"The Judicial Accountability Session"

Mogoeng Mogoeng

Chief Justice of the Republic of South Africa

Constitutional Court of South Africa

23 November 2018

Today, Friday 23 November 2018 marks a turning point in the history of the South African Judiciary and by extension in the history of the State as a whole. A turning point indeed because never before has the Judiciary of this country assumed the responsibility to account for the execution of its constitutional mandate without a "middle man" in the true sense of the word. And here lies the significance of this development in its proper context.

Our constitutional democracy comprises three co-equal and functionally independent arms of the State - the Executive, the Legislature and the Judiciary. Co-equal indeed because none of these arms is an impostor underserving of equal and constitutionally-assigned status as a real arm of the State.

The somewhat conservative, reserved, less dramatic, public space-shy nature, posture or disposition of the Judicial office-bearers has had the inevitable consequence of rendering the Judiciary less visible, which inadvertently relegated them to the level far below that of the political arms of the State. The acute underfunding, comparatively less public regard in which they are held, and the fact and their apparent resignation to the assumption of the parental role by the Ministry of Justice, inadvertently yet inevitably undermined or weakened the role and status of the Judiciary as a real arm of the State even more. This situation was

exacerbated by some of the additional factors to be touched on in the course of this address.

At long last, like the Executive whose performance is accounted for primarily by the President, and Parliament whose activities are reported on mainly by the Speaker of the National Assembly, and the Chairperson of the National Council of Provinces, we hold this first "Judicial Accountability Session" so that the Chief Justice may account for the performance and other activities of the broader Judiciary of South Africa, to the people of South Africa. We do so not only in recognition of our unique role as an independent arm of the State, but also because of our conviction that with independence comes accountability. We are not self-employed. Like functionaries in the other arms of the State, we are employed by the people and as their messengers we owe them an account of what we have exercised the mandate they charged us with and the resources they availed to us.

This being the first of its kind in this country, whatever teething problems we may encounter would be addressed in due course so that the next Session next year, would be handled even better than this one. We will take a few questions before we adjourn and then break for a much longer engagement with the media, there is an appetite for it. There we will be available until the media runs out of questions to ask us.

Section 165(6) and the Superior Courts Act requires of the Chief Justice and the leadership of the Judiciary to craft Norms and Standards. This we did and the Norms and Standards have been operational since 28 February 2013. They set a high standard towards which we will all have to work progressively, until it is attained. A misunderstanding of the purpose of the Norms and Standards has led some to think that if a Judicial Officer fails to deliver a judgment within three months of the trial or hearing being finalised, then disciplinary steps must be taken against the defaulting Judge or Magistrate. These time-frames are meant to alert each Judge or Magistrate affected and the Head of Court to the need to begin to work more earnestly to have the judgment delivered sooner rather than later and to be specific about the date for the hand down of the judgment. It is designed to constitute a red bright light that would help us avert the difficult situation of being left with no choice but to have a Judge or Magistrate hauled before a disciplinary structure.

Whether a Judicial Officer must be subjected to a disciplinary process is a decision that is governed by the provisions of the Judicial Code of Conduct, article 8 in particular. That decision cannot be based on the provisions of the Norms and Standards.

In broad terms the higher courts have performed as set out below:

The Judiciary Annual Report is a reflection of "where we are now" as the Judiciary and "how are we doing" in our endeavoured to fulfil our constitutional obligation to improve access to justice and to deliver quality justice speedily to all people. The report is thus aimed at enhancing transparency, accountability in the expeditious delivery of justice and the public confidence in the Judiciary. The confidence of the public in an independent Judiciary is of paramount importance for a vibrant and functional democracy. Lack of public confidence in the Judiciary has the potential of eroding the moral authority of the judiciary. We neither control the army, the police nor the public purse. Our orders are obeyed because of our public confidence generating moral authority. If we lose it then we are finished. Accountability is therefore important because it is a foundational value of our democracy which is applicable to all, including the Judiciary.

The promulgation of the Norms and Standards for all Judicial Officers is one of the milestones that seeks to promote court excellence and enhance judicial accountability. It is worth repeating that they seek to achieve the enhancement of access to quality justice for all; to affirm the dignity of all court users and ensure the effective, efficient and expeditious adjudication and resolution of disputes through the courts. These noble aspirations or objectives can only be attained through the commitment and co-operation of all Judicial Officers in keeping with their oath or solemn affirmation to uphold and protect the Constitution and the human rights in it and to deliver justice to all persons

alike without fear, favour or prejudice in accordance with the Constitution and the law. These Norms and Standards are underpinned by the core values of judicial independence and accountability; accessibility; transparency; responsiveness; collegiality and diligence amongst others.

