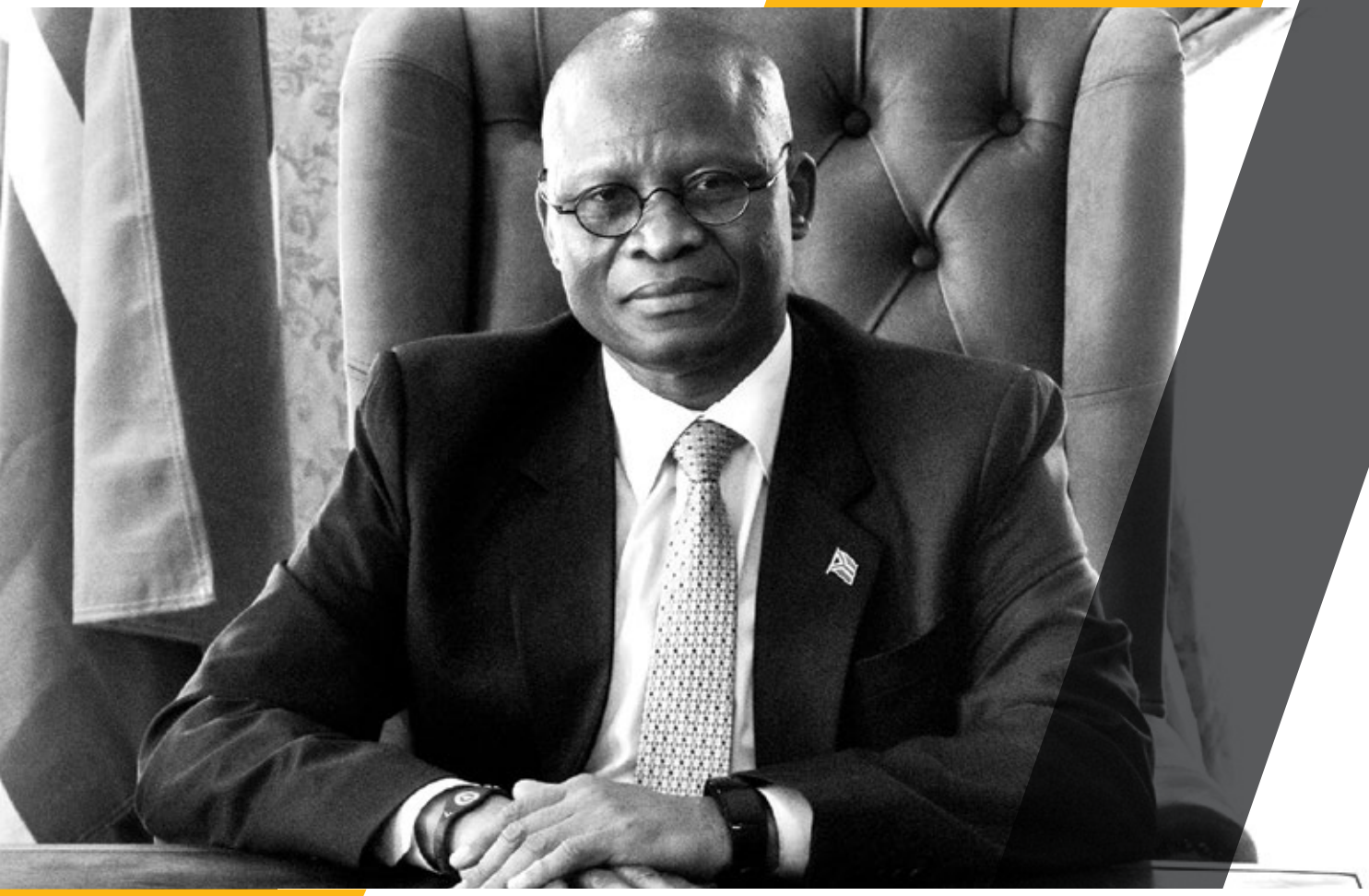
THE JUDICIARY

December 2020 | Q3 ISSUE



> RELEASE OF THE JUDICIARY ANNUAL REPORT

> JUDICIARY ANNUAL REPORT PRESENTED

> JUDICIARY DAY CANCELLED

> ETHICS AND PROFESSIONAL CONDUCT

> JUDICIAL ETHICS

> MANAGING AN URGENT MOTION COURT ROLL

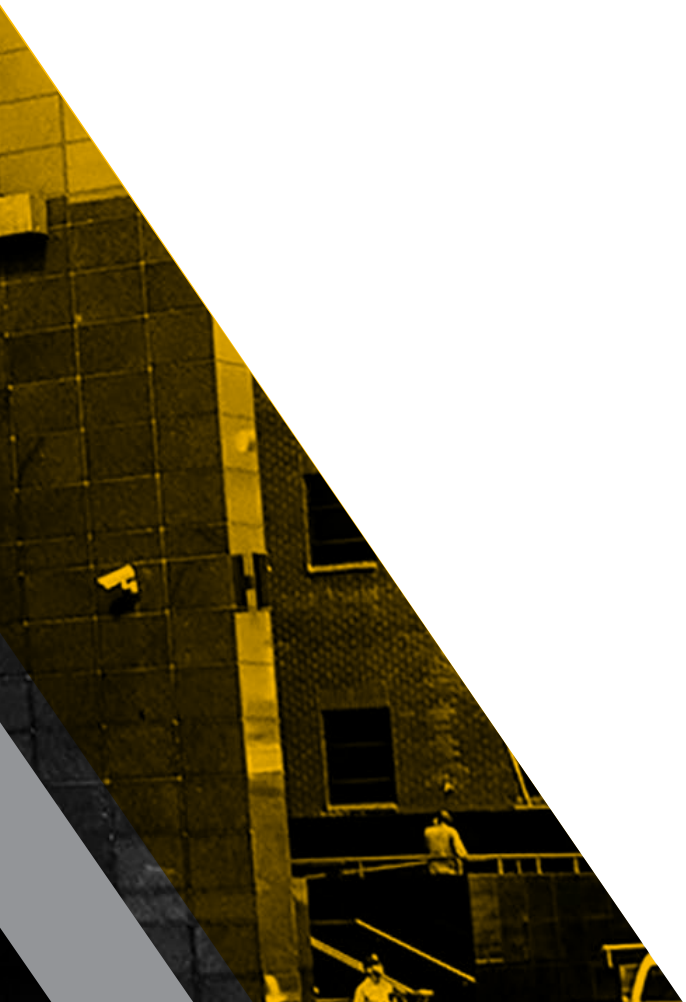


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TABLE OF CONTENTS

02 Release of the Judiciary Annual Report

06 Judiciary Annual Report presented

08 Judiciary Day Cancelled

13 Ethics and Professional Conduct

14 Judicial Ethics

16 Common Purpose: Collegiality and Ethics in Family Law

19 Managing an Urgent Motion Court Roll

25 Judicial Retirements

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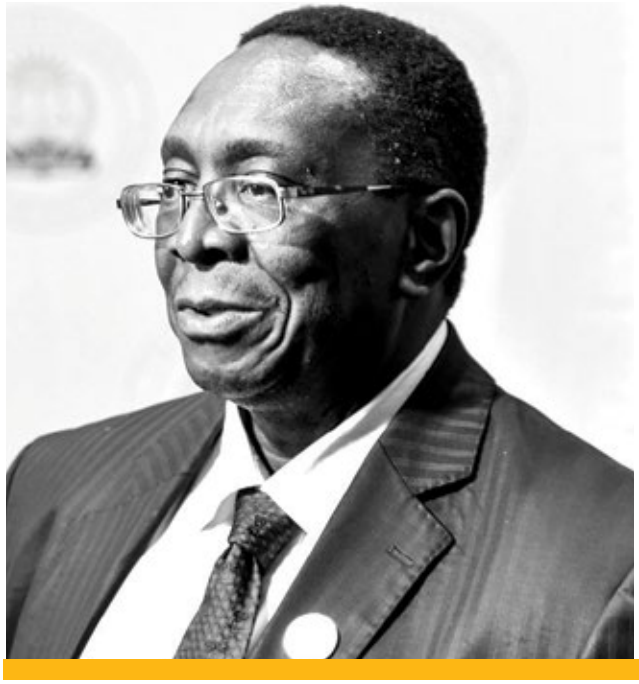

Dear Colleagues,

The third quarter of the financial year is now closely associated with the release of the Judiciary Annual Report for the preceding financial year. Normally, as the Judiciary has done since 2018, the Report is presented on Judiciary Day – a ceremony through which we brief the Executive, Parliament, the media, the public, the legal fraternity and other stakeholders on the Report and account for our work, and for the power and authority the State has endowed on the Judiciary.

Due to circumstances beyond our control brought on by the Covid-19 pandemic, Judiciary Day could not take place this year. Notwithstanding the cancellation of the ceremony, the Judiciary Annual Report for the 2019/20 financial year was released to the public on December 8.

We thank Chief Justice Mogoeng Mogoeng, as the Head of the Judiciary, for leading the Judiciary to this milestone. We also thank our colleagues who serve in the Superior Courts Judicial Accountability Committee, led by Judge President Monica Leeuw, and the Lower Courts Accountability Committee for their hard work and commitment to the development of the Judiciary Annual Report.

We also appreciate the Office of the Chief Justice (OCJ), led by Secretary General Memme Sejosengwe, for their coordinating role in the process and ensuring that the Report is adequately publicised on its release.

An important part of our work as Judicial Officials involves the sharing of knowledge, experiences and best practices with our peers in ensuring the smooth functioning of the courts and maintaining the Norms and Standards for the exercise of judicial functions.

It is pleasing that our colleagues continue to speak on various platforms and share information on appropriate judicial conduct, proven methodologies as well as good professional practice with other Judicial Officers. We thank Judge President Francis Legodi, Judge George Phatudi, and Judge Ingrid Opperman for sharing their work in this regard for publication in this newsletter. We also thank all other colleagues who have contributed content to our publication throughout the year. Your contribution is valued!

As the year draws to a close, we take this opportunity to wish everyone a restful and joyous holiday season. May you also be safe! The festive season comes as our country is experiencing a second wave of the Covid-19 pandemic and this requires all of us to be extra vigilant and diligent with following the protocols and guidelines that have been put in place to minimise the spread of this terrible virus. Let us all do the right thing. Isalakutshelwa sibona ngomopho!

See you in 2021!

Judge President Dunstan Mlambo
Chairperson: Judicial Communications Committee

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This is the third year of the South African Judiciary reporting on its performance and related issues directly to the public and other key court-process-participants

CHIEF JUSTICE MOGOENG MOGOENG SPEAKS:

RELEASE OF THE JUDICIARY ANNUAL REPORT

This is the third year of the South African Judiciary reporting on its performance and related issues directly to the public and other key court-process-participants. Comments on our performance, triggered the need to shed light on some of the factors that played an essential role in court performance.

