SPEECH BY THE CHIEF JUSTICE OF THE REPUBLIC OF SOUTH AFRICA

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Introduction

It is a great honour for me, to have been invited to come here and speak at a workshop, whose main focus is the development and achievement of a fair, efficient and effective case flow management system in the Eastern Cape. I am most grateful for the opportunity to share my thoughts with you on this matter.

I would like to recognise and acknowledge that your presence here is a testament of your commitment to the vision of ensuring that our people have access to justice. This vision cannot be achieved unless there is a concerted effort by the judiciary, the legal profession, state counsel and prosecution services, support services for the courts, correctional services, the police and indeed, by the litigants themselves. Our courts cannot be transformed into effective midwives of justice unless all the stakeholders commit to supporting this initiative.

In its *Court and Case Flow Management Practical Guide for South African Lower Courts*, the National Prosecution Authority has aptly recognised the importance of co-operation thus;

> The reality is that CFM (Case Flow Management) is an integrated process through which all role-players involved are interdependent upon one another in order to achieve and maintain

> effectiveness. One non-committed or underperforming role-player can thwart the best efforts of all other role-players.[1]

An effective case flow management is indeed a product of team effort. Independent of each other as we are in many respects, we are also indeed interdependent. I must disabuse any thoughts that case flow management is much-ado-about-the-judiciary. It is much-ado-about-every-person in this Republic. It is about access to justice. The UK Privy Council has correctly observed;

> The law's delays have been the subject of complaint from litigants for many centuries, and it behoves all courts to make proper efforts to ensure that the quality of justice is not adversely affected by delay in dealing with cases which are brought before them, whether in bringing them on for hearing or in issuing decisions when they have been heard.[2]

Access to Justice

Stripped to its bare essentials, case flow management is a tool intended to provide access to justice.

> Access to justice is a fast growing concept and practice. It encompasses the rule of law, administration of justice, good governance, and democratic ideals...It acknowledges and seeks to address the gap that exists between citizens and the law, in terms of equality of opportunity and approach in tackling issues, and providing an appropriate remedy. It attempts to eliminate, or at least counter-balance, the impact of inefficient or expensive systems of administration of justice that effectively deny the fullest protection and recourse of all litigants to the law in order to redress their grievances and vindicate their rights. It also helps to assert more precisely the scope of the role of the justice system and the courts in being part of a strategy to address the issue of exclusion of the poor from a formal system of public administration.[3]

It is not matter disputed much that in this country that the poor suffer most from an ineffective and inefficient justice system. While our Constitution guarantees that every individual the right to protection of the law and equal access to justice, the reality is that those without economic resources are the worst affected in terms of access to justice. The poor do not have cheaper and more efficient alternatives to lack of access. We are all aware that bigger corporations and the well-to-do can, as an antidote to delays and inefficiencies in the legal system, seek alternative dispute

[1] National Prosecution Authority, *Court and Case Flow Management: Legislation and Policy Practical Guide for South African Lower Courts*, page 4
[2] *Jerome Boodhoo (President) and Another v The Attorney General of Trinidad and Tobago*, Privy Council Appeal No. 8 of 2003 [2004] UKPC 17 para 1
[3] Ayesha Kwadwani Dias and Gita Honwana Welch (eds), Introduction, *Justice for the Poor: Perspectives on Accelerating Access*, Oxford University Press, 2009 at page xv

resolution mechanisms. The poor are stuck in a system in which the longer the case delays, the more they have to pay in terms of legal fees. At the same time, they lose the most in terms of the economic value if legal disputes involve the vindication of economic or financial rights.

> Access to justice has grown to become part of good governance and is a central building block for economic and social reform and the promotion and protection of human rights. It is inseparable from the struggle for social and economic justice and the struggle for economic survival. All these are linked to the concept of respect for the dignity of the human person, an acceptance that everyone possesses inherent worth and this is not diminished by poverty and lack of resources, be they special, economic, or social.[4]

Indeed, our Constitution is built upon the values of freedom, equality and human dignity. The lack of an efficient, timely and reliable legal system that guarantees the delivery of justice is matter of serious concern. It is time we take serious action to redress the negative impact of delays and cost in our legal system. Unless this is done, those who are economically weak have little chance of achieving real access to justice.

