A few months ago I attended a talk on mediation by Professor Mohamed Paleker, a professor of law at the University of Cape Town.

During the talk, Prof Paleker, who is also a member of the Rules Board for Courts of Law, focused on the then pending introduction of the court-annexed mediation rules. The rules have since come into operation on 1 December 2014.

Prof Paleker mentioned that the Rules Board is conducting an overall review of our system of civil procedure. This forms part of the Civil Justice Reform Project, which has been initiated by the Department of Justice and Correctional Services. He pointed out that innovative thinking in the area of civil procedure is emerging not only in this county, but in other parts of the world. In particular, he mentioned that there are legal systems that have either introduced or are exploring the initiation of all civil proceedings on oath/affirmation.

Shortly after attending Prof Paleker’s talk, I became involved in a matter, which is being heard in the English courts. I was informed that according to the Civil Procedure Code of England and Wales, expert evidence in contested matters is given by way of affidavit, and is accepted by all parties and court, without oral evidence being necessary, unless it is disputed. This got me thinking that although our courts do on occasion accept evidence by way of affidavit, this is generally done only in the context of undefended matters and not in contested matters. The question is why the distinction? In application proceedings all evidence is presented on oath/affirmation, so why not in action proceedings?

Why is adversarialism more rigorous in the action procedure than in the application procedure? Is this in the interests of justice?

The combined effect of the talk by Prof Paleker and the awareness of what appears to be a simplification in England, of rules relating to expert evidence, has led to this article.

I submit that the concept of substantiating claims and, for that matter, defences on oath/affirmation has merit. I therefore submit that in all action proceedings the plaintiff should, at the time of issuing his or her summons, attest to the nature of his or her claim. Essential supporting documents should be attached (see High Court r 18). I would even go so far as to say that the affidavit should contain both the facta probanda as well as the facta probantia of the case, as one would expect in applications. It should also not matter whether the claim is liquid or illiquid. Every claim should be brought on oath/affirmation.

A defendant who wishes to defend a claim must then do likewise.

Claims brought on oath/affirmation should then act in tandem with the court-annexed mediation rules. If a matter is mediated, the summons or plea on oath/affirmation should stand as the necessary statement of claim or defence for the purposes of the mediation. There would be no need to deliver supplementary information for the purposes of the mediation. If the mediation fails, the summons and the plea should serve as pleadings, should the matter go to trial. Having claims and defences on oath/affirmation will also obviate the need for a protracted discovery and pre-trial procedure because the parties will already be in possession of a substantial amount of documentary and other evidence.

The proposed new procedure would, I submit, have a number of further advantages:

• It would reduce the number of spurious claims which are instituted.
• Civil claims via action (summons) would be approached in a less adversarial manner. At present each party keeps their powder dry for as long as possible, with evidence being tested for the first time in court by way of evidence-in-chief, cross-examination etcetera. It seems better for fact and truth-finding and, a priori the administration of justice, that there be early discovery of evidence on both sides. It has always appeared strange to me that we operate like moles in the dark for the greater part of the litigation process, only to see the light at the end of the process, namely during trial, when the evidence each party has to support his or her claim/defence is led. Many claims are settled during trial when it becomes apparent that the evidence does not support the claim or the defence. This method of operating is time-consuming, inefficient and most certainly not cost effective (see Mohamed Paleker ‘Fact- and Truth-Finding in South African Civil Procedure’ in CH Van Rhee and A Uzelac (eds) Truth and Efficiency in Civil Litigation – Fundamental Aspects of Fact-finding and Evidence-taking in a Comparative Context (Cambridge: Intersentia 2012) at 189 – 227).
• The proposed new system will prevent the state from continuing with its current modus operandi which is, in general, to oppose all claims brought against it as a matter of principle and then dragging out those claims for as long as possible, often at the expense of the tax.
payer and to the detriment of claimants with legitimate claims. In passing, I understand that the possibility of a ‘solicitor general’ being appointed, to take charge of all litigation against the state and to ensure that there are earlier settlements in appropriate matters, and to prevent the current shambles, has not been taken any further. This, in my view, is regrettable.

- A considerable number of matters would be settled at an earlier stage, thereby alleviating the backlog of cases experienced in many courts.

It is interesting to note that our system of civil procedure has hardly been modified in decades. As Prof Paleker noted, the system that we currently have is essentially Victorian in nature and yet, the English in 2000 completely jettisoned their old system of civil procedure in favour of a more efficient one following the recommendations of the Woolf Report (Lord Woolf ‘Access to Justice Final Report’ July 1996 (http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/civil/final/index.htm, accessed 12-5-2015)). We are thus sitting with an anachronistic system of procedure that does not seem to serve modern needs and commercial realities. Where there have been changes in our system of procedure, these have mostly been minor technical modifications; there has been a lack of critical engagement with the substance of civil procedure. As Prof Paleker noted, we need to think ‘out of the box’ and overhaul our system of procedure completely if we really want to improve the state of civil justice in South Africa so that we can realise the access to justice provision in s 34 of the Constitution.

Part of this ‘out of the box’ thinking could, for example, address the question, why summary judgment is inapplicable to illiquid claims? After all, other jurisdictions make provision. Why should a court not separate the issue of quantum and merits when deciding to grant summary judgment? At the very least, it should be possible for a court to grant summary judgment on the merits and reserve quantum for trial.

Where is the radical and critical thinking of our present system of civil procedure? Most readers of this article will be aware of the complaints about the current system including delays, costs, lack of accessibility to justice etcetera. The complaints go on and on and are heard ad nauseam. The responses to these complaints have included the introduction of case management in the High Court, harmonisation of magistrate’s court and High Court Rules, and attempts to bring in mediation. But is that enough? I argue that a more radical re-engineering of our system of civil procedure is called for.

It appears to me that what we do in South Africa is ‘fiddle’ with the current rules of civil procedure while Rome burns. We are stuck with what is essentially a Dickensian form of civil procedure based on a system of justice of a bygone era, whereas we need a new system of civil justice, which meets the requirements of the individual and corporate citizens of the 21st century.

It is my hope that this article will generate discussion and debate and lead to the radical reform that, I believe, is required. We need to look at how civil justice works elsewhere in the world and try to incorporate the best features of foreign jurisdictions. After all, is this not what our constitutional parents did when they drafted our Constitution, which today is considered as one of the most progressive constitutions in the world? Has the time not come to produce the most progressive, efficient, cost-effective and people-centred civil justice system in the world?