 2020**.

Subsequently, the Rules Board considered the submission from the South African Board for sheriffs dated 24 June 2020 and resolved that the SABFS should be notified that the Board is considering their draft rules, that the Board's consideration of their rules will not be a solution to their issue and that they should consider writing to the Minister for relaxation of the prohibitions.

The Board further resolved that the drafting team consider the amendments proposed by the SABFS with a view to possibly including them with the e-justice rules amendments that are to be sent to role-players for comment.

8. CONCLUSION

I wish to once again thank the Board for having nominated me to serve in the Rules Board. Representation of the sheriffs in this critical structure which affects the functioning of sheriffs cannot be underestimated.

I also wish to commend the board for having nominated Mr Prince Maluleke as my replacement and substitute. I believe out of his participation in the Rules Board the profession will be well represented. The Board could not have made a better nomination. I am readily available to be of any assistance to the Board and Mr Maluleke for any advice or assistance they may require.

As reported previously it is important to note that the Board no longer meets once a quarter but meets only once in a semester. This again is impeded by the Lockdown as a result of the COVID 19 and has necessitated that meetings of the Board be conducted virtually.