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# **THE JUDICIAL ACCOUNTABILITY SESSION**

**ADDRESS BY MOGOENG MOGOENG**

**THURSDAY 3 OCTOBER 2019**

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1. We cherish and treasure the privilege bestowed upon us to be the bearers of the constitutional mandate to be final arbiters in all legal disputes, in this country. And we appreciate deeply, the opportunity to present a somewhat brief report on essentially where we come from, where we are, where we need to be and how.
2. In developing our reporting or accountability model we considered a wide range of jurisdictions like Singapore and Malaysia, but drew more from the USA, Uganda, UK, Kenya and Ireland. And we deliberately chose to focus on presenting a report that would give its reader a sense of where we are in relation to the major challenges that confront the South African court system. Our system has in the past eight or so years, received more attention in areas like better co-ordination, strengthening the institution as a true, not merely a notional Arm of the State, the enhancement of access to justice and the effectiveness and efficiency of our courts.

3. We could, but chose not to have, a detailed report that covers every issue of consequence. For example, we could have individualised the performance of each Division of the High Court including that of, each Judge, each Regional Court, District Court and each Magistrate. We could have set out details relating to when each case reached the court, how long it took for the trial or hearing, how many postponements were granted in each case, at whose request and why. We could also have stated how long it took to conclude the hearing or trial, and why. And when thereafter the final judgment was delivered.
4. But, considering where we were, and that we are only just beginning whereas others started well over 100 years ago, we chose to prioritise the cardinal challenges that our courts are experiencing. It is precisely for that reason that our focus is on what measures or programmes have been or are to be introduced to reduce inordinate delays relating to the stages at which Judicial Officers have the clear authority to determine the speed of case progression. And that is from the commencement of a trial or hearing to the delivery of a final judgments.
5. Before then other key roleplayers in the justice system are involved and what they do or don't do tend to have a direct impact on the pace at which matters are ripened for enrolment and hearing or trial. You can't take disciplinary steps against Judicial Officers for that leg of the process.

6. Mindful of this reality we humbly initiated the establishment of the National Efficiency Enhancement Committee (NEEC) and its Provincial equivalents (PEEC's) to have all these key players talk about what or who causes delays in the justice system and how to address that problem.
7. Additionally, learning from the best, we decided on court modernisation so that data relating to the registration of cases, the maturity or progression of cases from one stage to another and reasons for each delay could be captured electronically. An attempt to do it manually would not only be a laborious exercise but too costly for thinly staffed courts like ours. We know, that a full blown court automation system would not only facilitate e-filing, and easier access to judgments but also the capturing of data that goes into the finer details of each case and the performance of each Judicial Officer. Smart phones and i-pads would then be the tools we use to check on the performance of any of our courts, anytime regardless of where in the world we might be.
8. We are building systems. With Norms and Standards in place, Judicial Case Management and Court-annexed Mediation embraced, and automatisations being at an admirable stage under the circumstances, we are satisfied that a lot of good fruit is indeed being yielded by our efforts.  
  
Ask any practising lawyer whether in our higher courts where these and other innovative measures have been introduced, performance is improving or declining. You will most likely get a favourable response.

In many respects we are doing much better than some of the older democracies that we are at times compared to, sometimes selectively and unfairly.

9. The Judiciary is in the process of developing a Strategic Plan for the years to come.

10. The information in this report has been internally audited for the first time. This is an important step in refining the process and ensuring the veracity of the information presented.

11. This 2018/19 Annual Report also contains descriptions and explanations for the indicators, to assist those assessing the performance information.

12. But, to use the noting of appeals, their success or otherwise as a quality assurance tool for judgments, as some have suggested, would be most inappropriate. For example, the Constitutional Court overturns SCA judgments regularly, but it doesn't mean that the quality of their judgments is not right. The real test, whatever the outcome, is the soundness of the reasoning and the Judicial Officer's apparent appreciation of the legal principles involved. Some people don't take matters on appeal because they don't have money. And appeals succeed for reasons that do not always have anything to do with once competence.