A failure to highlight them might lead to an ill-informed and incorrect view of the underlying reasons for Courts' ability or inability to meet their targets.

The workload, equal opportunity, regardless of seniority, to write judgments in complex cases, the number of Judicial Officers in each Court, efficiency-enhancing capacities or resources, the number (panel) of Judicial Officers required to decide a case, the possibility to go on recess, the length of recess and long leave, all have a role to play on whether a particular Court will or will not reach its set performance target.

The overwhelming majority of Magistrates' Courts have a hefty workload to contend with, followed by most Divisions of the High Court and some of the specialist Courts of equivalent status. Some difference-making factors for the latter two are the recess periods, plus long leave, and the possibility to sit in and decide most cases on their own. The Supreme Court of Appeal has a complement of about 25 Judges. The Judges don't all have to sit and decide each case that comes before them. They have the option to sit in panels of three, or at the most five Judges, depending on the nature of the case. As for applications or petitions, they are decided by only two Judges.

A reconsideration of an application for leave to appeal or petition in terms of section 17(2)(f) of the Superior Courts Act is decided by the President of that Court, alone.

The Constitutional Court is the highest Court in the land. Each case enrolled for hearing or application, that is to be disposed of without a hearing, demands

the attention of either all eleven (11) Judges or a minimum of eight (8) if other are not available. It is also, even with the decision of the President of the Supreme Court of Appeal, in terms of section 17(2)(f) appealable, but is to be considered by, not the Chief Justice or Deputy Chief Justice alone, but by the entire body of Constitutional Court Judges. It entertains unsuccessful petitions or applications for leave to appeal from the Supreme Court of Appeal.

The Constitutional Court therefore entertains all appeals that come from the Supreme Court of Appeal, the Labour Appeal Court, direct appeals from all High Courts and Courts of equivalent status, applications for the possible confirmation of a declaration of constitutional invalidity, which also do not pass through the Supreme Court of Appeal, direct access applications and applications in respect of which the Constitutional Court has exclusive jurisdiction in terms of section 167 of the Constitution. The Apex Court is, unlike other higher Courts, therefore bound to take as long as it often does to finalise cases. Maintaining a strong culture of collegiality and the requirement that eleven or eight independent minds always be brought to bear on all applications occasional delays. It often takes long for Judges who bear the ultimate responsibility to develop and settle our Constitutional jurisprudence to iron out their differences. Clothing the Constitutional Court with a much wider jurisdiction in 2013 inevitably led to a progressive rise in the number of cases, which contributed to longer delays.

All of the above differentials explain why the Electoral Court and the Competition Appeal Court perform so fantastically compared to all other Courts. This context and a reasonably informed analysis should enhance a well-meaning reader's understanding of Court operations and our Annual Accountability Reports.

On the occasion of presenting the 2018/2019 Judicial Accountability Report, I indicated that we were unable to share a performance report for the Magistracy. I announced that a "new development in the Report was the inclusion of Key Performance Indicators for the Regional and District Courts". And, that "the sheer scope of their workload would require more time to develop a bespoke performance measuring tool". It bears reiteration, that based on the number of Magistrates' Courts, both Regional and District, and the huge volume of cases handled by that tier of the Judiciary, more time was needed to develop the necessary capacities for a customised performance monitoring and evaluation system or tools.

On page 31 of the 2018/2019 Judiciary Annual Report, we listed the Key Performance Indicators for the Magistrates Courts as adopted at a Workshop facilitated by the Judicial Accountability Committee for the Magistrates. We indicated that we would report on the tools which would facilitate the monitoring of the indicators in the 2020/2021 Judiciary Annual Report. Thankfully, the leadership of the Magistracy has ensured that the performance of the Magistrates' Courts forms part of the 2019/2020 Annual Judiciary

Accountability Report. Admittedly, this is a work in progress.

It is necessary to repeat our proposal for the adoption of some of the measures that could help alleviate the plight of victims of gender-based violence and strengthen the fight against this scourge even more. That, as we said, should include public awareness campaigns by people who are knowledgeable in responding to, and reporting these offences, the revitalisation, capacitation and establishment of more Thuthuzela Centres; the establishment of a focused, appropriately sensitised and well-trained unit of Investigators and a similarly equipped pool of Prosecutors to deal primarily, or exclusively with sexual offences or gender-based violence cases. Judicial Officers must be specially trained, possibly like their French counterparts, on the investigation and further handling of these cases. In sum, Sexual Offences Courts must in reality be endowed with the critical capacities or resources and be fit for purpose. This still needs to be done.

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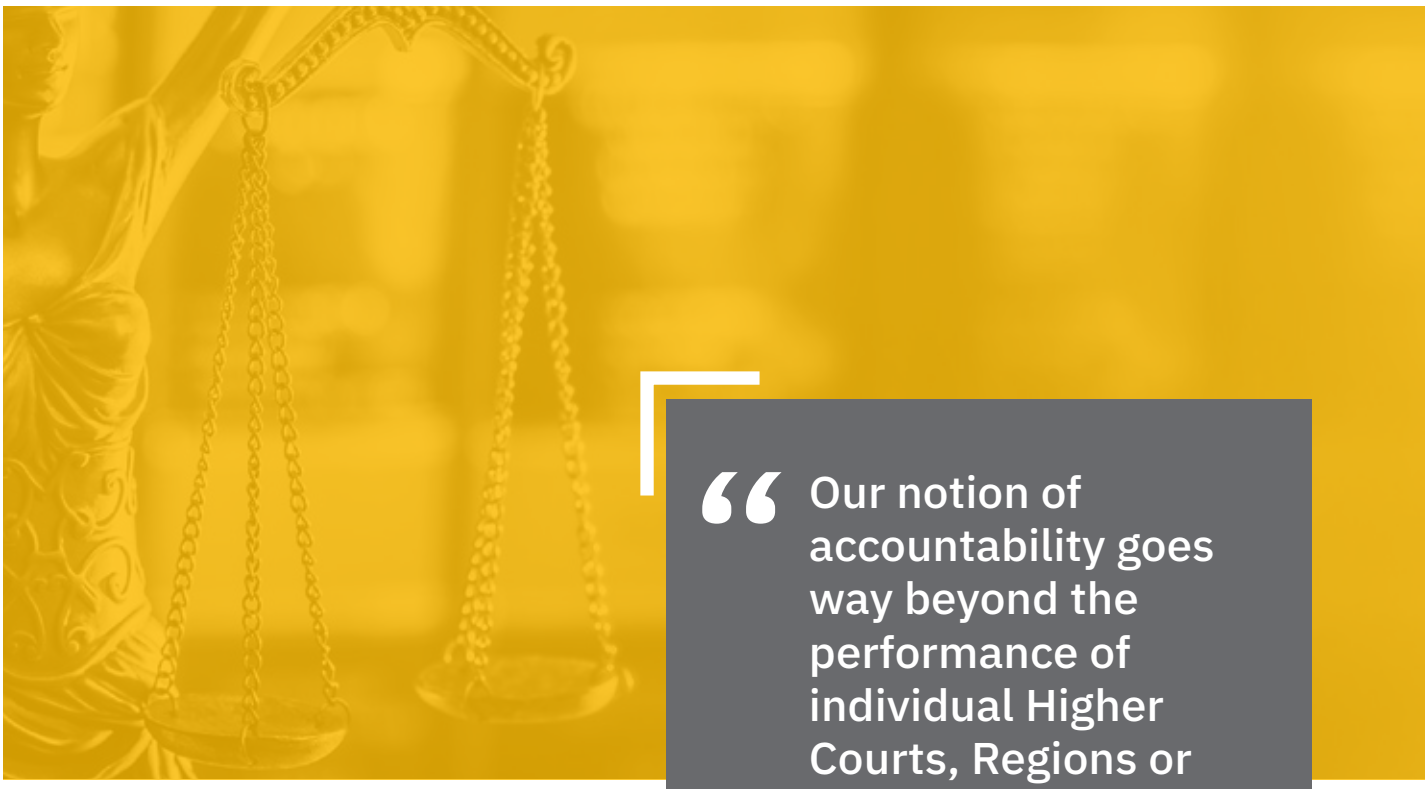
We reaffirm the undeniable reality that Prosecutors do not convict and cannot therefore, be assessed on the basis of a high or low conviction rate. It takes a credible witness, a competent and diligent Investigating Officer, Prosecutor and Judicial Officer to convict. Even then, the Constitutional mandate of Prosecutors is not to secure a conviction by any means necessary. It is to ensure that justice is done – conviction or acquittal. It is just as unpractical to use Court hours as a yardstick for performance. Court performance is not so much about the number of hours spent in Court, as it is about what is actually being done during that period. This is not to trivialise concerns about people not being in Court when they should, but to caution against over-rating Court hours as a yardstick for performance. Meaningful Court work is about finalising cases in a speedy and fair way, without compromising the quality of the service rendered. The National Prosecuting Authority must therefore re-examine its performance measurement system or tools and put forward objectively defensible suggestions. It does not matter who developed these tools, who believes they are right, which other jurisdictions have been using them and for how long. They are flawed, at odds with practical realities and deny witnesses, the police and the Judiciary their role in securing conviction which are warranted.

All along, the Judicial Case Management system that constitutes one of the best practices we have adopted, was not properly catered for in the Uniform Rules of Court. As a result, we initiated the amendment of these Rules to make provision for a full-scale implementation of this efficiency and effectiveness-enhancing system. This amendment took effect on 31 May 2019.

Our notion of accountability goes way beyond the performance of individual Higher Courts, Regions or Clusters. It extends to the conduct of individual Judges or Magistrates. Although disciplinary matters fall under the jurisdiction of the Judicial Service Commission and the Magistrates’ Commission, which account separately on their performance, this Report would be incomplete without an update on at least some of the complaints of alleged misconduct that have been before the JSC in particular, for many years. One of them is the Judge Motata matter which has at long last been disposed of. The matter of Judges Preller, Poswa, Mavundla and Webster has barring allegations against Judge Webster, who has been unwell and could not participate, also been finalised by the Judicial Conduct Tribunal. It is now in its final stages and the Tribunal recommendations are being considered by the Judicial Service Commission.

The only outstanding matter that has been before our disciplinary structures for well over a decade is that of Judge President J.M. Hlophe. Hopefully, it will not be hamstrung again by litigation and postponements. It must, however be said that Judge Joop Labuschagne



> “Our notion of accountability goes way beyond the performance of individual Higher Courts, Regions or Clusters. It extends to the conduct of individual Judges or Magistrates

and two Members of the Tribunal 9 The South African Judiciary Annual Report | 2019/20 are seized with that matter. They enjoy full independence in its processing and disposal. We, particularly Judicial Officers, in active service or retired, lawyers and other responsible thought-leaders, would do well not to make statements that create the incorrect and inadvertently misleading impression that there is something the JSC or the Chief Justice could have done, or can still do to accelerate the progression of these kind of matters, even in the face of litigation or justifiable postponements. It bears emphasis, having made the point to the public and the media last year, no Constitutional or legal power exists to interfere with such a processes.

