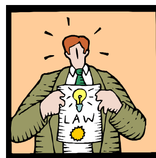
e-MANTSHI

A KZNJETCOM Newsletter

November 2010: **Issue 58**

Welcome to the Fifty Eighth issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. There is now a search facility available on the Justice Forum website which can be used to search all the issues of the newsletter. At the top right hand of the webpage any word or phrase can be typed in to search all issues.
Your feedback and input is key to making this newsletter a valuable resource and we hope to receive a variety of comments, contributions and suggestions – these can be sent to RLaue@justice.gov.za or gvanrooyen@justice.gov.za or faxed to 031-368 1366.



New Legislation

1. A Correctional Matters Amendment Bill was introduced in the National Assembly and published in Government Gazette no 33683 of 25 October 2010.The Purpose of the Bill is to repeal provisions establishing an incarceration framework introduced by the Correctional Services Amendment Act, 2008; to amend the Correctional Services Act, 1998, so as to amend a definition and insert new definitions; to provide for a new medical parole system; to clarify certain provisions relating to parole; to provide for the management and detention of remand detainees; and to provide for matters connected therewith.

2. The jurisdiction of the Small Claims Court has been increased to R12 000.00 with effect from 1 November 2010.The notice to this effect was published in Government Gazette no 33696 dated 27 October 2010

3. The following sections of the National Road Traffic Amendment Act, Act 21 of 1999 has come into operation on the 20th of November 2010**:** subsections 1(b) to subsection 1(k) of English text; subsections 1(a);1(c) to subsection1(k) of the Afrikaans text, and sections 4(a), 4(b), 5, 6, 7, 8, 9, 10, 11,14,15,16,18,19,20,21,22,23.24,25,27,28, 29, 30, 31(a), 32, 33(a), 34, 36, 37 and 39. On the same day the National Road Traffic Amendment Act, 2008 (Act 64 of 2008) was also put into operation. Both these proclamations were published in Government Gazette number 33742 dated 10 November 2010.

One of the amendments that are relevant to magistrates brought about by Act 64 of 2008 are the following:

"Amendment of section 35 of Act 93 of 1996
12. Section 35 of the principal Act is hereby amended—
(a) by the insertion in subsection (1) after paragraph *(a)* of the following paragraph:
*''(a*A*)* section 59(4), in the case of a conviction for an offence,
where—
(i) a speed in excess of 30 kilometers per hour over the prescribed general speed limit in an urban area was recorded; or
(ii) a speed in excess of 40 kilometers per hour over the prescribed general speed limit outside an urban area or on a freeway was recorded;''; and
(b) by the substitution for subsection (3) of the following subsection:
''(3) If a court convicting any person of an offence referred to in subsection (1), is satisfied, after the presentation of evidence under oath, that circumstances relating to the offence exist which do not justify the suspension or disqualification referred to in subsection (1) or (2), respectively, the court may, notwithstanding the provisions of those subsections, order that the suspension or disqualification shall not take effect, or shall be for such shorter period as the court may consider fit."

Recent Court Cases

1. **S v Mdlongwa 2010(2) SACR 419 (SCA)**

Although generally dock identification carries little weight , there is no rule that it be discounted altogether.

The appellant was convicted in a regional court of robbery with aggravating circumstances and sentenced to 20 years' imprisonment. His appeal to the High Court against both conviction and sentence having failed, he approached the Supreme Court of Appeal. The matter arose from a bank robbery in which the appellant had been implicated by eyewitness and video evidence. Although he did not testi', the appellant put forward an alibi defence. The sole issue in the appeal against conviction was the correctness of the identification, which was challenged on three grounds: that the eyewitness testimony of M, a security guard, and his dock identification of the appellant, were unreliable; that a police officer, N, who had conducted a facial comparison lacked academic qualifications, and was thus not an

expert; and that the video footage of the robbery, not being original, ought not to have been admitted.

Held, that, while M had given evidence as to the appellant's clothing that contradicted what was apparent from the video, this aspect should not be seen in isolation. The rest of his evidence was completely in line with the video footage. As to the dock identification, it would generally carry little weight, unless it was sourced in a preceding identification. However there was no rule that it should be discounted altogether especially where it did not stand alone. M had had ample opportunity to observe two of the robbers, one of whom was later identified as the appellant in the police's facial comparison. In addition, M had had no reason to falsely implicate the appellant. Accordingly, his evidence, taken together with the other evidence in the case, established the appellant's participation in the robbery. (Paragraphs [9]-[12] at 423b-424e.)

Held, further, that it was only N's lack of academic qualifications, not the merits of her findings, that had been challenged. While a lack of academic qualification might sometimes be indicative of a lack of sufficient training, this was not the case with N, given the vast experience she had accumulated as a police officer for 30 years and as a member of the Facial Identification Unit for 18 years. She had done hundreds of facial comparisons and compilations and had testified thereon in court on a number of occasions. The methods she had employed were in terms of the standards generally accepted in her department. She had found 13 points of similarity between the facial features of the person in the video footage and a photograph of the appellant; this established that one of the individuals captured on the video was the appellant. There was no reason to doubt the accuracy of her findings. (Paragraphs [18]-[21J at 425g-4261.)