As many of you will be aware, my predecessor Mr Justice Sandile Ngcobo, as Chief Justice, hosted the *Access to Justice Conference* in Johannesburg in 2011. The Conference resolved, among other things, that the former Chief Justice and 1 spearhead the development and implementation of a case flow management system in our legal system. The timing of the Conference and its resolutions coincided with the establishment of the new Office of the Chief Justice (OCJ), which is a national department. The establishment of this OCJ has given the responsibility for the full functioning of the courts to the Judiciary. As Chief Justice, I have therefore assumed greater responsibility for ensuring that the Judiciary lives up to its constitutional mandate.

The need for such an efficient system, bringing together all the stakeholders in the justice delivery system cannot be gainsaid. None of us can pretend that the way we have been doing things has worked. We only need to visit the nearest court in this country to be confronted by incessant delays, missing files, endless postponements, frustrated litigants, weary judicial officers and that haunting lamentation of witness seeking to do his or her civic duty and yet caught in this myriad of problems.

In order for us to vividly picture the poor performance of some of our courts I would like you to imagine this: how many complete cars would be manufactured every year

[4] Op cit at xvii

in South Africa if cars were manufactured by our legal system? I can assure you that if we were automobile makers, this country would to this day have no use for a dual carriageway, let alone a tarred road!

In order to achieve our core function as courts, we must therefore change the way we do things. We must harness our collective will and strength and develop systems that ensure that cases to be brought, or already brought before the courts, are resolved with the quickest speed and without undue delay. The impact of an efficient and reputable legal system in the overall performance of an economy is unimaginable. What is often forgotten by stakeholders in the legal system is that, while the Constitution enjoins organs of state to, through legislative and other measures, to assist and protect the court in, among other things, 'accessibility and effectiveness', the duty remains for our courts to ensure that they are accessible and effective.[5] It is therefore imperative upon us as role players in the legal system to ensure that we do our utmost to achieve this constitutional imperative. Litigants or accused persons who are stuck in the court system that is neither accessible nor effective are in effect being denied their fundamental right to protection of the law.

I will now turn to the theme of this workshop: case flow management.

Case Flow Management

May I restate that case flow management is about delivering Justice. It is the answer to the often quoted aphorism: justice delayed is justice denied! By talking about case flow management, we are not simply talking about an assembly line production system. We are in fact talking about effective Justice. The core function of judges is the adjudication of cases. Ultimately, case flow management is about living up to the calling that we answered. In order that judges may perform this function to the fullest, vital cogs must exist in the system.

[5] Section 165 of the Constitution provides that;

> (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 of prejudice.
> (3) No person of 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.

Case flow management is, in general, defined as the process through which courts move cases from inception to ultimate conclusion. As I have already stated, our present case flow management is totally unsatisfactory. Cases take too long to reach trial. Judgments are delayed once the trial has been held. In-between inception and delivery of judgment, there are numerous opportunities for delaying the matter. Most of these delays are due to;

a. Incomplete police investigations
b. Dilatory tactics of litigants or their legal representatives
c. Archaic rules that promote delay rather than expeditious processing of cases
d. Numerous unfounded requests for postponements
e. Poor recording facilities
f. Absence of witnesses
g. Disinterested judicial officers
h. Cursory regard to pre-trial procedures and their purpose
i. Over-reliance on oral evidence in trial matters
j. Inefficient registry staff
k. Misplaced files
l. Possible corruption
m. Poor preparation by judicial officers and counsel

These delays bring untold suffering to the citizenry. In criminal matters particularly, delays induce the inability of the state to perform one of its critical roles. The results of these delays are:

a. High cost of legal fees
b. Loss of memory by witness, thereby affecting the quality of justice
c. Disappearance of witnesses
d. Repeat offences

e. Justice system is held in disrepute

f. Economic loss

g. Corruption within the justice system

h. Mob justice

i. Disinterest in judicial careers

j. Waste of limited resources

k. Private arbitration prompted by the need to avoid the court system by those who can afford alternatives. This naturally deprives our precedent-dependent legal systems of the opportunity to adjudicate upon complex and often ground-breaking legal problems as litigants opt for private resolution. Let me not be understood to be critical of alternative dispute resolution.