Similarly, there is no power to remove leaders or interfere with the running of the Western Cape High Court or any High Court, absent a Judicial Conduct Committee-informed decision that points to, or paves the way for that to be done.

The lockdown highlighted several critical challenges, which impacted negatively on the independence of the Judiciary and its possibility not only to preserve that independence, but to also execute its Judicial and administrative functions more effectively and efficiently. Those challenges are the absence of full-blown Court modernisation, rule-making authority and a Judiciary-led independent Court administration. Starting with Court modernisation, each Provincial Executive Council and Legislature, presumably has its own standalon IT infrastructure as is the case with their national “equivalents”. The same probably applies to municipalities, most likely the metropolitans. Not so with the Judiciary. There can be no acceptable explanation for excluding another arm of the State in circumstances where Court modernisatio would undoubtedly help to accelerate case progression and finalisations, reduce backlogs and significantly improve access to justice.

For years now, we have been working hard to get our Courts to the point where they would be able to function more effectively and efficiently. And Court informatisation or modernisation has been identified as a critical feature of that project. Very little progress has been and could be made, owing

to underfunding and SITA's initial inability to help us progress beyond having a concrete plan in place. The SITA blockages have since been removed. It is time to advance past the effectually-circumscribed case lines experimentation stage, and progress towards implementing the pre-existing comprehensive and futuristic Court automation master plan in terms of which we have always intended to run our Courts.

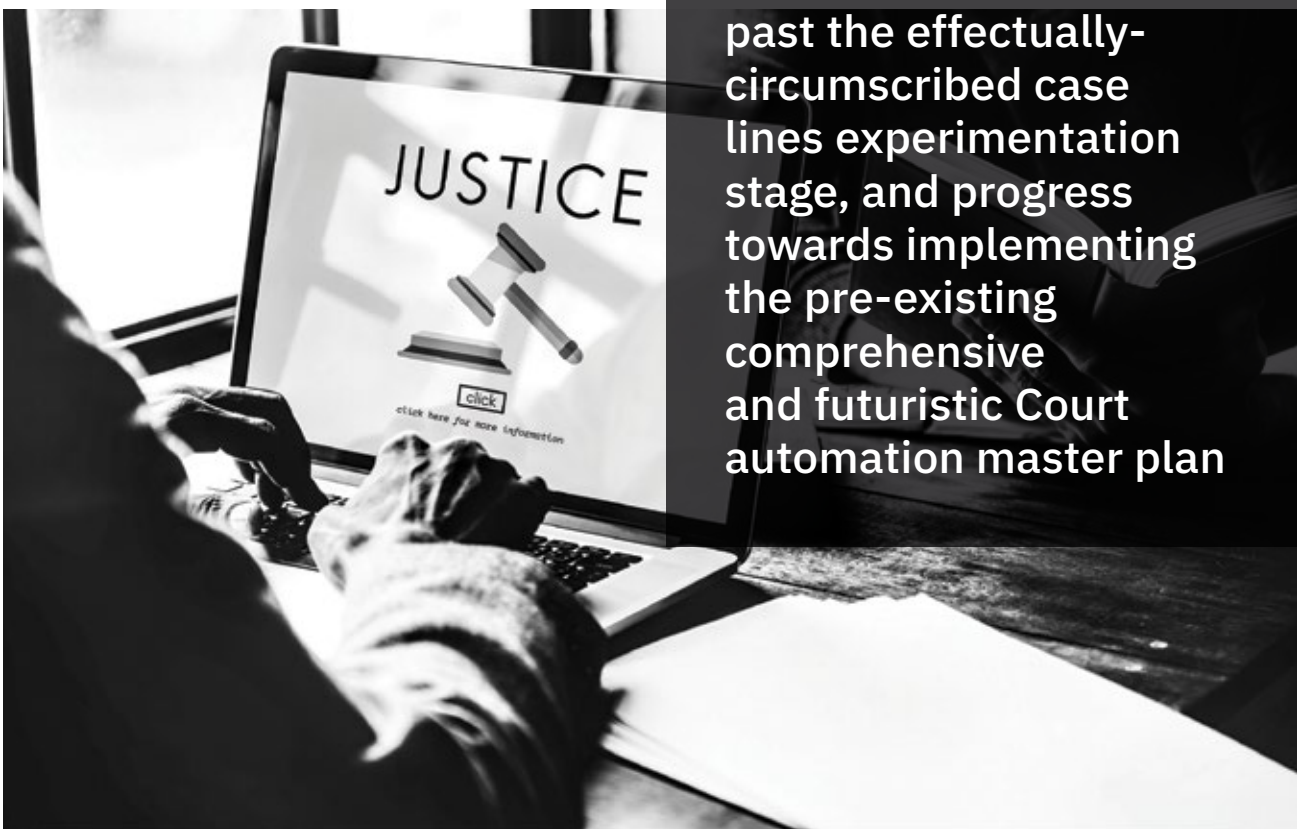
Funding for its implementation has, presumably owing to budgetary constraints, been rather closefistedly released. As soon as the national kitty permits, and the essentiality of fullscale Court modernisation is appreciated, it would hopefully be prioritised for proper funding and implementation. Had this been done as early as we have asked, access to justice and Court operations would have been very smooth, and cases would not have piled-up as much as they have, during the lockdown. Because Courts are an essential service, we did everything reasonably practicable to keep them open with the limited resources and facilities at our disposal. For the first time, we held virtual Court hearings. Appellate Courts fared well, but not so with Trial Courts, who constitute the major part of our Court System. The IT infrastructure to run trials is sorely needed.

That said, we did our best to facilitate access to justice under very difficult circumstances.

The weakness borne out of the intertwinement, at times conflation, of the role of the Executive and the Judiciary in the running of the Courts became even more apparent when Directives for the functioning of the Courts had to be settled.

At times, two sets of Directives were issued – one by the Chief Justice and the other by the Minister of Justice and Correctional Services. Given this fluidity of guiding roles, some Judicial Officers and practitioners were initially left uncertain, to say the least, as to which Directives were to be followed, particularly in the event of conflict. Thankfully, the Judiciary found a Constitutionally-permissible way of managing the challenge and proceeded accordingly. Heads of Court, Regional Court Presidents and Cluster Heads commendably crafted Directions to steer the ship through unchartered waters.

> "It is time to advance past the effectually-circumscribed case lines experimentation stage, and progress towards implementing the pre-existing comprehensive and futuristic Court automation master plan



This experience, points to the need to resolve the underlying problems and links-up neatly with the need for the Judiciary to have rule-making authority.

For, where Court rule-making authority reposes could either strengthen or weaken Judicial independence and the efficiency and effectiveness of the Courts.1 And the solution lies in reverting to the 1965 position where the Judiciary had the authority to make rules that 1 See section 165 of the Constitution which reads: "165. Judicial authority–

1. The Judicial authority of the Republic is vested in the Courts.
2. The Courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.
3. No person or organ of State may interfere with the functioning of the Courts.
4. Organs of State, through legislative and other measures, must assist and protect the Courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the Courts.
5. An order or decision issued by a court binds all persons to whom and organs of State to which it applies.
6. The Chief Justice is the head of the judiciary and exercises responsibility over the establishment and monitoring of norms and standards for the exercise
7. of the Judicial functions of all Courts."

The South African Judiciary Annual Report | 2019/20
10 regulated its core responsibility – the functioning of the Courts.

After all, identifying the need for and crafting Court rules is the forte of Judicial Officers as evidenced by the leading role they play in the Rules Board. That restoration of lost authority would help address challenges relating to the delays attendant to rule-making.

Added to this is the need for the Judiciary's institutional independence. We place a high premium on competence and integrity and would therefore want to have a meaningful say in the suitability of those who are to help us operate smoothly.

We need to ensure that administrative responsibilities pertaining to the Judiciary are somewhat insulated from external influence. Institutional independence would also eliminate the blurred accountability lines between the OCJ and the Judiciary on the one hand and the OCJ and the Executive on the other. This could be done by adopting the American, Russian or Kenyan-type of Court administration model that is led and controlled by the Judiciary, as a truly independent arm of the State.

In conclusion, the lockdown period has been challenging but loaded with invaluable lessons. I can't thank fellow leaders, in the Superior Courts and the Magistrates' Courts, enough for their understanding and cooperation as well as their principled and firm approach to the management of these unprecedented challenges. My heartfelt gratitude also goe to all other colleagues in the Judiciary for their hard work and support in these trying times. So too to the Secretary General, Ms M. Sejosengwe, and her OCJ team for their diligence an insistence on compliance with the prescripts whenever State resources are to be deployed, regardless of whether the Chief Justice or another Judicial Officer is involved.

I also thank them for always sensitising Judicial Officers to the need to keep a critical distance from OCJ-related contractual issues and from direct involvement with potential or alreadycontracted service providers. As a result, we again have a great pleasure to congratulate the SG and the OCJ for another clean audit in a row, at the time when this has become a rarity in Government.

On behalf of all my colleagues, it is a great privilege for me to present the 2019/2020 Judiciary Annual Report to the South African public. ■

JUDICIARY ANNUAL REPORT PRESENTED

Annually since 2018 the South African Judiciary presents its Annual Report on Judicial Functions and Court Performance.

Throughout the world the Judiciary remains accountable to the people for the power and authority bestowed upon it. Historically there were no accounting mechanisms which allowed the Judiciary to report on court performance and other matters related to the exercise of its constitutional mandate. Traditionally, Judges accounted through their judgments with the Executive reporting on court performance and related budget matters.

As our democracy matures and develops and the principle of judicial independence becomes more crystallised, it becomes necessary for the Judiciary to develop its own system of accounting as one Arm of the State. In its initial phases after delinking from the Department of Justice and Constitutional Development, reporting on judicial functions was integrated in the planning and reporting processes of the Office of the Chief Justice, the National Department.

The Chief Justice raised a concern at the Heads of Court meeting held on 02 October 2016 that the then draft Office of the Chief Justice (OCJ) 2017/18 Annual Performance Plan (APP), including the OCJ Strategic Plan (2015/16 – 2019/20), contained 'performance indicators', under programme two (namely; Judicial Support and Court Administration), that related to judicial functions.

The Heads of Court resolved that the Judiciary, as a self-contained, responsible Arm of State, had to develop Key Performance Indicators and set targets on court performance for the purpose of monitoring its own performance.

> "As our democracy matures and develops and the principle of judicial independence becomes more crystallised, it becomes necessary for the Judiciary to develop its own system of accounting as one Arm of the State

The performance of the Judiciary should not be assessed through "executive tools of planning and evaluation" which Parliament as an Arm of State is also not subjected to.

As a result, 'Performance indicators and targets' relating to Judicial functions were delineated from the OCJ Planning documents from 2017/18 going forward. ■

The reporting mechanism developed by the Judiciary will allow the Judiciary to account to the public and give the public and other Arms of State and interested stakeholders, access to information from such reports when required.