Held, further, that each branch of the bank had its own hard drive on which footage from security video cameras was captured, and from which such footage could be downloaded. The video footage in casts was, therefore, unquestionably original and it constituted real evidence. As to the question of possible interference with the recordings, the evidence established that no tampering had occurred before they were handed over to the police. Consequently, neither the authenticity nor the originality of the video footage could be rejected; and what emerged from it was unmistakably the identification of the appellant as one of those participating in the robbery. Against the totality of the evidence, the appellant's bald denial of involvement must be rejected as false, and the appeal against conviction must fail. (Paragraphs [22]-[27] at 427b-428d.)

2. **Claassen v Minister of Justice and Constitutional Development and Another 2010 (2) SACR 451 (WCC)**

The doctrine of judicial immunity from civil liability is consonant with the Constitution. The only exception is where judicial conduct is malicious or in bad faith.

The appellant appealed against the dismissal of his action for damages for unlawful detention, brought against a criminal court magistrate in his personal capacity and against the first defendant on the basis of the latter's alleged vicarious liability for the wrongdoings of the magistrate. The trial court found that the criminal court magistrate had not been properly joined in the action, and the appellant's initial appeal against this finding was abandoned during the course of the appeal. The appellant, who had been released on warning, had failed to attend court for a provisional appearance on certain criminal charges, due to unforeseen difficulties in the transport arrangements he had made. He was subsequently arrested and brought before the court, where he was summarily remanded in custody until the next scheduled hearing of the matter. He had taken the precaution of deposing to an affidavit explaining his difficulties, but was given no opportunity of presenting it or of otherwise explaining the reasons for his failure to appear.

Held, that the importance of punctilious compliance with the procedural requirements bearing on any sanctioned deprivation of liberty could not be overemphasized. The criminal court magistrate had not held an enquiry [into the appellant's failure to attend] in terms of s 72(4) of the Criminal Procedure Act 51 of 1977, and neither had he cancelled the appellant's release on warning in the manner provided for in terms of s 72A, read with S 68(1) and (2) of the Act. The magistrate had thus acted in disregard of both the substantive and the procedural requirements for the exercise of any power he had to curtail the appellant's right to personal freedom. The magistrate's explanation for his failure to enquire into the reasons for the appellant's absence—that s 72(4) employed the word 'may' rather than 'must', and was therefore permissive and not peremptory—was inherently implausible in the context of the magistrate's conduct. Without such an enquiry there could have been no basis for committing the appellant to prison. (Paragraphs [12]-[15] at 457b-458d.)

Held, further, that, despite the magistrate's actions and his demeanour at the hearing, it could not be found that he had acted mala fide or maliciously. There was no doubt, however, that he had acted negligently: his conduct had fallen short of what might be expected from a reasonable person in his position; he should have been aware that it might cause the appellant damage; and he had unreasonably failed to avoid such harm occurring. As to whether or not a remedy in damages should be extended, where a person was unlawfully detained in consequence of a negligently made order by a magistrate acting outside the authority of the law, judges and others exercising adjudicative functions had been held immune against actions for damages arising out of the discharge of their judicial functions. This was a matter of legal policy and the only exception was in cases where the judge's conduct was malicious or in bad faith. Given the finding that the magistrate in casu had not acted maliciously, three questions had to be considered: firstly, whether judicial immunity applied in a situation where a magistrate exercised powers that he did not have; secondly, whether the fact that the appellant had been unlawfully committed to prison, in breach of his fundamental rights under s 12 of the Constitution of the Republic of South Africa, 1996, should affect the judicial immunity that would otherwise have protected the magistrate from delictual liability; and, thirdly, whether the fact that South Africa had adopted the International Covenant on Civil and Political Rights (ICCPR)—s 9(5) of which provided that any victim of

unlawful detention had an enforceable right to compensation—likewise affected the magistrate's judicial immunity. (Paragraphs [1 6]-[24] at 458f-461f.)

Held, further, that, although the matter had been properly before the magistrate, he had dealt with it ineptly and without proper regard to the statutory constraints on his powers, thereby exceeding his jurisdiction. However, albeit his acts in connection with the matter may have been fundamentally misdirected, they were nevertheless judicial acts; accordingly, immunity applied to them.(Paragraph [27] at 462 c-e.)

Held, further, that the doctrine of judicial immunity was consonant with the provisions of the Constitution, notably s 165, which entrenched the principle of judicial independence with the attendant promotion of the ability of the judiciary to administer the law without fear, favour or prejudice. Section 12 of the Constitution entrenched a right to personal liberty, but did not by itself afford a right of compensation to a person whose right had been infringed. Accordingly, denying the appellant a claim for damages against the magistrate did not entail a limitation of his right to liberty; nor did it denote that judicial immunity offended against the spirit, purport and objects of the Bill of Rights. The considerations underpinning the doctrine of judicial immunity compelled the conclusion that it would be inappropriate as a matter of legal policy to characterise the magistrate's conduct as wrongful, in the sense required for the appellant's claim to have succeeded. (Paragraphs [31] and [32] at 464i-.465e.)