Our courts are suffering from huge backlogs. A legal system that is required to be accessible and effective cannot meet its constitutional mandate unless there is a new approach to doing court business. It is in this light that I would like to share with you my views regarding the solution to many of our problems with delays.

Judicial Case Management

At present, our system first provides the opportunity for the judicial officer to look at the case when it has reached the adjudication stage. This sad circumstance means that there is little room for judicial intervention while the case goes through the numerous hoops provided by our rules. The judge does not drive the matter to finality. The judge relies on the actions of the litigants themselves, or in higher courts, the actions of their legal representatives. This is a source of constant frustration.

It is for this reason that modern legal systems are moving away from litigant driven case management to judicial management of case flow. The judicial officer should take over the responsibility to drive the case to resolution. In this position, the judicial officer is able to set and enforce time limits specific to the case to ensure that there are no unnecessary delays. The judge's familiarity with the development of the case gives him or her unique insight into the needs of the case and the issues in

dispute. This allows the judge to promote the effective resolution of the matter which is impossible through the kitchen-sink mill system that operates at present.

Many a time, a judge realises when the matter is finally allocated to him or her for hearing that the matter could have been resolved a long time before had a judge been involved in time. The flurry of settlement negotiations at the door of the courts bears testimony to the fact that not enough effort is being put in to resolve matters. While settlements at the door of the court no doubt relieve the court of unnecessary work, the fact that it takes years before serious efforts are made to resolve matters is worrying. Our registry cabinets must be full of matters that have no hope of ever getting into court and yet they remain active at great expense to litigants and the state. In the United States, studies have shown that between 90 and 98 per cent of the cases filed actually reach trial. Even lawyers, forever suspected of preying on delayed justice, must acknowledge that these delays are really unnecessary and bring our justice system into disrepute.

The Supreme Court of Appeal (SCA) has reaffirmed the need for the active involvement of judicial officers in the resolution of legal disputes. Judges are not silent umpires. Though the SCA was not dealing with pre-hearing date delays per se, its views are apposite. It stated in *Take and Save Trading CC v Standard Bank of SA Ltd*[6] ;

> Fairness of court proceedings requires of the trier to be actively to be actively involved in the management of the trial, to control the proceedings, to ensure that public and private resources are not wasted, to point out when evidence is irrelevant, and to refuse to listen to irrelevant evidence. A supine approach towards litigation by judicial officers is not justifiable either in terms of fair trial requirement or in the context or resources. One of the oldest tricks in the book is the practice of some legal practitioners, whenever the shoe pinches, to withdraw from the case [and more often than not to reappear at a later stage], or of clients to terminate the mandate [more often than not at the suggestion of the practitioner], to force the court to grant a postponement because the party is then unrepresented. Judicial officers have a duty to the court system, their colleagues, the public and the parties to ensure that this abuse is curbed by, in suitable cases, refusing a postponement.

I readily associate myself with this view. Judges have a responsibility to ensure that they manage cases in their court. This responsibility starts way before the hearing date. It exists from the moment a matter is commenced in the division or court. Unless judicial officers are able to influence the pace and scheduling of hearings, there is little chance of unearthing the rampant delaying tactics that adversely affect our ability to deliver prompt, fair, efficient and effective justice.

[6] *Take and Save Trading CC v Standard Bank of SA Ltd* [2004] SCA 1

I am mindful that this change in the way we handle case flow is not simple. Judicial officers will need to undergo training in order to ensure that they are alive to their new responsibilities. At the same time, legal professionals must similarly be educated about litigating in a judicial case management environment. Our court facilities and support services must similarly be geared towards the achievement of this goal. It is an effort that requires our collective commitment.

I am pleased to say that the South African Judicial Education Institute (SAJEI) has already commenced training programmes on effective case management. This training initiative will offer an opportunity for us to standardise the performance of courts and judges in case flow management. We would then be able to offer our citizens, a legal system that is fair, efficient, accessible and effective.

South Africa can also draw from the experiences of many modern democracies that have moved away from litigant driven delays. Foreign judges and experts in judicial training have offered their services to us and are ready to share experiences. This is an invaluable opportunity for us to learn.