13. The NPA's reliance or the requirement for prosecutors to rely on the conviction rate as a performance yardstick must be corrected. They don't convict. Judicial Officers do. How then can it ever be appropriate to

measure their performance on the basis of what they don't do? Theirs is to present cases, and even support an acquittal where the interests of justice would be served by doing so. Not to pursue a conviction at all costs.

14. Court performance, is summarised as follows:

- a. During the period under review, the Superior Courts managed to perform at 70%.
- b. The following targets were not met: Percentage of Constitutional Court Cases Finalized (76% against a target of 80%), Percentage of Competition Appeal Court Cases Finalized (57% against a target of 90%) and Number of criminals cases on High Court roll for more than 12 months.
- c. The challenges experienced by the Judiciary have been exacerbated by an ever-increasing workload.

15. The 17th Constitutional Amendment increased the jurisdiction of the Constitutional Court so that, as well as constitutional matters, the Court will also have jurisdiction over other matters of general public importance that it chooses to hear. The Court is now the apex court, and court of final appeal, on all matters. This amendment has resulted in a marked increase in the workload of the Court. Despite these increases, the Judicial establishment has remained unchanged placing increasing pressure on Judges to ensure that access to justice is done. The fact that all applications must be considered by all or at least eight Judges, and the increasingly

complex matters including those of a highly political character, that are brought to the Court, and an increase in direct application, has contributed to the inability to meet the target. As a result, of the 490 cases received, 370 were finalised within the last financial year. Some are even wondering whether the Constitutional Court should perhaps merge with the SCA or have the number of its Judges increased and sit in panels in most of the matters.

16. The Supreme Court of Appeal has performed well. It finalised 214 appeals of the 231 during the reporting period. This is in addition to the 1062 applications for leave to appeal, out of 1095 applications, which were finalised.

17. In all the Divisions of the High Court, criminal matters on the backlog roll are being monitored at PEEC level by all stakeholders. In many instances these matters are delayed, beyond the control of the Judiciary. This delay is clear from the High Court's failure to reach the target on the finalisation of criminal matters.

18. From the court performance statistics contained in the report it is clear that the bulk of the work is done by the High Court. And of the 145 127 civil cases they received, 114 650 were finalised and of the 13 140 criminal matters, 10 666 were finalised. This despite limited resources and a judicial establishment which has remained unchanged despite an increase in the workload.

19. Our specialist courts have also ensured that matters are expediently finalised. The Labour and Labour Appeal Courts have finalised 3756 of the 5915 Labour matters brought before them.
20. The Competition Appeal Court deals with matters that relate to all economic activity in the country. The scope of the jurisdiction of the court is wide. But given the growth in economic activity, it is necessary to ensure that competition is based on constitutional principles.
21. The Land Claims Court, although situated in Randburg, has dedicated itself to bringing justice to the people. It regularly holds court sessions where needed, around the country, especially in the remote rural areas where sensitive historical issues relating to land are predominant. It has finalised 219 of the 354 cases brought before it during this reporting period.
22. The Electoral Court has lived up to its mandate and track-record of finalising cases as speedily as it is almost always required to.
23. 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 monitor performance at a specific court.
24. As part of accountability and in an effort to be transparent, the Heads of Court 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 the disclosure of 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.

25. Another new development in this report is the inclusion of Key Performance Indicators for the Regional Courts and the District Courts. The sheer scope of their workload require more time to develop a bespoke performance measuring tool.

26. For the period under review the South African Judicial Education Institute (SAJEI) facilitated a total of 142 judicial education training courses as provided for in the SAJEI Act (2008), covering a total of 3 068 delegates in the period under review. The training conducted included court-annexed mediation, case management, and skills to manage the children's court, criminal court, family court and civil court, competition law, cyber crime, maritime law, judicial ethics as well as environmental crimes. These training courses contribute towards the efficient and effective administration of justice. SAJEI has also produced 2 monographs on judicial education.