Held, further, that the ICCPR was not a self-executing legal instrument—the Republic's formal adoption of its provisions did not, without more, amend established domestic law. If unqualified effect were to be given to art 9(5) of the ICCPR, South Africa would have to enact legislation to do so. Finally, given that the magistrate was immune from liability, the issue of the vicarious liability of the minister for the former's acts did not arise for determination. (Paragraphs [36] and [37] at 466e-g.)

Appeal dismissed. No order as to costs.

3. S v Khan 2010 (2) SACR 476 (KZP)

The provisions of section 35 of the Constitution of the Republic of South Africa ,1996, applied only to 'arrested', 'detained' and 'accused' persons, and not to 'suspects'. The rights of the latter were adequately catered for by the provisions of the Judges' Rules.

The appellant was convicted of contravening ss 4(b) and 5(b) of the Drugs and Drug Trafficking Act 140 of 1992, and sentenced to five years' imprisonment, half of which was conditionally suspended. She appealed against the conviction only. It was contended on her behalf that evidence of a pointing out by the appellant ought not to have been admitted, since the police had not warned her of her right to remain silent and her right against self-incrimination before she produced the drugs in question.

Held, that it was clear on the State's version that the police had not warned the appellant of her rights before telling her to hand over the drugs. The provisions of s 35 of the Constitution of the Republic of South Africa, 1996, applied only to 'arrested', 'detained' and 'accused' persons, and not to 'suspects'. The rights of the latter were adequately catered for by the well-established provisions of the Judges' Rules. To cast an obligation upon the police not only to caution a suspect in terms of the Judges' Rules, but also to advise him or her of the rights encompassed in s 35 of the Constitution, would not strike an even balance between the interests of suspects and the need not to hamstring the police in their investigation of crime. (Paragraphs [IO]-[24] at 481c-484d.)

Held, further, that, at the time the police approached the appellant, they had a reasonable apprehension that she was a suspect in the offence they were investigating. They were accordingly obliged to caution her in terms of the Judges' Rules, and their failure to do so was an infringement of her rights. It had therefore to be determined whether, if the evidence of the production of the drugs by the appellant were excluded, the remaining evidence was sufficient to prove that she possessed the drugs. (Paragraphs [27]-[29] at 484g-485b.)

Held, further, that, when due weight was given to the fact that the appellant was untruthful as to the place where the drugs were found, as well as to the nature and extent of her involvement in the running of the shop in which it were found, which shop bore her name, the inference was irresistible that the appellant had been aware of the existence of the drugs and of its location. Such awareness, combined with the evidence of her involvement in the running of the shop, had as a necessary consequence that the appellant had physical control over the drugs, as well as the intention to exercise such control. Accordingly, the remaining evidence established her guilt beyond reasonable doubt, and the admission of the pointing out evidence would therefore not be prejudicial to her. Furthermore, the production of the drugs by the appellant had not played a material role in their discovery. The police, who believed in the correctness of the information they had been given, would have lawfully located the drugs in any event, and such location, together with the rest of the evidence, would have resulted in the appellant's conviction. (Paragraphs [35]-[39] at 486j-487g.)

Appeal dismissed.

4. S v Hodgkinson 2010 (2) SACR 511 (GNP)

On a charge of contravening s 120(6) of the Firearms Control Act 60 of 2000 (Unlawfully pointing a firearm or something likely to be believed to be a firearm, without good reason to do so) the *mens rea* that had to be proved was intent.

The appellant was convicted of contravening s 120(6) of the Firearms Control Act 60 of 2000, unlawfully pointing a firearm or something likely to be believed to be a firearm, without good reason to do so. The charge arose from a practical joke in

which he had pressed a water pistol against the body of one of his employees. The trial court rejected the complainant's evidence that he had been threatened with a real firearm, but found that the complainant had believed the water pistol to be a real gun.

Held, that, since the trial court had rejected the complainant's emphatic evidence that the firearm was a real one, which had been cocked in his presence, it was difficult to understand on what basis the magistrate could have found that the complainant had believed the water pistol to be a real gun. Apart from this, however, the magistrate had erred in interpreting the statutory provision. The mens rea that had to be proved was intent, not culpa or, as the trial court's judgment suggested, strict liability. The words'. . . without good reason to do so' clearly suggested a conscious decision to point an object resembling a firearm under circumstances that would constitute a threat. The verb 'to point' similarly described a conscious and deliberate action. The Act's predecessor, the Arms and Ammunition Act 75 of 1969, expressly required that the pointing be willful in order to be an offence, and, while the present provision was differently worded, it was clear that the legislature had not intended to introduce a different form of mens rea. (Paragraphs [26]-[31] at 5l4g-5 15d.)

Appeal upheld. Conviction and sentence set aside.