Court performance

Case flow management is not going to be an ad hoc project. It is going to be part and parcel of the South African legal system. It is here to stay. For us to make sure that it is effective, we must monitor and evaluate its performance continuously. What we are setting in motion in the Eastern Cape is a platform. It must be used to improve justice delivery. Imperfections must be continuously corrected in order to ensure that it achieves the desired results.

The Office of the Chief Justice is initiating the monitoring of performance of all our courts. This initiative will ensure that the Judiciary has the most up to date and reliable information and is able to assess the level of service delivery in each court. We will therefore, at a central level, be able to augment the local monitoring efforts by giving feedback and engaging with all role-players regarding case flow management and general court performance.

May I inform you that I recently met with the Public Protector. She has advised my office of numerous complaints that she has received regarding the performance of our courts. These complaints do not relate, in the main, to the quality of decision-making, but to delays, lost files, absenteeism and other unsatisfactory conduct by officers in our courts. It is therefore incumbent upon each role player in the justice

delivery system to recognise that we are accountable, and that the citizenry will not accept the way we have been conducting court business.

Use of Information and Communication Technology (ICT)

Information and communication technology (ICT) offers an effective means of storing and accessing information and general communication. Our courts must be at the forefront of harnessing the latest ICT tools and methods in order to enhance service delivery. ICT is an important component of case flow management. Firstly, courts can use it to collect, collate and store data. Secondly, it provides an opportunity for easy retrieval and sharing of information. The frequent disappearance of court records and police dockets would be greatly reduced by an effective use of electronic storage. Cases would not easily be postponed on the basis that dockets or records cannot be found. Within a few minutes, a new record or docket may be produced. This will additionally frustrate those who have the nefarious tendency to corruptly influence the disappearance of dockets and records. In addition, this would enable judicial officers to access records remotely without the need for them to carry huge piles of paper and transcripts.

With accurate statistics, judicial officers, court managers, state counsel and all interested persons will be able to monitor, for example, the time it takes from arrest to conclusion of a criminal trial. The same could be applied to civil matters. We would also be able to readily identify the chief causes of postponements and the repeat offenders in this regard. Armed with that information, it would be possible for us, as leaders in the justice system to intervene and resolve problems, plan, allocate adequate resources, hire new personnel where necessary, provide appropriate training and take any other necessary corrective action.

In addition, our courts, armed with accurate filing and disposal statistics will be able to assess own court performance, reduce processing time and thereby counter the huge backlogs we currently experience. Judges should be able to inspect and assess cases that remain without movement clogging the system. It should not be left to the day the matter finally reaches court for a judge to notice that the matter has been lying in the registry with little movement and no resolution for years. As I have said experience in the United States has shown that most of the civil cases in our courts cry out for resolution way before the hearing date. This statistic may not be far off in this country. This must spur us to do all we can to ensure that matters filed in our courts are resolved as early as possible.

I am pleased to announce that ICT will form part and parcel of case flow management. It will be employed to monitor statistics and delivery of reports. Litigants will in the future be able to track their own matters without the need to queue up at the registry. Litigants should also be able to receive notices from the courts in the quickest and cheapest way. It is a source of great frustration to litigants, accused persons and witnesses that they turn up at court only to be informed that the matter would be postponed. With ICT, it should be possible for the prosecutor or the registrar to send such messages promptly and thereby avert the costs related to travelling for court and attendant discomfort of sitting endlessly on court benches waiting for information.

Allied with that, it is regrettable that the e-filing of court documents has not had much uptake within our country. In my own court, the Constitutional Court, litigants file documents electronically and have been doing so for years. But that is only part of the story. In addition to filing electronic copies, they are required to deliver 25 hard copies of each document! While our registry is well run and looks nothing like the average registry in the country, I am concerned that we are not making the most of electronic tools. It is my vision that in the near future, our courts should have set procedures for the electronic filing of documents. The electronic age offers us effective and prompt tools to access and distribute information. Court procedures must therefore move in line with this development. Law schools must also stop producing computer-literate graduates.

In addition, the use of internet and video technology would greatly reduce the cost of providing legal services. Ordinary remands should be capable of dispensation via video link without the need to ferry accused persons to court. The same applies to handing down of judgments and other simple interlocutory matters.