The 2019/2020 Annual Performance Plan (APP) for the Judiciary has been developed and it defines and identifies performance indicators and targets for the various courts.

The Performance Indicators and targets are measures that allow for monitoring of performance on one or more aspect of the overall functions and mandates of the Judiciary. The performance indicators for the Judiciary are informed by:

- Constitutional provisions, Superior Courts Act, 2013, and legislative mandates and functions;
- Judicial Norms and Standards; and
- Strategic and operational priorities. The performance targets express a specific level of performance that the Courts should aim to achieve within a given time period.

The performance targets are informed by:

- The baseline figures based on previous reports/ current performance;
- The available resources (budget, Human Resources, etc); and
- The Norms and Standards.

The purpose of the court performance monitoring report is to provide progressive updates on the implementation of the Judiciary APP with specific reference to monitoring delivery against set quarterly performance targets. The report below provides an overall picture on how the Superior Courts performed for the period 01 April 2019 to 31 March 2020.

Please use the QR code or link to read the full Report:
https://bit.ly/3mMD8md

JUDICIARY ANNUAL REPORT HIGHLIGHTS

SUPERIOR COURTS

76%	Percentage of reserved judgments finalised in all Superior Courts
76%	Percentage of cases finalised by the Constitutional Court
86%	Percentage of cases finalised by the Supreme Court of Appeal
63%	Percentage of cases finalised by the Labour Court
69%	Percentage of cases finalised by the Land Claims Court
100%	Percentage of cases finalised by the Electoral Court
90%	Percentage of cases finalised by the Competition Appeal Court
84%	Percentage of criminal cases finalised by the High Court
64%	Percentage of civil cases finalised by the High Court

MAGISTRATES COURTS

87%	Percentage of criminal matters finalised within 6 months from date of plea by the Regional Courts
96%	Percentage of disposed of civil cases within a period of 9 months of date of setdown by the Regional Courts
99%	Percentage of criminal cases finalised within 6 months from date of plea by the District Courts
92%	Percentage of criminal cases disposed of 9 months after first appearance date by the District Courts
94%	Percentage of Child Justice preliminary inquiries disposed of within 90 days after date of first appearance

JUDICIARY DAY EVENT CANCELLED AMID COVID-19 CONCERNS

Since 2018 the South African Judiciary has hosted Judiciary Day, an event in which the Judiciary as an Arm of State accounts for the power and authority the State has endowed to it.

During Judiciary Day, the Chief Justice, on behalf of the Judiciary, addresses a gathering of various stakeholders – including members of the Executive and Parliament, the legal fraternity, civil society organisations and the public – and presents the Judiciary Annual Performance Report. The Chief Justice also delivers an address on the state of the Judiciary.

As a result of the current coronavirus (Covid-19) pandemic and the need to avoid gatherings, the South African Judiciary this year opted to forego the Judiciary Day event. However, the Judiciary Annual Performance Report was released to the public as scheduled on 08 December 2020.

The South African Judiciary urges all South Africans to do their part in preventing the spread of Covid-19 by following the guidelines that have been made available, including wearing a face mask in public spaces, observing social distancing, avoiding gatherings and practising good hand hygiene. ■

ETHICS AND PROFESSIONAL CONDUCT

By Judge President MF Legodi
Mpumalanga High Court

Judge President Legodi, Mpumalanga Division of the High Court, on November 7 addressed members of the National Bar Council of South Africa on ethics and professional conduct. The following is the full text of his virtual address.

Exactly 45 years ago, I registered for a B.com degree under-graduate. At that time, I was dreaming of becoming the most successful businessman of all times. However, that was not to be.

Days thereafter, my friends from high school who had registered for a law degree kept on saying, almost like a slogan: “Law is an honourable profession. Law is dynamic. Law changes every day”. It was because of that slogan-song like, that three weeks after I had registered for a B.Com degree, I switched to something different. I registered for a law-degree. Whilst I did not immediately see the extent of that honourable profession and whilst I did not immediately see the extent of the everyday change in the law and the dynamic nature of the law, something happened.

> There must be a high sense of honour. There must be an incorruptible integrity. He or she must serve his client faithfully and diligently

When I started as a clerk of the court, when I started as an interpreter, when I started as a prosecutor, when I started as an article clerk and when I started as a lawyer, I was the first one unsolicited to start sing the slogan-song like:
"Law is an honourable profession.
Law is dynamic.
Law changes every day".

And here we are today! Your theme is: Ethics and professional conduct. What is it? Or put differently, why ethics and professional conduct?

You ask me now! I will say I do not know. However, those who know better put it this way: "The law exacts from every legal practitioner, advocate or attorney abburrema-fides. That is, the highest possible degree of good faith. He or she must manifest in all business matters an inflexible record for the truth. There must be a vigorous accuracy in minutiae.

There must be a high sense of honour. There must be an incorruptible integrity. He or she must serve his client faithfully and diligently. He or she must in no way betray his client to the other side. An advocate or an attorney is expected to maintain a measure of detachment". (see Van Zyl, Judicial Practice of South Africa,4th Ed).

These are words of wisdom. And, they hold true today. Everything that was said here, is entrenched in your code of conduct to which many of you have participated in its creation and promulgation.

This is humbling. In my early days of practice of the law, I was humbled and motivated by the following words of wisdom: "Intellect, voice, personality are all weapons in one's armoury. But, to none can be ascribed any degree of dominance or even of importance. There is, however, one quality that overcomes any physical failing. And, fortunately, it is a quality that is yours for the taking.

It is the quality of being or becoming conscientious and diligent. Counsel should strive to be known for this quality to his colleagues, to attorneys and even to the bench.

Judges will listen with more tolerance and more receptively to an argument which they know has conscientious effort as its foundation.

Attorneys will gain the respect of their clients if they display the same characteristic. And from that respect, they will acquire the reputation upon which a successful legal practice is built.

Apart from the personal talents of the practitioner, there arises the question of his character. Let us not delude ourselves with the belief that all lawyers live by a strict code of ethics.

There are many, perhaps no more and no less in South Africa than anywhere else in the world, whose code of ethics has an elasticity that adjusts itself to meet the exigencies of the case.

Fortunately, the number of practitioners who are actually unscrupulous, are infinitesimal. I would suggest that it should be the aim of every practitioner to acquire a reputation for honesty and candour amongst his colleagues.

For, you will find it takes no more than one case for a man worth in this regard to be known to the profession. Your word must be your bond. But beware of giving your word, unless you are prepared to defend it even against your own client.

> “I would suggest that it should be the aim of every practitioner to acquire a reputation for honesty and candour amongst his colleagues

For many of us, make rash promises for the convenience of our colleagues; and, then try to retract them in the face of the wrath of your client? Your undertaking to a colleague should be sacrosanct. When you make an arrangement or agreement, it should be honoured to the letter.

Your attitude should be that your client has put his trust in your ability and conferred on you a discretion in the conduct of his or her case. That discretion will not be abused. But if you do act on it, you must have the courage to stand fast on your undertakings”.

These ladies and gentlemen, were words said in 1969 by Eric Morris, an Advocate of the Supreme Court of South Africa at the time.Who am I today to say anything more than these wise words said in 1969 by the one who knew better?

But of course you, as members of the profession, you have adopted all these words of wisdom. I say so because on 29 March 2019, the Chairperson of the Legal Practice Council published in the Government Gazette the final code of conduct after intense process of consultation, I want to imagine.

In paragraph 3.1 of the code of conduct, you tell us that every legal practitioner, must maintain the highest standards of honesty and integrity

You tell us in paragraph 3.3 of the code of conduct that, every legal practitioner shall treat the interest of their clients as paramount; provided their conduct shall be subject always to:

- their duty to the court;
- the interests of justice;
- observance of the law;
- the maintenance of the ethical standards prescribed by your code of conduct and,
- any ethical standards generally recognised by the profession.

It is also required of every legal practitioner as contemplated in paragraph 3.11of the code of conduct to use, and this is very important, their best efforts to carry out work in a competent and timely manner.

I have seen a statement in the course of this week which reads as follows:

“We do not promote or encourage incompetence. Transformation is not synonymous to incompetence and incapacity”.

I suspect, this statement was made with reference to paragraph 3.11 of your code of conduct referred to earlier. Please do not attribute this statement to me. You know, who the author is.

But let me make it clear. I have always believed that every person is competent. I have always believed that every person has the ability for excellence in their respective professions.

It is all in the mind. If in the positive mind set, there is a desire for excellence and all driven by the passion blended with honesty and integrity, anything you touch, is like a mission accomplished.

Let me tell you this! Life-long in the legal fraternity is all within reach, and your name as a legal practitioner will forever be tied up to the steel wall of a profession which is so honourable. You know what am getting at.

Paragraph 3.13 of your code of conduct requires of every legal practitioner to remain reasonably abreast of the legal developments, applicable laws and regulations, legal theory and the common law, and legal practice in the fields in which they practice. This will include familiarising oneself with the practice directives of the court in which he or she as a legal practitioner appears or practices.

On the other hand, 'attorneys and counsel are expected to pursue their clients' rights and interests fiercely and vigorously without undue regard for their personal convenience. In that context they ought not to be intimated either by their opponent or even, I may add, by the court.

Legal practitioners must present their client's case fiercely and vigorously, but always within the context of set of ethical rules that pertain to them, and which are aimed at preventing practitioners from becoming parties to the deception of the court'.

What is stated above was articulated in the case of Africa Pre-Paid Nigeria Ltd & others v Blue Label Telecoms Ltd. The statement seems to be in line with paragraph 25.1 of your code of conduct which as you know reads as follows:

'Counsel shall, in the advancement of the client's cause, resist any conduct calculated to deflect counsel from acting in the best interests of the clients and to that end, counsel shall be fearless in the conduct of the client's case, and shall not be deterred by the threat of or the prospects of adverse consequences to counsel or any other person".

There are however, certain types of conduct that cannot be tolerated or condoned. As indicated in Africa Pre-Paid Services Nigeria Ltd, this will be circumstances where a practitioner is dishonest, obstructs the interests of justice, displays irresponsible and gross negligent conduct, litigates in a reckless manner or displays gross incompetence and lack of care or misleads the court.

In 2017, the SCA in the case of Anderssdorffs Boerderye v Shabalala came to the conclusion that a conduct which shows gross negligence and ignorance of the

> "Remember, 'a judge's position is not merely that of an umpire to see that the rules of the game are observed by both sides. A judge is an administrator of justice

rules governing for example, appeals deserves the displeasure of the court. This kind of conduct was found not to be excusable and not to fall within the errors of the law or everyday occurrence.

The unexplained delays in that case and the flagrant disregard of the rules in the conduct of a client's case, warranted a punitive cost to be paid de bonis propriis. Having come to this conclusion the SCA remarked:
"This court has repeatedly admonished legal practitioners (attorneys) who purport to practice in this court for their failure to familiarise themselves and comply with the rules".