From The Legal Journals

Wallis, M

"*Ordinary justice for ordinary people*: The eighth Victoria and Griffiths Mxenge Memorial Lecture"

2010 SALJ 369

Zaal, F N

"Paper tigers no more: The new penalties jurisdiction for children's courts"

2010 SALJ 401

Otto, J M

"The incidental credit agreement"

2010 THRHR 637

Boraine, A and Van Heerden, C

"Some observations regarding reckless credit in terms of the National Credit Act 34 of 2005"

2010 THRHR 650

Coetzee, H

"Voluntary surrender, repossession and reinstatement in terms of the National Credit Act 34 of 2005"

2010 THRHR 569

(Electronic copies of any of the above articles can be requested from gvanrooyen@justice.gov.za)

Contributions from the Law School

A move towards family mediation

Recent cases accentuated the importance of an alternative approach to litigation in the settling of disputes surrounding children – mainly dealing with issues around care (custody) and contact (access) (*Townsend-Turner v Morrow* [2004] 1 All SA 235 (C) and *Van den Berg v Le Roux* [2003] 3 All SA 599 (NC)). In *MB v NB* 2010 3 SA 220 (GSJ) the court stated that the parties have a duty to attempt to mediate a dispute and that their legal representatives are obligated to encourage such mediation before litigation. In this matter the cost order reflected the attitude of the court by capping the fees of the attorneys. Brassey J said the following about mediation (para 50):

> "Mediation can produce remarkable results in the most unpropitious of circumstances, especially when conducted by one of the several hundred people in this country who have been trained in the process. The success of the process lies in its very nature. Unlike settlement negotiations between legal advisers, in themselves frequently fruitful, the process is conducted by an independent expert who can, under conditions of the strictest confidentiality, isolate underlying interests, use the information to identify common ground and, by drawing on his or her own legal and other knowledge, sensitively encourage an evaluation of the prospects of success in the litigation and an appreciation of the costs and practical consequences of continued litigation, particularly if the case is a loser."

This trend towards mediation in judgments is also seen in the Children's Act 38 of 2005. In general, s 6(4)(a) provides that in any matter concerning a child, an approach which is conducive to conciliation and problem-solving should be followed and a confrontational approach should be avoided. Litigation should clearly be the last resort in instances where mediation is possible. And even where litigation is used, the parties, their legal representatives and the courts should not follow the usual adversarial approach.

There are two instances where mediation is made compulsory in the Children's Act. One, if there is a dispute between the child's mother and biological (unmarried) father [to whom she is not, (and has not been) married], as to whether the biological father meets the requirements for the acquisition of full parental responsibilities and rights as set out in s 21(1)(a)-(b), the dispute *must* be referred for mediation to a family advocate, social worker, social service professional or other suitably qualified person (s 21(3)(a)).

Two, where co-holders of parental responsibilities and rights are experiencing difficulties in exercising their parental responsibilities and rights, they must first seek to agree on a parenting plan (s 33(2)). In preparation of the parenting plan the parties must either obtain the assistance of a family advocate, social worker or psychologist; or seek mediation by a social worker or other suitably qualified person (s 33(5)).

The Act also makes provision for discretionary mediation: where the children's court or an official in children's court procedures *may* make an order for such mediation (see in this regard lay forum hearings, family conferences and pre-hearing conferences (ss 49, 69-71)).

Mediation would seemingly be appropriate in any instance where there is an agreement to be reached by the parties regarding a child in light of s 6(4)(a) mentioned above. Examples of these instances of possible mediation are where the mother of a child enters into an agreement with the unmarried father of her child that does not have automatic parental responsibilities and rights (s 21); or where co-holders of parental responsibilities and rights enter into an agreement with other co-holders (or other persons) to allow such co-holder (or other persons) to exercise specific parental responsibilities and rights on behalf of the co-holder (s 30(3)).

But, what is mediation? Mediation as an alternative dispute resolution measure for families has been described as a voluntary and co-operative process whereby parties reach a mutually acceptable settlement through the assistance of the mediator; or, at the very least, reduce the conflict between them. In light of the definition it has been argued that by making mediation mandatory, as the Children's Act purports to do, the object of mediation is defeated.

The most important benefit of mediation is that the parties come to an agreement themselves. They "own" the decision. Schneider describes it as follows:

> "The essence of mediation is that it involves an impartial third party who creates a safe space within which one is able to explore different solutions to bring about a negotiated agreement acceptable to the disputing parties. It is a space where the parties are able to communicate their frustrations, insecurities, concerns, needs, dissatisfactions wishes and desires. It is a quick and comparative inexpensive process which is conducted on a without prejudice basis and is confidential in nature. The process re-orientates parties towards each other without imposing rules or outcomes on them but rather enabling the parties to be more involved in the process of resolution, helping the parties to achieve a new and shared perception of their relationship which will then re-direct their attitudes and dispositions towards each other. Mediation avoids the win/lose situation of the adversarial system thereby bringing about a greater sense of satisfaction and closure than a resolution which is imposed upon them by a court or uninvolved third party. (Schneider C "Mediation in the Children's Act 38 of 2005" available at http://www.famac.co.za/mediation/in-the-childrens-act).

The mediation process is however not without criticism as women could be prejudiced in the process where they are in a subordinate position to their husbands – especially in instances of domestic violence. Moreover, the "profession" is unregulated, opening the door to untrained and inexperienced persons.

Finding a mediator may be problematic, especially in the rural areas. The Children's Act seems to accept that the following persons would be able to mediate: a family advocate, social worker, social service professional or another suitably qualified person. It is noteworthy that attorneys and advocates are not listed as an automatic possibility, although it does not mean that they cannot mediate. They may be regarded as a "suitably qualified persons" in individual cases where such "suitable qualification" has been argued, considered and accepted.