We saw the need to identify challenges that undermine the efficiency and effectiveness of the court system. As a result a governance structure was established to ensure that the process for identifying those areas that impact negatively on the delivery of Justice is driven by the Judiciary. This includes a performance monitoring, information and communication technology at the courts, Library services, case flow management, court infrastructure and security.

For example to allow for the proper management of Judicial functions, the Judiciary itself has assumed the responsibility for the monitoring of court performance. Indicators were developed and ambitious targets set. This report is the result of that process. The information obtained from the court performance statistics allows the Leadership of the Judiciary to interrogate issues relating to broader judicial functions more efficiently access.

It is important to note that the Leadership of the Magistracy has also started this process in order to identify indicators and targets for court performance information for the Magistrates' Courts. That information will in future also

be reported on and form part of the composite Annual Report so that the single Judiciary of this country accounts for all its performance.

From the court performance statistics contained in the report it is clear that the bulk of the work performed at Superior Courts is done by the High Court. And of the 152 944 civil cases received at the High Court, 106 936 were finalised and of the 15 293 criminal matters, 10 411 were finalised. This despite limited resources and a judicial establishment which has remained unchanged despite an increase in workload and responsibilities.

The Supreme Court of Appeal has performed admirably and 223 appeals of the 235 were finalised during the reporting period. This is above the 1104 applications for leave to appeal, out of 1487 applications, which were finalised.

Our specialist courts have also ensured that matters are expediently finalised. The Labour and Labour Appeal Courts have finalised 287 of the 427 Labour matters brought before them. The Land Claims Court, although situated in Randburg, is a court which has dedicated itself to bringing justice to the people. It regularly holds court sessions where needed, around the country, more especially in the remote rural areas where sensitive historical issues relating to land are predominant. The Court has finalised 227 of the 330 matters brought before it during the reporting period.

The challenges experienced by the Judiciary have been exacerbated by an ever-increasing workload. The 17th Constitutional Amendment increased the jurisdiction of the Constitutional Court. As you are probably aware over and above entertaining constitutional matters, the Constitutional Court also has jurisdiction over other matters of general public importance that deserves its attention. And the Court is now the highest court in the Republic, and is a court of final appeal, on all matters. This amendment has resulted in a marked increase in the workload of the Court. More importantly, it is the only court where all its available Judges are required to sit together and this contributes to the delays it is now experiencing in finalising cases. Every case demands the attention of all available Judges. Some Judges were even beginning to wonder whether the time has perhaps not come for Judges to sit in panels like the SCA and the Federal Constitutional Court of Germany. But, as presently advised, we believe that is a bit too early to venture in that direction.

The total caseload for this court as at the time of this report was recorded as 437 of which 295 cases were finalised. As this translates to 68%.

The number of reserved judgments in the Superior Courts is monitored to measure compliance with the set Norms and Standards and the Judicial Code of Conduct. The report on reserved judgments is also a tool for Judges

President and all Heads of Court to manage the judicial functions at that specific court.

The Heads of Court, as part of accountability and in an effort to be transparent, have taken a decision that a reserved judgment report, containing a list of those judgments outstanding for 6 months or longer, will be placed on the OCJ website. Any requests for further information, such as information on the list of reserved judgments for individual Judges, or judgments outstanding for less than 6 months, must be referred to the Head of Court concerned.

In order to ensure that the courts remain efficient, the Judiciary will be introducing win-win court annexed mediation. In July of this year Judicial Officers from all courts were trained on the practical implementation and benefits of court-annexed mediation as part of a broader judicial case flow management strategy. This training was led by Judge John Clifford Wallace, a Senior Judge and Chief Judge Emeritus of the Ninth Circuit United States of America Court of Appeal. Judge Wallace is internationally renowned as one of the leading authorities on case flow management and court-annexed mediation. A pilot project will be started in due course in the jurisdictions that Mlambo JP presides over before proper mediation is rolled out to the entire court system, where it does not already exist.

Access to justice to all South Africans remains one of our top priorities, hence the establishment of the National Efficiency Enhancement Committee (NEEC) and its Provincial equivalents. This structure exists in order to promote interdepartmental cooperation and stakeholder relations aimed at enhancing efficiency in the justice system, the improved performance of all Courts and access to quality justice for all.

One of the main challenges of courts is that they handle a lot of hard copies throughout the court processes, including dockets, case files and judgments. The Judiciary would like to implement an electronic filing (E-Filing) system to manage, secure and ensure sharing of records in order to improve efficiency and the quality of service to the public. Digitisation or automatisation is critical in managing and securing all records linked to a case.