By the way, any order of costs against a legal practitioner is an expression of displeasure by the court and signifies improper conduct on the part of the legal practitioner.

Similarly, any conduct that lacks restraint and is bent on bringing the image of the legal profession or the courts into disrepute by abusing the imperative in paragraph 25.1 of your code of conduct, would not escape the wrath of our courts and more importantly would not escape the wrath of the professional body as it has recently happened in a matter brought before court by the Limpopo Legal Practice Council.

Look at it this way: In terms of paragraph 9.7.1 of your code of conduct a legal practitioner, shall not gratuitously disparage, defame or otherwise use invective.

Similarly, in terms of paragraph 9.7.2 of your code of code, a legal practitioner shall not recklessly make averments or allegations unsubstantiated by the information given to the legal practitioner.

Whilst paragraphs 9.7.1 and 9.7.2 relate to composition of pleadings and of affidavits, the essence or principle must find application under any communication or interaction with other members of the profession and the court.
In 1969, Eric Morris sought to give an advice as follows:
"If you have erred (and who does not) admit the error, suffer the wrath of the court. But earn and preserve your reputation".

Remember, 'a judge's position is not merely that of an umpire to see that the rules of the game are observed by both sides. A judge is an administrator of justice. He or she is not a mere figure head. He or she has not only to direct and control the proceedings according to the recognised rules of procedure, but also to see that justice is done'. (see in this regard R v Hepworth).

The point is this: As you seek to act in the best of interests of the client; as you seek to defend your client fearlessly and, not easily deterred by the threat of or the prospects of adverse consequences, remember this: Truth matters, right matters and decency matters in this profession.

Be sure about the following as you are about to embark on the road of invoking the provisions of paragraph 25.1 of your code of conduct:

- that you have proper instructions from client;
- that you are true and right to the facts of the case;
- that you are right in law;
- that you conduct and express yourself in a manner that will show you are not carried away by emotions or your own weakness or ignorance.

> "In other words, you need to have inflexible regard for the truth before you fiercely resort to the advancement of your client's case and interests

In other words, you need to have inflexible regard for the truth before you fiercely resort to the advancement of your client's case and interests.

Do not forget that in terms of paragraph 25.2 of your code of conduct whatever counsel does, must be within the law and bounds. Every legal practitioner is in terms of paragraph 3.15 of your code of conduct required and obliged to refrain from doing anything which could or might bring the legal profession into dispute.

Therefore, there are limits to invoking paragraph 25.1 of the code of conduct and some of these limits require common sense and self-restraint.

Eric Morris in his time had the opportunity to nicely put it this way:
"Counsel must exercise his calling with care, skill, diligence, restraint, fearless and dignity. It takes many years of painful practice to combine all these qualities".

If this statement was true then, it is equally true today. There is another lesson to learn from the statement. There is no quick and easy money making process in the legal profession. It takes time. It requires patience, discipline and experience.

The last lesson, and, perhaps the last take away home. I conclude with these words borrowed in 1969 by Eric Morris from Voet:

"It is in accordance with this oath that they (advocates) gave an assurance that they will not undertake patronage of an unjust lawsuit. Nor pursue one once undertaken when injustice becomes evident. Nor use

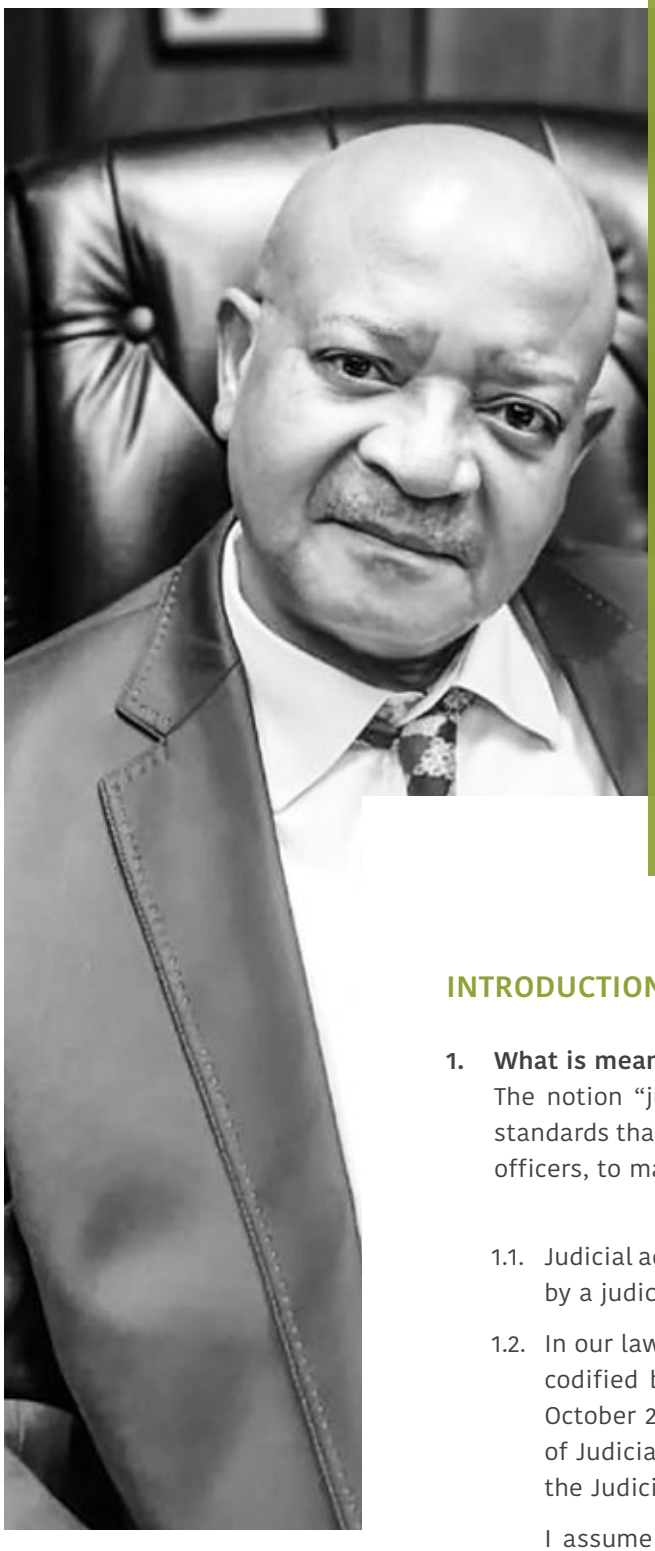
> "Truth matters, right matters and decency matters in this profession

false statements and lying charges in a just cause. Nor either openly or covertly rave with invective to the insulting of the opposite party or the court beyond what the advantage of lawsuits demands.

Nor purposely drag out lawsuits to their foul profit or disgusting pelf. But, they will instead essay every path and catch at every chance of heightening their true honour.

It is in this context that the society and courts and the profession demand an absolute personal and scrupulous honesty of each practitioner''.

As I conclude, join me if you so wish, to chant with me that slogan which brought us here together. "The law is an honourable profession. The law is dynamic. The law changes every day". ■



JUDGE PHATUDI SPEAKS JUDICIAL ETHICS

By Judge M.G Phatudi
Polokwane High Court

Judge Phatudi, Limpopo Division of the High Court, recently addressed District Magistrates in KwaZulu Natal on Judicial Ethics. The following is the full text of his address.

INTRODUCTION:

1. **What is meant by "Judicial ethics"?**
The notion "judicial ethics" in legal parlance consists of the norms and standards that are brought to bear upon. Judges and Magistrates as judicial officers, to maintain judicial independence and accountability.

1.1. Judicial accountability also covers aspects of impartiality and avoidance by a judicial officer of dishonourable conduct and impropriety.

1.2. In our law what is often referred to as "judicial ethics" had since been codified by proclamation in Government Gazette No. 35802 dated 18 October 2012. The judicial ethics referred to were adopted as a Code of Judicial Conduct for Judges pursuant the provisions of Section 12 of the Judicial Service Commission, Act No.9 of 1994.

I assume that the Magistracy have its own codified rules of judicial conduct of which the Magistrate's Commission plays an oversight role.

1.3. Judicial ethics, whether or not codified, applies to all judicial officers who preside in the courts of law. Be it in the lower courts or higher courts up to the Constitutional court, which is the apex court of the land.

1.4. The concept of "judicial ethics" derives historically from the common law, but in the main, involves such issues as honesty, integrity both inside and outside the courtroom, honour, dignity, independence and

above all, accountability to the rule of law and the Constitution, which is the supreme law of the Republic.

1.5. Judicial rules of ethics inevitably impacts on the judicial officer's private lives. In other words, a Judge or Magistrate is required to always exercise restraint in his/her private life as we socially interface with the public in general.

1.6. The majority of civilized jurisdictions around the world, do recognise in their charters on Human Rights or Bill of Rights, that the concept of "private life" is a broad term not susceptible to exhaustive definition.

It is for this reason that it is hard to define with reasonable certainty the extent to which judicial ethics may go. But, in my view, it suffices to mention that to uphold judicial ethics as a Judge/ Magistrate should not be that an onerous exercise, for it merely entails the elements I have earlier referred to in this discourse of the present.

CONDUCT THAT DOES NOT BREACH JUDICIAL ETHICS:

2. **Judicial accountability, and judicial independence, are in my view, fundamental elements that underpin judicial ethics for every single judicial officer.**

2.1 In this discussion, an attempt will be made to lay a few relevant instances of conduct that would generally amount to morally or judicially acceptable norms and standards for judicial ethics. The list is by no means exhaustive, but merely serve as an example of critical conduct applicable to all judicial officers. The examples of the judicial ethos at issue have constitutional undertones.

2.2 What follows are some of the relevant and useful examples:-

JUDICIAL INDEPENDENCE:

3. **A judicial officer must uphold and exercise fearlessly, without favour or prejudice the independence of the his/her authority and decorum of the courts. This applies when a Judge or Magistrate or a Chairperson of an administrative or quasi-administrative Tribunal performs judicial duties or administrative functions or duties, as the case may be.**

3.1 In terms of S.165 (1) of the Constitution (RSA) the judicial authority of the Republic is vested in the courts.

3.2 The judicial independence referred underscores judicial integrity and, therefore, good judicial ethical conduct is paramount. Such ethics denote freedom of conscience for judicial officers and non- interference in the performance of their judicial duties and unfettered discretion, and decision-making, is fundamental.

TO ACT HONOURABLY:

4. Judges and Magistrates are as judicial officers obliged to display uttermost honesty, integrity and honourable conduct at all material times when executing their judicial duties. For instance, judicial officers are required when making their decision, to confine themselves to judicial sphere, that is, to limit themselves to the underlying issues before them.

They must also desist from making findings against persons not called as witnesses before

> "In other words, you need to have inflexible regard for the truth before you fiercely resort to the advancement of your client's case and interests

court. In short, Judges or Magistrate must abstain from injecting personal views or personal preferences into judgment. To do so, will inevitably damage the esteem they are required to uphold.