A network of private mediators focused on the wealthier members of society, exists around the country mostly affiliated to one of the umbrella organisations of which the South African Association of Mediators in Divorce and Family Matters (http://www.saam.org.za) and the Family Mediators Association of the Cape (http://www.famac.co.za) are seemingly the most active. Each of these organisations has its own rules, requirements and procedures. Affiliation to these organisations, or any other organisations, is not required and it is uncertain how many private mediators are actually practicing at the moment. For the less affluent, a variety of organisations offer family mediation services, especially the Family and Marriage Society of South Africa (http://www.famsa.org.za).

Various other problematic questions remain unanswered by the Act: What will be regarded as substantial compliance to mandatory mediation where parties are unable to agree? Should the parties attempt further mediation? What are the options when mediation is unsuitable? Litigation? An additional complicating factor is s 10 of the Act that prescribes that "every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning the child has the right to participate in an appropriate way and the views expressed by the child must be given due consideration". Does this mean that the minor should be part of the mediation process? It is submitted that it would depend on the circumstances.

In conclusion it should be noted that whatever the problems surrounding the implementation of mediation, it is clear that it is, as a process, now part of the South African family law. Presiding officers and legal representatives should be aware of the possibilities of mediation to ensure that it is used to ensure that the best interests of the child remains the paramount consideration in all matters pertaining to that child as required by the Constitution (s 28(2)). Following Brassey J's approach of financial penalties, would quickly bring the message home!

Prof Marita Carnelley
UKZN Pietermaritzburg

Matters of Interest to Magistrates

ANNUAL GENERAL MEETING OF THE

LAW SOCIETY OF THE NORTHERN PROVINCES

THE ROLE OF AN INDEPENDENT JUDICIARY AND AN EFFICIENT JUSTICE SYSTEM IN TRANSFORMING SOCIETY

SANDILE NGCOBO

CHIEF JUSTICE OF SOUTH AFRICA

13 November 2010

INTRODUCTION

I am delighted to have the opportunity to talk to you this morning on the occasion of your annual general meeting. It is always a rich and rewarding experience for me to take a break from the day-to-day demands of my judicial commitments to reflect on some of the critical issues facing our constitutional democracy.

Ladies and gentlemen, when I was invited to be the guest speaker, it was suggested that I might spend my time with you reflecting upon two themes: firstly, the transformation of our country; and secondly, attacks on the independence of the judiciary. These themes were well chosen and indeed, discussion on them is both timely and significant.

THE INDEPENDENCE OF THE JUDICIARY

Taking the second theme first, an independent judiciary is vital to any constitutional democracy. Ours is no exception. The judicial role is meaningless without the independence necessary to impartially resolve disputes without any

interference or perception of interference from any source, whether it be powerful interest groups or the other branches of government.

An independent judiciary is particularly important in South Africa as we remain in the early stages of our constitutional democracy.

South Africa is a nation in transition - a transition from a society characterised by racial injustice, inequality and a disregard for fundamental freedoms to a new society that is based on social justice, equality, human dignity and respect for fundamental human rights and freedoms. This transition was introduced by the Interim Constitution in 1994 and was formalized with the adoption of the new Constitution in 1996

Our Constitution is therefore fundamentally transformative. Under the old order, parliamentary supremacy was the rule. Today, the Constitution is the supreme law – any law or conduct that is inconsistent with it is invalid. Under the new constitutional order the courts are the ultimate guardians of our Constitution and its values. They have the last word on what the Constitution says and they are empowered to strike down legislation or conduct that is inconsistent with it. As such, the courts have a crucial role in helping to achieve the new society envisioned in the Constitution. Indeed, the courts are vital to the transformation of our society to that envisioned in the Constitution.

If the courts are to effectively perform this crucial role, it is essential not only that they are actually independent, but that they are also perceived to be independent. The challenge is that the courts lack the power to raise money and enforce their rulings on their own. For that reason, the judiciary is particularly vulnerable. Public confidence in the courts, especially as manifested in public support for the principle of judicial independence, is the judiciary's only weapon.

On several occasions in recent months the judiciary has been the subject of unbridled and unwarranted attacks in the media. The problem with such attacks, whether from political parties, academics or political commentators, is that they imperil confidence in the courts and therefore pose a risk to judicial independence. This does not mean that court decisions or judges who engage in misconduct should not be criticised. What this means is that criticism should focus on the reasons for the decisions or the unacceptable ethical conduct.

It is completely appropriate, and indeed healthy and necessary, that the decisions of judges be subjected to scrutiny. Judges are human, and no matter how diligently they attend to their duties, mistakes are inevitable. At the same time, the judicial system has a built in mechanism for the correction of errors – the opportunity to appeal. Parties should take advantage of this opportunity and invoke the appellate process where they believe that a judge has made a mistake. For interested parties and academics alike, constructive criticism is crucial in the development of the law. Nevertheless, criticism should be directed at the judge's analysis, rather than at the judge's person. And at no time should anyone, particularly public officials, question the necessity of respecting and obeying the judgment, no matter how strong their disagreement.