The envisaged benefits include:

- Improved accessibility of documents by litigants and other stakeholders
- Reduction of paper storage and records management challenges for the courts
- Improved response time based on to documents provided to the courts by 3rd parties
- Improved case handling processes within courts

- Improved adherence to standards across all courts with regard to indexing and document accessibility
- Better security of documents

I am delighted to announce plans to pilot an eFiling system at the Superior Courts within the next six months.

It is worth noting that despite the serious budgetary constraints within which the Judiciary has to function and the country's economic challenges, the Judiciary has made great strides in the pursuit of the efficient and effective delivery of justice for the benefit of the public in South Africa.

One of the mechanisms for fostering accountability and promoting transformation is through continuous education and training of Judges and Magistrates and aspirant Judicial Officers. The South African Judicial Education Institute (SAJEI), is seized with the task of continuously implementing training programmes and courses for Judicial Officers. During the period under review, SAJEI trained 1882 Judicial Officers through 90 judicial education courses. It also appointed five permanent judicial educators as facilitators to provide dedicated judicial training. That is additional to Judges and Magistrates who volunteered their services as facilitators.

The Judicial Service Commission, is tasked with this mammoth task of ensuring that our Judiciary reflect broadly the racial and gender composition

of South Africa when making recommendations of judicial appointments. The JSC continues to make strides to accelerate transformation of the Judiciary by recommending for appointment fit and proper Judicial Officers as required by our Constitution. Despite these progressive strides, more still needs to be done for transformed Judiciary that is properly reflective of our racial and gender diversity. As at the end of the period under review, 184 Judges were black and 90 were women out of the total of 250 Judges on the Superior Courts establishment.

We aim to meet the high standard we have set ourselves at some point in the future. To address some of the challenges that frustrate our noble endeavours to make excellent performance a Norm, we have embarked on the following additional measures:

1. Judicial Officers do not always have to write scholarly and reportable judgments. The norm ought to be the delivery of short yet complete judgments immediately after the trial or hearing, unless the complexity or length of the matter does not allow this to happen.

2. Only trial or hearing-ready matters must be set down. To achieve this, judicial case management and pre-trial conferences that involve and are driven by a Judicial Officer must be fully embraced and the first phase of this system has been implemented.

3. Returning to the National Efficiency Enhancement Committee and its Provincial equivalents, they were set up to really enhance the efficiency and effectiveness of the broader justice system. All the key role-players in the justice system come together and the Chief Justice chairs the meeting whereas the Judges President do likewise in relation to provincial structures. There, challenges to efficiency are identified and solutions proposed for each.

4. Another mechanism employed to reduce the costs of litigation and to accelerate the pace of litigation was a resolution by the Heads of Court to have only English as the language of record. What this means is that every litigant is free to testify or even investigate in a language of preference but, the record of proceedings is itself required to be in English. Recent experience has borne out the wisdom behind this resolution.

5. The ability to access tools of trade in the form of reports and other library materials has been seriously hampered by the fact that this function is yet to be transferred from the Department of Justice and Constitutional Development to the Office of the Chief Justice. This requires urgent attention.

6. Court judgments are produced by Judges as functionaries of the State. The State or the Judiciary should own copyright over these judgments. Yet, they are availed to publishers for free, who with the editorial services provided by Judges and Advocates then package them and sell them back to the State for consumption by the Judiciary. The Judiciary buys back its judgment at no discount whatsoever. As the Judiciary we have for years been asking for funding from those who control the library services budget to have us compile our own judgments so that we may access them at no cost whatsoever. It is very difficult to secure the requisite funding to implement this cost-saving measure which countries like Ghana, Qatar and Singapore have implemented to the benefit of their Judiciaries.

7. Gauteng is one of the Divisions that have a much lower number of Judges in comparison to the workload. This contributes to the delays in enrolling and finalising matters notwithstanding the JP and Colleagues, best endeavours to speed up the finalisation of cases.

8. At NEEC level we have appealed for SAPS to consider arrest and detention only when it is essential to do so. This would reduce the workload of the Magistrates and free them from the remand court to do trials and applications, thus speeding up case finalisation.

9. The 665 unfilled vacant posts for prosecutors will weaken court performance even more. Difficult as it is, we plead for more funding for the NPA so that these posts can be filled and the criminal justice system strengthened.

10. We also plead for the strengthening of the investigative capacities of our detectives. But offer a word of appreciation and encouragement for the enhanced police visibility where it is already happening and express the wish to see it more widespread.