See, NDPP v ZUMA 2009 (2) SA 277 (SCA)

EQUALITY

5. It would offend good judicial ethics for a judicial officer to associate himself/ herself with undesirable comments or conduct by individual subjects to his/her control that are racist, sexist, or otherwise manifest discrimination in violation of the equality guaranteed by the Constitution. (S.9 (1)) The Constitution entrenches equality before the law and the right to equal protection and benefit of the law.

OPENNESS AND TRANSPARENCY:

6. It is not only ethically correct, but it is also professionally sound and advisable to be judicially accountable as a court to promote public understanding and confidence in the complex judicial process. Hence, trials or hearings must take place in open court to ensure transparency. It is only in exceptional cases like sexual violations or where the interests of children are at stake that a court may sit in camera.

7. Furthermore, it would be unethical, in my view, for a presiding officer to play favouritism in respect of one of the litigants much to the detriment of his/her opponent. To do so would be repugnant to the hallowed principle of impartially, openness and transparency required of a Judge or Magistrate.

7.1 To that extent, a Judge or Magistrate must apply the law in a fair and balanced a manner, which covers the duty to observe the letter and spirit of the law, and of the maxim, audi alteram partem rule.

7.2 Crucially, providing adequate reasons for any decision is of utter importance.

> “
>
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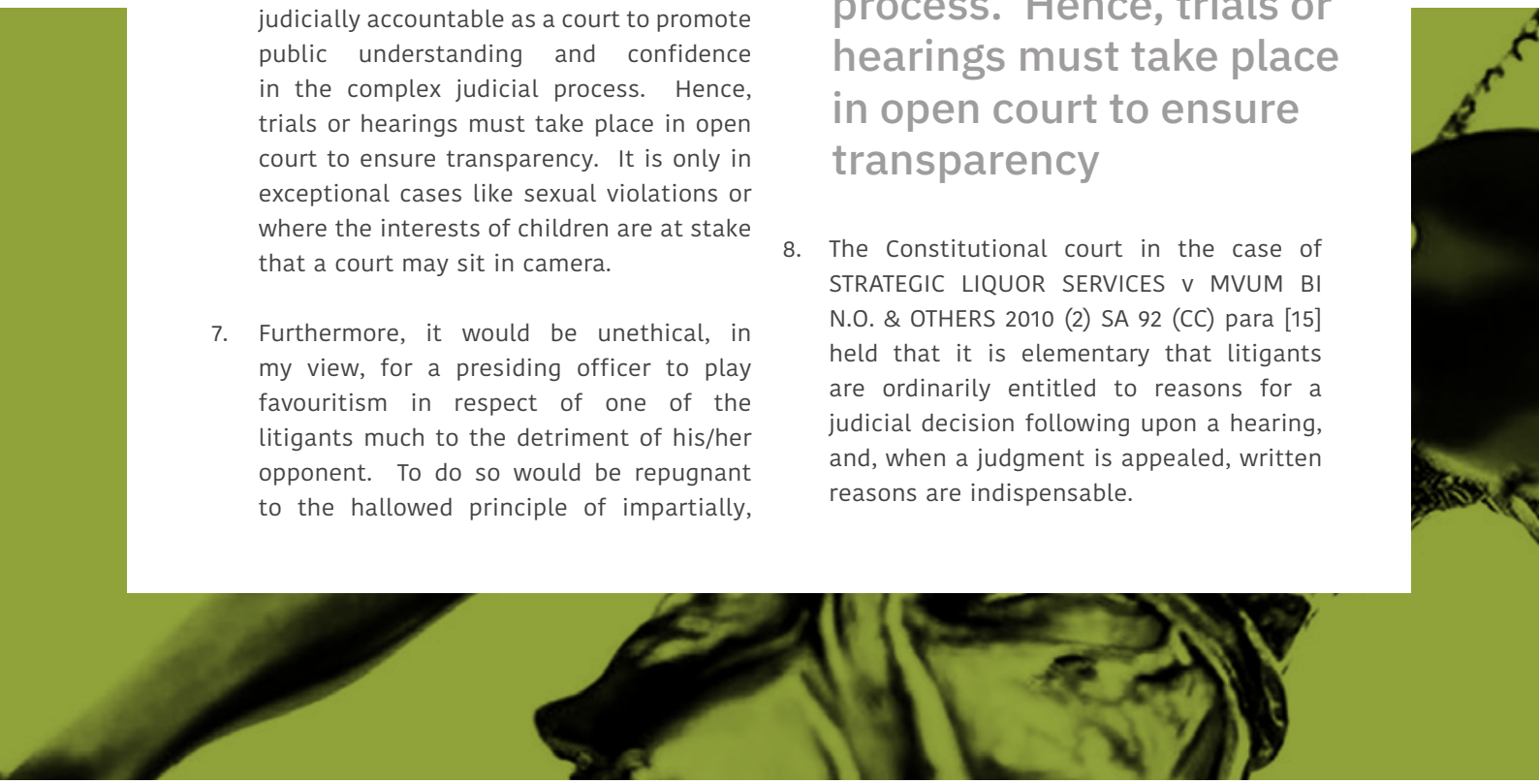
8. The Constitutional court in the case of STRATEGIC LIQUOR SERVICES v MVUM BI N.O. & OTHERS 2010 (2) SA 92 (CC) para [15] held that it is elementary that litigants are ordinarily entitled to reasons for a judicial decision following upon a hearing, and, when a judgment is appealed, written reasons are indispensable.



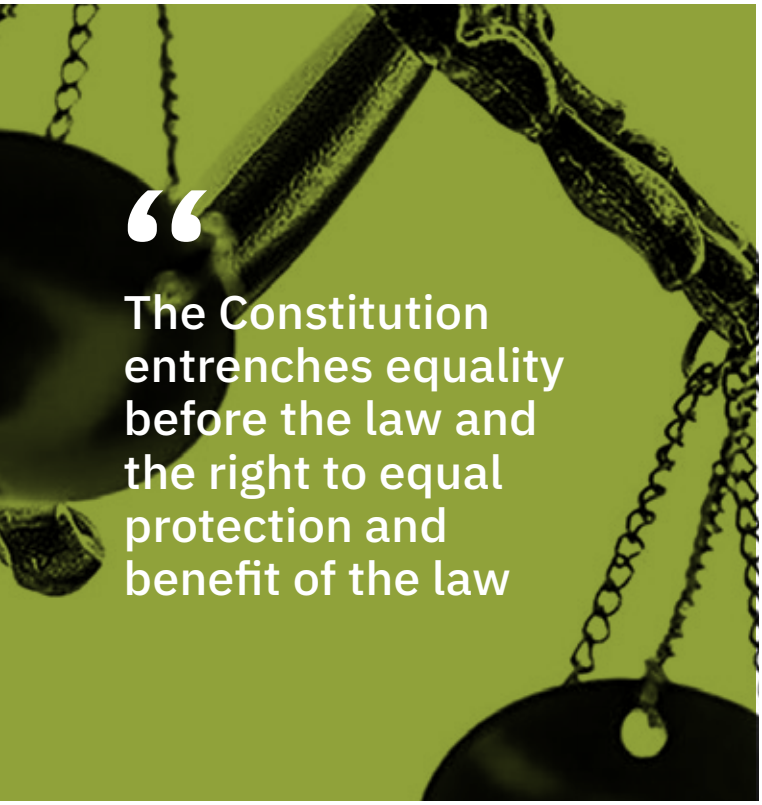
DILIGENCE:

9. Any conduct that breach the required due diligence in the performance of judicial duties would be viewed as unethical, dishonourable or inpropriety.

   For instance, failure to perform assigned judicial duties, reasonably and diligently, and to deliver judgment/s promptly and without inordinate delay. To be astute, however, when analysing or evaluating the law and the facts, will certainly enhance the public confidence in the judiciary and thus enhance the court's decorum.

   9.1 Thus, unwarranted overly postponements, undue formalism and point-taking, boarders on unethical behaviour.

   9.2 A pattern of intemperate or intimidating treatment of legal practitioners or conduct evincing arbitrariness and abusiveness often gives rise to prejudice and subverts the effective administration of justice and should, therefore, be avoided.



MISCELLANEOUS INHIBITIONS:

10. For avoidance of prolixity and in order to save the limited time allocated, I propose to enumerate miscellaneously some of the conduct that would be deemed consonant with good judicial ethics;-

A Presiding Officer must avoid –

10.1 To belong to any political or secret formations;

10.2 To publicly pronounce any controversial political or racist utterances;

10.3 To use his/her judicial office to advance private or commercial interests;

10.4 A conflict of interests;

10.5 To receive partisan treatment or special favour or dispensation from potential litigants or their lawyers.

10.6 Taking any appointment that is inconsistent with the independence of the judiciary or his/her office.

10.7 To engage in financial or business activities incompatible with a judicial officer, and finally

10.8 To accept, hold or perform any other office of profit or receive fees apart from the salary and/or allowances payable to a judicial officer. ■

Image Source: https://bit.ly/3miGlcU

COMMON PURPOSE: COLLEGIALITY AND ETHICS IN FAMILY LAW

Judge Ingrid Opperman
Gauteng Division of the High Court, Johannesburg

I had to decide a matter the other day in urgent court. It had to do with a little girl I have called Gaby. She had a sensory integration disorder and found tight clothes unbearable. At five years old she refused to wear a swim suit particularly a tight one. She liked to swim without anything on. Her father knew that that preference couldn't last long. He is a martial arts expert. He was evidently exasperated by the situation. One could imagine what a martial arts expert could do with exasperation.

I had to decide whether to terminate the shared residency arrangement and to permit the father to have only 10 minutes telephonic contact every alternate day, pending an experts report. Based on the facts and the law before me, I made my decision in favour of preserving the status quo.

I woke up in the middle of the night and asked my husband: "Is Gaby okay?" Why do I tell you this? Because I, and my judicial colleagues who decide the family law matters which you bring to us, need you to understand that we understand how hard you work for your clients. How much they, and their children, mean to you as family law practitioners. We know you wake up at night too, wondering: "Is Gaby okay?" Win or lose, this is a hard, hard field of law. And we all need to work together to make the right decisions for the families you represent and I, and my colleagues, decide on.

> "this is a hard, hard field of law. And we all need to work together to make the right decisions for the families you represent and I, and my colleagues, decide on

> “there is a minority of attorneys who approach each divorce as a war between the two litigants. The rules of court and legal principles are utilised as weapons in a fight to destroy the opposition

So it does not help to have unbridled aggression in the correspondence and vitriolic allegations against colleagues which spill over into the papers unnecessarily.

We all have our own family histories. We all have a parent who could have done better, a raw deal somewhere in our pasts. So, to don the hat of a family lawyer is to carve upon one’s forehead the old adage of the medical profession, and read it every morning before one goes to work, the writing scarred in red welts above one’s eyebrows: “DO NO HARM.” This is an adult injunction. We cannot indulge our childhood hurts and angers as family law practitioners just because it is labelled an adversarial system. And the place where harm stops being done is in the first letter in the matter or the first phone call to the colleague on the other side.