As members of the legal profession, you are uniquely situated to work towards safeguarding the independence of the judiciary. More than any other group, it is attorneys and advocates that serve as the intermediary between the judiciary and the public. Clients turn to you when they have questions about the law and the media seeks you out when it is putting together a news story about the latest

happenings at court. It follows that the legal profession plays a critical role in determining whether public confidence in the judiciary is preserved, and therefore whether judicial independence is protected. I urge you to continue to discharge your special role in a manner which promotes the independence of the judiciary.

TRANSFORMATION

An independent and impartial judiciary is crucial to the achievement of the new society envisioned by the Constitution. As I have pointed out earlier, the Constitution contemplates the transformation of our society from a society characterised by racial injustice, inequality and a disregard for fundamental freedoms to a new society that is based on social justice, equality, human dignity and respect for fundamental human rights and freedoms.

In order to facilitate the transformation of our society the Constitution contains a Bill of Rights which protects both civil and political rights. And to alleviate socio-economic conditions brought about by past discrimination, the Bill of Rights contains justiciable socio-economic rights. But these rights will remain meaningless unless there is a constitutional guarantee of access to courts. Section 34 of the Constitution provides that guarantee. And implicit in this guarantee is access to justice. The challenge facing us in this regard is to improve access to justice and make our justice system work efficiently.

In July 2003, at the First Conference of Judges, I raised concerns about the delays in our civil justice system. This is not to suggest that the criminal justice system was functioning efficiently, but my focus was on the civil justice system. I was concerned then because it took years for a civil matter to come on trial. The delays were not confined to getting a case to trial, however, they extended to the amount of time spent in courts on simple matters that should ordinarily last less than a day in court.

Regrettably not much has changed since I spoke at the First Conference of Judges. Indeed, since I took office as Chief Justice, I have come to realise that delays are not confined to getting cases to trial and finalising cases in court, but delays also extend to the delivery of judgments. When I took office, it was reported to the Judicial Service Commission that there were approximately 47 reserved judgments in the various courts. The reserved judgments were mainly from North Gauteng, and the period of delay ranged from 1 year to 5 years.

I was greatly disturbed when I learned of the number of reserved judgments. Put simply, I found this utterly unacceptable. I consider delays in delivery of judgments to be especially troubling because the core function of a judge is to decide cases. If a judge fails to decide a case timeously, the judge fails to perform the very core of his or her judicial role.

As you are aware, section 34 of the Constitution guarantees to everyone the right to have any dispute that can be resolved by the application of law access to courts. It is implicit, if not explicit in this guarantee that litigants are entitled to have their disputes decided without undue delay. Inordinate delays in delivery of

judgments undermine the right of access to courts, and arguably violate the very document that Judges swear to uphold.[1]

For the practitioner, delays in delivery of judgments raise a number of practical questions which go to the professional responsibilities of the attorney. What explanation does a legal representative give to his or her client when a judgment has been delayed for a period ranging from 1 year to 5 years? Do you tell your client that the wheels of justice grind slowly and nothing can be done other than to keep writing standard letters to the Judge President or the Registrar enquiring about when judgment would be handed down? Or do you write to the Judicial Service Commission complaining about the delay? Do these delays not reach a point where an attorney is duty bound to approach a court for relief?

While these questions point to no easy answer, I am sure we can all agree that the cumulative effect of delays in getting to trial, finalising cases in court and delivery of judgments, is the denial of justice.

So long as these delays persist, lawyers and judges cannot avoid the accusation that our justice system has failed to deliver on the promise of access to justice.

In light of the unacceptable delays we continue to see, and the constitutional duty to ensure access to justice, we need to re-examine the fundamentals of our justice system. While we have had a number of commissions of enquiry into our justice system in the past – the Hoexter Commission and the Galgut Commission come to mind – a review of their reports demonstrates that we have been tinkering where comprehensive reform is needed. To date, we have not sufficiently explored whether there are mechanisms and procedures we could implement to meet the needs of society and of individuals.

We are challenged then to rethink our court procedures, the way we conduct our business in courts, the way we run our courts, the type of service we render to our clients and others who require our services, and how we should deal with those who flout the rules of procedure and judges who fail to deliver judgment timeously. Indeed we must take a hard look at how our system of justice is working and not working, and ask whether it is coping with the demands of our society now and whether it can cope with the demands of the future.

As we undertake a re-examination of our justice system, let me suggest some of the problem areas and let me venture some thoughts on what we might do to address them. In these areas we must probe for fundamental changes and major overhaul rather than simply tinkering. My thoughts are based on my visits to the various high courts. I am at present engaging with the heads of the lower courts in order to determine the best way of visiting selected magistrates' courts that can provide me with a sense of the problems in these courts.

There can be no question that the challenges to our system of justice are many and immediate and we must therefore determine our priorities. I would begin by giving priority to methods and machinery, to procedure and technique, and to management and administration of judicial resources.

---

[1] See the Code of Judicial Conduct for Judges that was recently tabled before Parliament. Section 9(2) provides that "[a] judge gives judgment or any ruling in a case promptly and without undue delay."