Rules of Procedure

Our Rules of Procedure, especially in civil matters both at the High Court and at the Magistrate Court leave a lot to be desired. They offer endless opportunity to the wily litigant or representative to drag a matter almost endlessly. This practice brings untold suffering on citizens who wait years for justice. A cursory survey of the various courts in this country reveals widely divergent time lines for the allocation of hearing dates. In some, litigants wait for as much as 18 months while in others hearing dates are available in within six months of request. Yet, when one looks at the filing rate, judicial capacity and so forth, one cannot explain such a wide divergence. Our Rules ought to be relooked at. A wholesale revision of Rules of Procedure must be undertaken so that they deal with endless delays that clog our system.

After undertaking an extensive review of the Rules of Court in the United Kingdom, Lord Woolf's Report identified eight principles which a civil justice system ought to meet in order for it to ensure access to justice. In his view, the system should;[7]

(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.

We must strive to ensure that our court system achieves Lord Woolf's vision. We need to ensure that the Judiciary takes the central role in the determination of rules of court and procedure. The present system the responsibility is haphazardly shared amongst the Legislature, Executive and Judiciary is unworkable.

Delayed Judgments

In the interest of fairness, it would be remiss of me not to acknowledge the untold suffering visited upon litigants by fellow judicial officers who delay in writing and handing down judgment. When all the other role-players have performed their functions to the best of their abilities, it will serve little purpose if judicial officers reserve judgments for inordinate periods of time. Proper case flow management does not stop at the door of the hearing but includes prompt delivery of judgment. The Judicial Service Commission has had to intervene in many instances after receiving complaints of delays in handing down judgments. This does not augur well

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

for the accountability that courts must have in terms of their work. This brings the entire Judiciary into disrepute. As the Indian Supreme Court has noted:

> As the pronouncement of the judgment is part of the justice dispensation system, it has to be without delay. In a country like ours where people consider the judges only second to god, efforts must be made to strengthen that belief to the common man. Delay in disposal of cases facilitates the people to raise eyebrows, sometimes genuinely which, if not checked, may shake the confidence of the people in the judicial system. A time has come when the judiciary itself has to assert for preserving its stature, respect and regards for the attainment of the rule of law. For the fault of a few, the glorious and glittering name of the judiciary cannot be made ugly. It is the policy and purpose of the law, to have speedy justice for which efforts are required to be made to come up to the expectation of society of ensuring speedy, untainted and unpolluted justice.[8]

Conclusion

Human beings are creatures of habit. We are all too aware that the legal system has a well-set culture- a way of doing things. Resistance should be expected. But once the fruits of the tree are seen everyone will wonder why we had not taken this road years ago.

In conclusion, let me once again reiterate the need for co-operation between all role-players in the legal system in order to ensure that delayed justice becomes a thing of the past. We must all work together to ensure that there is an effective and efficient case management system that starts from prehearing all the way to delivery of judgment and disposal of any applicable appeals. As the late Deputy Minister of Justice and Constitutional Development, Ms Cheryl Gillwald (MP) observed in her opening address at the 'Integrated Case Flow Management System Development Seminar for South African Courts' ten years ago;

> '...people will continue to evaluate our judicial system based on their individual experiences in our courts. And their patience is being sorely tested. Surveys of public opinion as it pertains to our courts reveal experiences of administrative tribulation, incessant postponements and protracted delays in the hearing of cases.
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> These problems clearly have no place in our system and they need to be eliminated if we are to fulfil our vision of providing responsive, modern and cost effective court services that

[8] *Anil Rai -v- State of Bihar*, a decision of the Supreme Court of India [2001] RD-SC 367 (6 August 2001); 2001 AIR 3173, 2001 (1) Suppl. SCR 298; 2001 (7) SCC 318' 2001 (5)

allow us to dispense justice efficiently and fairly...Efficient case flows are the litmus test- the barometer of sound court management.'[9]

I would like to wish you a successful workshop. I thank you for your kind attention.

[9] Ms Cheryl Gillwald, MP, Deputy Minister of Justice and Constitutional Development, Opening Address at the Integrated Case Flow Management System Development Seminar for RSA Court, 20 October 2002