“Hello, how are you. How are you coping with the pandemic? How is practice? Are you going to the Clarks Family Law Conference? Can I talk to you about Gaby?” Colleagues who talk to each other with an appreciation of where we are in our lives, our commonality in practice, our country, make life better for those of us who have to decide their cases.

Why? Because they bring to us the real issues. The issues that, despite their courtesy and patience, the indulgences they afford each other to get the papers done properly, remain the issues. Those are the intractable ones, the issues that we need the wisdom of the law and the benefits of its tools in judicial hands, to dismantle and decide. That is what the Bench is there for. To bring those skills, that knowledge, that experience and those values to bear.

What we don’t need is petty, aggressive, fights for the sake of fighting, matters cluttering up our rolls where the egos and fee targets of the practitioners have caused much harm and Gaby is wandering, crying on the battlefield in the fog of war while titans clash mightily and pointlessly with gods, far above her head. Those battles tend to obscure from judicial view the real reason why we are designated the upper guardians, and undermine our ability to perform that, our primary role.

We, as the Bench, owe the children of the country that duty, and to do it we need to work with their parents and with the family advocate and with you the practitioners. This is not a facile request to ‘be nice’ to each other. It is a very serious challenge to dig deep within yourselves to find one another as practitioners and keep the litigation on a mature and civil keel. It is the essence of professionalism and it is rooted in rationality and results.

But, I ask, is professional courtesy between lawyers a dying tradition? Is it still an insult to be referred to as a hired gun or is it a title to be aspired to, a badge of honour? Have you been conditioned to believe that

disregarding professional courtesies will be in your client's interests, that it proves you love your clients, that they love you and that anything short of it would compromise them?

The two major forces which control lawyer collegiality are the ethical guidelines that the lawyer sets for herself and legal guidelines that the profession provides. In his landmark book, A Course of Legal Study, David Hoffman – the father of American legal ethics and who practiced in the eighteen hundreds wrote:

'In all intercourse [action] with my professional brethren, I will be always courteous. No man's passion shall intimidate me from asserting fully my own, or my client's rights; and no man's ignorance or folly shall induce me to take any advantage of him; I shall deal with them all as honourable men, ministering at our common altar.'

And of course this common altar should, in my view, be, amongst legal practitioners, to resolving disputes efficiently and effectively and on the Bench, and amongst members of the judiciary, the altar should include, getting the law right. Court proceedings that do not remedy disputes substantively, tend not to be effective. Sometimes, the purpose of such proceedings is to harass and not resolve problems but to gain a tactical advantage. It is part of a willful and deliberate strategy. Let me cite an example from a law report, which illustrates the harm that the Bench sees being inflicted by practitioners of family law on their clients from time to time.

In Clemson v Clemson, the husband approached the urgent court for return of a list of goods taken by the wife when she, together with the two teenage children, left the matrimonial home. Some of the items on the list which the husband needed back included the daughters' bedding, their lamps, their clothes and their CD's. Judge Blieden commented: 'The only rational explanation for this application being brought in the manner it was brought is that it was to harass the respondent in order to intimidate her in the ongoing litigation.

It was not an error of judgment on the part of the attorney, but was part of a wilful, deliberate strategy. These tactics cannot be attributed to the applicant who is clearly a layman and not versed in law. It is the attorney who is responsible for this matter coming before the court in the way it has.'

Judge Blieden went on to say: 'The marriage has irrevocably broken down and the parties themselves cannot function rationally with each other as emotional issues intrude.

The Court expects attorneys acting on behalf of such people, as professional people and officers of the court, to display objectivity and sound common sense in assisting their clients. Fortunately most attorneys perform this task admirably. However there is a minority of attorneys who approach each divorce as a war between the two litigants. The rules of court and legal principles are utilised as weapons in a fight to destroy the opposition. As happens in most wars of attrition by the time the war has come to an end both sides have lost. There is now permanent hatred between the parties and their joint assets have been consumed to pay legal fees.'

We, as Judges, recognise that a legal practitioner's loyalties are divided among the selfish interests of her client, the justice seeking interests of the court and the morality of the lawyer herself but we hope that she is not absolutely bound to follow truth-obfuscating instructions given to her by her client.

It is thus comforting and refreshing to learn that the Gauteng Family Law Forum has a code of practice which requires its members to approach family law matters in a constructive way and in a manner which seeks to resolve and not to inflame. The code of conduct includes: to act with honesty, integrity and objectivity; to reduce or manage conflict and confrontation, using your expertise and experience to avoid hostility and aggression.

Members are also required to help clients to understand the bigger picture, and the long term consequences of the financial and emotional decisions they make. This requirement, to always keep in mind the bigger picture reminded me of a matter which had been assigned to me to case manage where one of the parties was unrepresented. Mrs X had established that counsel for Mr X was in the same group of advocates as my husband. This gave rise to all sorts of accusations and threats of recusal applications. Despite explaining that my husband had left that Group and that we had no social contact with the counsel for Mr X, the wife persisted with the accusations.

The table was set for suspicion and distrust and it became clear to me that this process was neither efficient nor effective as each case management meeting was followed by a threat of a recusal application. Because I had not yet decided an interlocutory application and my function until that point had not been judicial but rather administrative in nature (and in truth could not form the subject matter of a recusal application), I approached the acting deputy judge president and it was decided that it was not in the interests of justice to proceed on this basis. She appointed a colleague, not previously from the Bar, so as to avoid a repeat of the situation. The attorneys and counsel for Mr X wrote letters denying any wrong doing but accepted my decision, because, I believe, they could see the bigger picture and that this cycle we were locked into was not advancing the finalisation of the matter and thus not the common altar, being efficient and effective dispute resolution.

Another practice that you have to ascribe to as a member of this Forum is to advocate for your clients in a way that is helpful and not destructive. A good example of a constructive letter appears in the 'Resolution Guide to Good Practice: Correspondence' - utilized in the UK, the example reads: 'I have been instructed by your husband and he tells me that sadly your marriage has broken down. John has asked for my help and advice in resolving the arrangements arising from your separation. John is keen that all the arrangements are dealt with as amicably as possible.' Another practice that the Forum demands is to, at all times put the childrens' interests first, and to encourage clients to do the same. When I mentioned

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the picking up of the phone to deal with the Gaby incident, I was not suggesting that the telephone replace correspondence, clearly writing is required to document the myriad issues, which arise in matrimonial disputes, but sometimes it may well have its place. Remember companies' fight over invoices and perhaps one of the companies so fighting will be liquidated. The approach in such litigation is wholly inappropriate where there are children involved, where there is generational continuity or where you are dealing with domestic violence and economic sub-ordination.

You as legal practitioners have a responsibility to buffer your client's vindictiveness through collegiality, which I consider to be very much part of ethical practice because collegial practice, like ethical practice is focused on doing the right thing. You will be required to make difficult decisions along the way but be assured that the road you choose and which is less travelled, will make all the difference. ■

MANAGING AN URGENT MOTION COURT ROLL

By Judge M.G Phatudi
Polokwane High Court

1. INTRODUCTION:

1. The urgent motion court is one of the busiest motion court week in and week out in this Division. Often, this court receive and hear no less than an average of ten (10) matters on every Tuesday, weekly. Most of these applications are often opposed.

1.1 It is in this court that we often hear urgent applications with matters ranging from.

a) Urgent Interim Interdicts;
b) Ex parte applications;
c) Disputes over burial of the deceased persons;
d) Illegal land invasions and evictions;
e) Disputes over children's rights; to
f) Urgent commercial interest disputes.

1.2 Considering the foregoing complex and mostly intricate matters, it follows logically that far-reaching orders of public interest, commercial and family law disputes, are decreed in this court, often under overly intense urgent circumstances.

1.2 For a legal practitioner to move smoothly and exponentially within these constraints, requires adequate preparation.

2. THE STRUCTURE OF AND COMPOSITION OF AN URGENT MOTION COURT:

In both Polokwane High Court and Thohoyandou Local Division of the High Court, the urgent motion court are structured as follows:

2.1 Each urgent motion court in the said courts sit on every Tuesday in a week, except for "extreme" urgent applications, which may be accommodated on every day of the week other than on a Tuesday. This arrangement endures for each week of the year.

2.2 In the Polokwane court alone, the urgent motion court sits on every Tuesday of the week to hear an average of ten (10) to twelve (12) matters, mostly opposed.

2.3 These matters are allocated to a Judge who is assigned court duty on the opposed motion court every week, except on a Tuesday, which in terms of the new flexible dispensation, is set apart for urgent applications.

2.4 Court files are allocated to a Judge sitting on the opposed motion court on a Thursday after closure of the urgent court roll at 12H00 noon.

2.5 The composition of the urgent court has so far a coram of a Judge per court room, who, regrettably, unlike in the ordinary opposed motion court, hardly have time to read the litigants' heads of argument.

2.6 With the ever-increasing volume of opposed urgent applications weekly, time has come to request counsel at least to settle a Practice Note upon the filling of opposing papers for this court.

3. HOW AND WHEN TO LAUNCH AN URGENT APPLICATION:

3.1 Urgent motions proceedings are regulated by the provisions of Rule 6 (12) (a) and (b) of the Uniform rules of court. ("the rules")

3.2 For considerations of convenience and brevity, I shall only paraphrase the general import of Rule 6 (12) (a) and later enlarge on Rule 6 (12) (b). Both subrules are fundamental when launching an urgent motion.

3.3 Rule 6 (12) (a) generally provides that when a case for urgency is shaped in the founding papers, the court or a Judge in chambers may condone non-compliance with the rules regarding forms and manner of service.

3.4 IN COMMISSIONER, SARS V HAWKER AIR SERVICES (PTY) LTD[1] Cameron AJ (as he then was) held that:-

" [9]

..... Urgency is a reason that may justify deviation from the times and forms the rules prescribe. It relates to form not substance, and it is not a prerequisite to a claim for substantive relief. Where an application is brought on the basis of urgency, the rules of court permit a court (or a Judge in chambers) to dispense with the forms and service usually required, and to dispose of it as it seems meet (Rule 6 (12) (a)). This in effect permits an urgent applicant, subject to the court's control, to forge its own rules..... where the application lacks the requisite element or degree of urgency, the court can for that reason decline to exercise its powers under Rule 6 (12) (a)"

3.5 Following this principle, it follows that the matter is then not properly enrolled on the urgent court roll, and the court declines to hear the matter. The appropriate order is generally to have it struck off the roll.

4. It is crucial to bear in mind the fact that an applicant claims or proves urgency is no reason to deviate from the requirements of Rule 6 (5) regarding the use of Form 2 (a).

Additionally, practitioners seeking audience on urgency basis must set out the requested abridgment of the time periods, and condonation, in the Notice of Motion.