First, we must reflect on the basic philosophy that should underlie our civil justice system. Happily, other jurisdictions have already reflected on this issue. Lord Woolf has identified eight principles that a civil justice system ought to meet in order for it to ensure access to justice.[2] In his view, the system should:[3]

(a) be *just* in the results it delivers;
(b) be *fair* in the way it treats litigants;
(c) offer appropriate procedures at a reasonable *cost*;
(d) deal with cases with reasonable *speed*;
(e) be *understandable* to those who use it;
(f) be *responsive* to the needs of those who use it;
(g) provide as much *certainty* as the nature of particular cases allows; and
(h) be *effective*: adequately resourced and organised.

This in my view summarises the ideal civil justice system that we should strive for in this country.

Second, our civil justice system is very, perhaps overly, adversarial and not always conducive to a fair trial of issues. There are concerns that lawyers are using the courts for their own ends with no consideration of the public interest. There is a growing feeling that the legal profession and judges are overly tolerant of lawyers who exploit the inherently contentious aspect of the adversarial system to their own private advantage at public expense. Some elevate procedural maneuvering above the search for truth. This sends a wrong message to society about the purpose of the law.

Too often, parties go to trial not knowing what evidence will be lead and what issues will emerge from the evidence. Yet in motion proceedings the parties are required to put in writing under oath their entire case, including their witnesses' evidence. If the matter is referred for oral evidence to resolve factual issues, the parties know exactly what case they have to meet in court and the nature of the evidence, including that of witnesses. This shortens the amount of time spent in court and enables the judge to control cross-examination because the issues are clearly defined.

In other Commonwealth jurisdictions, notably Australia, parties are required to submit sworn written statements of their claim or defense. It is reported that this has resulted in a drastic reduction in the amount of time spent in court. We need to explore this option.

Third, at present, the unsatisfactory situation is that all three branches of government, namely, the legislature, the executive and the judiciary have some responsibility in the rule-making process.[4] As I have noted:

---

[2] Rt. Hon. the Lord Woolf, Master of Rolls, *Final Report to the Lord Chancellor on the civil justice system in England and Wales* July 1996.

[3] Id at page 2.

[4] Justice S Sandile Ngcobo *Delivery of Justice: Agenda for Change* 2003 SALJ 688 at 691-92.

> "The legislature has the authority to regulate practice and procedure despite the fact that it has no immediate familiarity with the day to day practice of the courts and is thus unable to isolate the pressing problems of procedural revision; that it lacks the experience and expertise necessary for the solution of these problems; that it is slow to act and may cause unnecessary delay in effecting urgent and necessary procedural changes; and that the legislature is not held responsible by the public for the efficient administration of justice, but the judiciary is."[5]

We need to give consideration to placing rule-making power in a single authority so as to develop a coherent and uniform civil justice code. And that authority must be the judiciary, which has immediate familiarity with the practice of courts and is thus in a better position to attend to urgent problems of procedural revision.

Fourth, there is evidence emanating from other jurisdictions that where the pace of litigation is controlled by the judiciary, coupled with appropriate sanctions, pre-trial as well as trial delays can be minimised. This is particularly so in those jurisdictions which have implemented case flow management to address case backlogs. In Botswana, a country that has recently initiated case flow management, initial indications are that the case backlog has been reduced drastically. We must therefore consider seriously implementing case flow management which involves shared control over the pace of litigation.

I can understand the reluctance of the legal profession to consider the possibility of ceding complete control over the pace of litigation. But may I emphasise two aspects of case flow management: the first is its purpose and the other is its relationship to the legal profession.

The primary purpose of case flow management is to improve the quality of civil justice; to help parties to civil disputes obtain a fair resolution at a cost commensurate with what is at stake.[6] It does so by facilitating the just, speedy and inexpensive resolution of civil disputes. In all cases, it should be limited to what is appropriate and necessary for the case at hand.

Case flow management does not mean taking cases away from lawyers,[7] but rather means giving direction to the litigating activity of lawyers, fixing bounds, and applying means of control only as necessary. It should not be viewed as an intrusion into a lawyer's function as his or her client's legal representative. Indeed, there is no contradiction between directing attorneys' efforts towards early issue identification and the fair and efficient disposition of litigation on the one hand and the purposes of the adversary process on the other.

Another area which requires our attention is the use of information technology in our courts. Advances made in the field of technology have made communication, including the transmission of documents and the accessing of filed documents, easier. While previously it took hours or days to send documents from one point to

---

[5] Id at page 691.

[6] *Manual for Litigation Management and Cost and Delay Reduction* Federal Judicial Center 1992 at page 2.

[7] Id at page 3.

another, now this can be done within seconds via email. Likewise, if the proper systems are in place and the necessary hardware available, it is now possible for busy judges to access court documents from anywhere. In the Constitutional Court, documents must be filed both electronically and in hard copy. The result is that a judge of the Constitutional Court can access any document in a case from wherever he or she is.

We should investigate whether this system of electronic filing, otherwise known as e-courtfiling, should not be extended to courts in general as well as whether we should continue to require paper filing or if electronic filing is sufficient.

As we investigate these questions, we should keep in mind an added advantage of electronic filing – electronic filing facilitates electronic data storage. The burning down of the magistrates' court in Pretoria a few weeks ago underscores the critical importance of storing copies of court documents in multiple sites so that if one copy is lost, a back-up copy remains available.