11. More funding is required for repairs or renovation of the buildings courts occupy. Courts are virtually unsecured. People with batons are the ones offering protection to courts. Sadly, Judiciary is unable to do anything about it but raise it as a concern.

12. The Road Accident Fund must have its capacities more enhanced so that matters that are capable of speedy resolution do not have to wait for the last hour to settle. This would also save huge costs.

13. More vigilance is required in relation to the amounts at which RAF and medical negligence claims are allowed to be settled.

14. It bears emphasis that the Judiciary is acutely underfunded in comparison to the other arms of the State. We cannot even afford an

annual Judicial Colloquium which other Jurisdictions around the world hold without fail.

15. A stress-management programme is needed urgently for all Judicial Officers. They go through so much as a result of some of the traumatising cases, like rape, murder, difficult divorce matters that they have to handle. It cannot be left to an individual to fend for herself or himself. It is a work-related challenge that requires institutional response as was most impressively done by Australia and Singapore.

16. At some point the and however long it may take, institutional independence of the courts would have to be appropriately resolved.

Leadership-related issues

It is necessary to sketch the scenario relating to the role of leaders of the arms of the State. Our President and Members of the Executive have never sought to discharge their duties only or predominantly within the confines of their offices or seat of the arms of the State they head. Similarly, leaders of Parliament have never seen it as a requirement for the proper execution of their mandate to spend most their time in their offices or stations.

As a result, apart from having a deputy, at any given time there are at least three Cabinet Ministers already sworn-in and ready to assume Presidential responsibilities if the President and his Deputy are for one reason or

another unable to fulfil that role. And additional to their domestic responsibilities, they also have an obligation to help resolve continental and global challenges. Examples are the Lesotho, Sudan, DRC and Somalia. They rightly even deploy soldiers and financial resources there because we belong to the family of nations. Parliament has not been left out. Additional to the Deputies, there are at least three House Chairs to do that which would have been done by either the Speaker, or Chair or the Deputy of a particular House had they been present.

The Judiciary is no exception. There is an incredible demand or hunger for the intervention of the leaders of the Judiciary locally, continentally and globally. Judge President Mlambo has made us proud many times over as the Judiciary and as the nation. Most of the time he is not in court and for very good reason. Now the United Nations has a Protocol on Legal Aid because of the critical leadership role that Mlambo JP has played to facilitate State-sponsored legal representation for the indigent in countries that did not have such a system in place. He has played and continues to play a crucial role in championing the cause of immigrants or refugees and to promote access to justice through the medium of community based justice centres, globally. I encourage him to keep on absenting himself as and when the global community needs his essential intervention. I will never discourage him.

My own leadership role is multi-dimensional. Any notion that the Chief Justice of South Africa is somehow Constitutional Court-bound can only be a consequence of a woeful lack of understanding in relation to the responsibilities that come with that Office. To start off with the responsibilities are not confined to the operations of the Constitutional Court. As demanded even by section 165(6) of the Constitution and the Superior Courts Act, the Chief Justice must ensure that all Courts in South Africa serve the nation well. Additional administrative responsibilities extend to overseeing our administrative department, the OCJ, which incidentally has received a clean audit because of how it stands guided by the leadership of the Judiciary, the SAJEI, the NEEC, the JSC and being Chancellor of UKZN.

Additionally, I have since 2013 or 2014 been elected to the Office of Vice President of the Conference of Constitutional Jurisdictions of Africa(CCJA). On 26 April 2017 I assumed the Presidency of the CCJA. Since not all apex courts in Africa had joined this continental body, I had to encourage the remaining jurisdictions to take up membership of the CCJA. And happily, at least 13 new members have since been enlisted through these efforts. I have to interact with member Jurisdictions and attend some of their programmes and represent Africa whenever other continental bodies and the world body of Judges meet.

We also had to intervene when the Kenyan Judiciary was under unprecedented attack after making a particular ruling. As a result when they subsequently pleaded that I come to address the whole body of Judges, in my capacity as President of the CCJA, remembering what they had just been through and that they all had to be interviewed anew not so long ago as a result of allegations of widespread corruption, I considered myself duty-bound to go and encourage Colleagues to discharge their constitutional duties in line with their oaths of office. And they appreciated the interventions so so much.

And of course, the Chief Justiceship, the Presidency of the CCJA and the Chairmanship of the WCCJ, from 26 April 2017 until end of February 2018 demand that I represent South Africa, Africa and the world body during the term of my Chairmanship of the WCCJ by attending almost all the meetings of the Executive Bureau of the continental and world body and other members that brought Colleagues together, to discuss matters of importance to the Judiciary.

I THANK YOU FOR YOUR PATIENCE