5. In our Division, the Practice Directives prescribe how and when an urgent application may be launched[2]. For avoidance of prolixity, I refer only to the most important and relevant portions for our purposes in this discussion.

5.1 The normal time for the bringing of an urgent application is 10h00 on Tuesday of the motion week.

5.2 There are exceptional instances where due to "extreme urgency" of the matter, it may be brought at 10h00 on any day during the motion court week, or 11h30 or 14h00.

5.3 In such exceptional cases, the applicant in the founding affidavit ("FA") must set forth facts, which justify the bringing of the application at a time except for 10h00 on the Tuesday and other than 10h00 on any other day. (Own emphasis)

CLOSURE OF THE URGENT COURT ROLL:

6. When an urgent application is brought for the Tuesday at 10h00, the applicant must ensure that the application is filed with the registrar by the preceding Thursday at 12h00 noon. If the Thursday thereof falls on a public holiday, then papers must be lodged either a day preceding or a day after. The court files will, at 16h00 on the preceding Thursday, be brought to the Judge's Clerk.

6.1 In cases of "extreme urgency", the reasonable time that must be afforded the respondent/s to give notice of intention to oppose, is usually

1. 2006 (4) SA 292 (SCA) at 299, Para: [9]
2. Effective from 01.09.2015, Clause 13.15.1 to 13.15.10.5 thereof.

not less than two (2) hours, excluding the hour between 13h00 and 14h00.

7. If the facts in the application do not:-

   a. establish real urgency; or
   b. justify the abrogation or abridgment of time periods envisaged in Rule 6 (5), or
   c. Justify the failure to serve the application as required in Rule 4, the court may decline to grant an order sought for enrolment of the matter on an urgent basis.

8. In the well-known case of LUNA MEUBELS VERVAARDEGERS (EDMS) BPK V MAKING & ANOTHER[3] Coetzee J (as he then was) had occasion to analyse and quiet aptly so, in my view, rule 6 (12) (a) what a litigant is required to do when bringing an urgent application other than an ex parte application.

Importantly, safety velves are inter alia that:

8.1 Whether there must be a departure at all from the time lines set out in Rule 6 (5) (b);

8.2 Only if the matter is so urgent that the applicant cannot wait for the next motion day, for his/her obligation to file papers by preceding Thursday, may the matter be enrolled without filling papers the previous Thursday;

8.3 Only in compelling "exceptional cases", where applicant cannot wait for the next Tuesday, may the matter be set down for hearing on the next court day at 10h00. (except Tuesday).

8.4 Only after the court has disposed of causes for that day and has adjourned, and the matter may not wait for hearing until the next day at 10h00, the matter may forthwith be set down for hearing at any convenient time, in consultation with the registrar, be it after hours, at night or a weekend.

(These are "extremely urgent" matters)

9. It is the duty of a legal practitioner to be astute to carefully evaluate the facts of each case to gauge the preponderance and weight that warrant an urgent application. Importantly, to gauge whether a greater or lesser degree of relaxation of the rules and the Practice Directive of the court is required.

10. Furthermore, "the degree of relaxation should not be greater than the exigency of the case demands, it must be commensurate therewith. Mere lip service to the requirements of Rule 6 (12) (b) will not do and an applicant must make out a case in the founding affidavit to justify the particular extent of the departure from the norm, which is involved in the time and day for which the matter be set down"[4].

11. The Learned Judge then decried the tendency by attorneys to feel at large to select any day of the week and at any time of the day (or night) to demand audience. He described this mal practice an "intolerable and calculated to reduce the good order which is necessary for the dignified functioning of the Courts to shambles"

12. I echoe sentiments expressed by Coetzee J as far back as in 1977, and it is quiet disturbing that the malfeasance persist to date post 1996 in our courts.

13. I appeal to our practitioners to at least familiarise themselves with the relevant authority to which reference is made, to appreciate the application of Rule 6 (12) (a)

14. That said, Rule 6 (12) (b) is equally crucial to found urgency on paper. It provides as follows:- "6 (12) (b):

    "In every affidavit or petition filed in support of the application under paragraph (a) of this sub-rule, the applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course".

15. The sub-rule was eloquently accentuated by Kirk-Cohen AJ (as he then was) in the case of SIKWE V S.A MUTUAL FIRE & GENERAL INSURANCE[5]. In Sikwe's case, the court emphasised the requirement to provide reasons for and the

3. 1977 (4) SA 135 (W)
4. Ibid- 136
5. 1977 (3) S.A 438 (WLD) at 440 G-H.

circumstances that render the matter urgent and why he claims he would not obtain substantial redress at a hearing in due course.

14.1 There is in our law a plethora of case law that re-affirmed this hallowed procedural principle by various Divisions of the High Court.

16. In later years NOTSHE AJ in applying the use of and the import of Rule 6 (12) (b) in urgent applications, appositely stated in the case of EAST ROCKTRADING 7 (PTY) LTD & ANOTHER V EAGLE VALLEY GRANITE (PTY) LTD,[6] and stated at paragraph [6] that "…….. the import thereof (Rule 6 (12) is that the procedure set out in rule 6 (12) is not there for taking"

The Learned AJ further stated at paragraph [9] that "the correct and crucial test is whether, if the matter were to follow normal course as laid down by the rules, will the applicant be afforded substantial redress…."

16.1 Furthermore, and importantly, in MAKUWA V POSLSON[7] Patel J also echoed adverse comments about practitioners who simply handed up documents from the bar, which ought to be properly filed with the registrar.

The Learned Judge also stated at paragraph [13] that:

"[13]

Finally, there appears to be a growing in prevalence of failure to comply with the Rules of Court and having a total disregard for the practice in this Division as enjoined by the Manual….."Undoubtedly, it is time to sound a stern warning that court will not countenance non-compliance with the Rules of courts and the practice, ……"

In conclusion, Patel J warned Practitioners to incur the displeasure of the court and invariably attract an exemplary order of costs.

16.2 Regrettably, this Division is no exception to this unpleasant state of affairs, as lawyers continue to erode the nobility and honour of the court.

17. Clearly, therefore, and I agree, "the question whether a matter is sufficiently urgent to be enrolled and heard as an urgent application, is underpinned by the issue of absence of substantial redress in an application in due course."[8]

18. The foregoing principle was endorsed by Weperner J in the matter of IN RE: SEVERAL MATTERS ON URGENT COURT ROLL[9].

In that case, the Learned Judge, also expressed disquiet about the malpractice of "setting matters down in the urgent court for flimsy and inadequate reasons. This practice needs to be discouraged."

19. In our Division, as I have already shown elsewhere in this paper, the urgent court has since 2017 been fraught with more than 10-12 urgent matters on every Tuesday. 95% or more, speaking roundly, are opposed and became voluminous. Time has come perhaps as Wepener J had lamented the situation, that "if a matter become opposed in the urgent court and the papers became voluminous, there must be exceptional reasons why the matter is not removed to the ordinary motion court. The urgent court is not geared to dealing with a matter, which is not only voluminous, but clearly includes some complexity and even some novel points of law[10].

20. I fully subscribe to this sentiment. I can perhaps even add that, most opposed urgent matters are quiet commercially involved with full sets of lengthy affidavits (F.A.R) and lengthy heads of arguments, and parties demanding a quick fix solution without ado.

CONCLUSION:

21. Another cause for concern Judgement or orders made regarding urgency only entails the exercising of a judicial discretion. The decision not to uphold urgency, resulting in a matter being struck off the roll, is simply not appealable.

Accordingly, seeking leave to appeal or reasons for decision is not only time consuming, but

6. 2011 JDR 1832 (GS) or 2012JOL 28244 (GSJ)
7. 2007 (3) SA 84 (TPD) P88, Para: [12] [13] & [14]
8. Ibid Para : [6] Judgment
9. 2013 (1) SA 549 (GSJ) at P551, Para: [7]
10. Ibid. P553

erodes the very scares judicial resources. We make a clarion appeal to the legal practitioners to desist from this practice.

22. The test whether a matter is appealable or not has been laid down in the instructive case of ZWENI V MINISTER OF LAW & ORDER.[11]
PART B:
RULE 41 A:

23. The insertion of Rule 41A in the existing rules is intended as a platform for mediation by the litigants as a way of alternative dispute resolution mechanism. (ÄDR")

23.1 Embarking on this mechanism, the parties will be required to submit to a voluntary mediation process by agreement where a Mediator will assist the litigants whether to resolve the impasse themselves, or identify the issues in dispute upon which they may reach agreement, or explore areas of compromise.

23.2 The process involves exploring various options, to settle or resolve the dispute, prioritize issues, facilitating discussions, and guide the parties in their negotiations.

[24] Rule 41 A (2) (a) requires that in every new action or application proceedings, the plaintiff/applicant shall together with a combined summons/ notice of motion, serve a notice on defendants/ respondents to gauge if the latter agrees to or opposes referral of the dispute to mediation.

24.1 A defendant/respondent is obliged when entering an appearance to defend or serving a notice of intention to oppose, or soon thereafter, but before delivery of a plea or answering affidavit, to serve on the plaintiff/s or defendant/s a notice whether or not, are amenable to mediation. (Notice to conform to Form 27)

24.2 If not amenable, he/she must state the reasons why mediation would not help to resolve the dispute.

The parties can still later agree before judgment to submit to mediation.

25. Rule 41 A (3) (b), authorises a Judge or a Case Management Judge ("CMJ") referred to in Rule 37A or the court, may at any stage before judgment, direct the parties to consider mediation, subject to agreement.

PROCEDURE: (Summarised)

26. Upon referral to mediation the parties shall:

a) Deliver a joint signed minute ("JM") agreeing to referral to mediation;

b) Conclude an agreement to mediate;

c) Exchange of pleadings and filing of notices become suspended;

f) The mediation is required to be concluded within 30 days after signature of the "JM".

e) Disclosures or discoveries made during mediation are "without prejudice" thus inadmissible in evidence if matter proceed to trial.

f) The mediator is required to issue a "JM" within 5 days after conclusion of mediation and make a report of the outcome, which "JM" must be filed with the registrar.

g) Where the outcome of mediation produced a settlement, the provisions of Rule 41 shall apply mutatis mutandis. ■

11. 1993 (1) SA 523 (SCA) The concourt reaffirmed the Zweni's principle in National Treasury v Outa 2012 (6) SA 223 (CC)

JUDICIAL RETIREMENTS

Justice C J Olivier
Northern Cape Division of the High Court, Kimberley
Retired: 12 December 2020

Justice S Desai
Western Cape Division of the High Court, Cape Town
Retired: 15 December 2020
Image source: https://bit.ly/37l2xyw

Justice K G B Swain
Supreme Court of Appeal
Retired: 21 December 2020

Justice D Davis
Western Cape Division of the High Court,
Cape Town (Competition Appeal Court)
Retires: 1 January 2021

Justice J W Louw
Gauteng Division of the High Court, Pretoria
Retired: 14 December 2020

NOTES

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