Finally, leaders of the superior courts and the lower courts, leaders of the organised profession, legal scholars, leaders of the national legislature and the executive, thoughtful members of other disciplines, members of civil society and other participants in the administration of justice, must join forces and come together to take a hard look at every aspect of how our justice system is working. A national imbizo on enhancing access to justice is long overdue. It should provide a forum where the areas that I have referred to can be probed and re-examined.

While these areas that I have referred to require thoughtful reflection, every day that passes without necessary reforms constitutes a continuation of the denial of access to justice. Therefore we have already begun preparatory work to investigate the feasibility of changes to our justice system. To date, this work consists of collecting information on the causes of delay in our justice system; putting in place a pilot project on case flow management; exploring challenges concerning the implementation of an e-courtfiling system; and reviewing our library resources. These initiatives are being facilitated by the Office of the Chief Justice, also known as the OCJ.

In itself, the recent proclamation of the OCJ as a national department by the President constitutes an important first step in addressing the ills of our justice system. Two of the most important functions of the OCJ are to lead research into all matters affecting the judiciary, and to ensure that the judicial branch of government runs smoothly and efficiently. Let me identify some of the initiatives that the OCJ is currently facilitating which collectively will set the foundation for a holistic review of our justice system.

First, a team consisting of a senior registrar, chief director in court services and other officials is presently investigating the causes of delay in the various high courts. This team is led by the Deputy Judge President of the North Gauteng High Court, Judge van der Merwe.

Parallel to this investigation, I have asked the Law Society of South Africa, the General Council of the Bar, and the National Director of Public Prosecutions to submit memoranda setting out what they see as the causes of delay in our justice system and suggesting how we might address these. To this end, I urge you to cooperate with the Law Society of South Africa in the preparation of their

memorandum by supplying them with your input as to the causes of delay in the Northern Provinces, as well as possible strategies for addressing these.

Second, together with the heads of court I have taken an in principle decision to initiate a pilot project on case flow management. To this extent a team of judges of the High Court, Supreme Court of Appeal and the Constitutional Court is presently investigating the possibility of implementing case flow management. This team has already held a workshop conducted by a United States federal judge, and it will be travelling to the U.S. in December to visit federal courts where case flow management is being implemented.

This visit will inform us of the challenges involved in implementing case flow management and how we may implement a pilot project. How participation in the pilot project should be managed will be determined after consultation with the organised profession and other role players in the administration of justice.

Third, an IT task team consisting of judges and representatives from the Department of Justice is being formed. This team will no doubt include representatives from the profession. Its task is to investigate, among other issues, the feasibility of introducing e-courtfiling.

Finally, a task team has been sent to the various high courts to review their library facilities with a view towards ensuring that they are both adequately resourced and efficiently managed. In due course this will be extended to the lower courts.

The results of these initiatives will be the subject of discussion at a conference on access to justice. This conference will be held in Johannesburg from 8 – 10 July 2011. It will be attended by all participants in the administration of justice including the legislature, the executive, the judiciary, legal practitioners, civic organisations and members of the public. It will be the national imbizo to review our justice system from all angles in order to determine what is wrong with it and how to fix it.

There is, however, no reason for you to wait until July to reflect on these matters and how you might contribute. Indeed, I am inviting you to begin to do so today. I think you could begin by identifying problems that are unique to your provinces and suggesting options for how to manage them.

CONCLUSION

The picture of our justice system that I have painted this morning is a sombre one. I thought I should say to you frankly – even bluntly – what is wrong with our system of justice and what can and must be done to transform it in order to make it fulfil its high purpose.

While the picture is sombre, it is also hopeful. As I have explained, the necessary preparatory work which is the first step in fundamental reform and transformation is well underway. I am optimistic that it will set the required foundation for lasting change.

To conclude, let me refer to the undertaking that I gave shortly after my appointment as the Chief Justice before the joint sitting of Parliament. I undertook to

devote myself to ensuring that in this country we have an efficient justice system. An efficient justice system is vital to the transformation contemplated by the Constitution.

Let me assure you this morning that I will continue to push for the changes necessary to ensure that access to justice in this country is not just an ideal, but a reality. And this morning I would like to invite you to reflect on the areas I have raised, and to join me in working towards the creation of the justice system demanded by our Constitution, and deserved by our people.

The legal profession is a force with enormous, almost unlimited capacity to address every problem in the administration of justice. The facilities and the power, the influence and the prestige of the legal profession are literally on the doorsteps of every court in this country and that power and influence can be put to work to address the challenges facing our justice system.

Thank you for lending me your ears.

A Last Thought

…the LSSA continues to express its concern that a substantial number of law graduates are lacking in a number of essential skills such as research, computer work, literacy and numeracy. 'Graduates who lack basic skills – which they should already be equipped with when they enter the profession – place a great burden on the attorneys' profession to provide training in these skills instead of using the time and funding to strengthen the legal transactional skills required in the attorneys' profession,' say *LSSA Co-Chairpersons Peter Horn and Max Boqwana.*

They add: 'Clients in legal matters are placed at risk if new legal practitioners are not properly equipped to assist them. This, in turn, impacts negatively on access to justice in our country.'

It appears that, in general, law graduates are not adequately equipped for the practice of law. A gradual decline in skills over time also appears to have taken place.