27. The stress on Judicial Officers which, as a result of some of the traumatising cases like rape, murder, difficult divorce matters that we have to handle and attacks of all kinds by aggrieved litigants or similarly-situated people and others, requires the introduction of a judicial wellness



or stress-management programme. It cannot be left to an individual Judicial Officer to fend for herself or himself. It is a work-related challenge that requires an institutional response as has been most impressively done by Australia and Singapore. To this end, the Heads of Court are developing such a bespoke programme or system which will hopefully be implemented under the auspices of the Judiciary or the OCJ in the near-future, funding permitting.

28. One of the priorities of the Judiciary is to introduce Court-annexed Mediation in all courts where it is reasonably practicable to implement it. The leadership of the Judiciary, with the facilitation of the South African Judicial Education Institute (SAJEI), embarked on a training programme for all available Judicial Officers on a win-win court-annexed mediation system during the month of July in 2018. Pilot projects are running in both the Pretoria and Johannesburg High Court and Magistrates' Court. Plans are underway to appoint a highly-skilled mediator to oversee the implementation of this programme and the training of the trainers.

29. Court automation and the development of modernisation systems are among our priorities. We have set up a committee that has helped us to develop an appropriate court-automation system. The system will help us implement electronic-filing and electronic record-keeping, performance-related data capturing, information dissemination or access to information

relating to cases, judgments and all other matters that affect court operations. We are piloting caselines in Gauteng.

30. In addition to our plans on judicial case management, court modernisation and court-annexed mediation, we continue to innovatively explore other measures for the enhancement of the efficiency and effectiveness of the Judiciary in order to improve court performance. 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. The recently promulgated amendments to the Uniform Rules of Court, formally introduce judicial case management and mediation in the South African legal terrain. The process of drafting the amendment was initiated and led by the Judiciary and will greatly assist in ensuring that there is clear movement towards the speedy delivery of quality justice to all.

31. It took too long to get to this point. We remain convinced that as was the case as at 1965 when the Uniform Rules of Court were drafted, the Judiciary must have full rule-making authority. This would facilitate speedy progress whenever our court rules need to be changed. Judges chair the Rules Board precisely because Judicial Officers are best-placed to handle that process well and with deliberate speed.

32. The Judicial Service Commission (JSC) was established to assist with the selection of potential Judges before the President of the Republic makes

appointments that would cause the Judiciary to be reflective of the racial and gender composition of South Africa. More still needs to be done in order to ensure gender representation in the composition of the Judiciary, particularly at the leadership level in the higher courts.

33. Most cases of alleged misconduct against Judges have been speedily finalised, barring of course the Hlophe JP, Motata J as well as the Preller J, Mavundla J, Webster J and Phoswa J matters. These have been the subject-matter of a series of legal challenges that led to inordinate delays that nobody could have done anything about. Some have argued that Judges ought not to be allowed to litigate in such matters. This begs the question, in terms of which law? We have no power, as the Judiciary or the JSC, to deny people their constitutional right of access to courts, just because they are Judges. Such a law does not exist. Criticism that assumes that we could have, but failed to, expedite this process can in the very least only be a consequence of ignorance or frustration.

34. It must be said that the Judiciary has never shied away from openly pursuing any Judge who is rightly or wrongly accused of a misconduct. Cases of racism, failure to perform their duties, or alleged corruption have been entertained and dealt with.

35. There have been allegations of corruption levelled against certain Judges, we have examined very closely. Neither the JSC nor the Chief Justice has the legal authority to peer into the bank accounts of my Colleagues. It

would be criminal. There has been some suggestion that we do so. We can't as long as the rule of law matters to us, as it should.

36. On our instructions, the Secretary General of the Office of the Chief Justice asked the National Commissioner of SAPS to investigate and locate the real faces behind allegations of corruption against certain Members of the Judiciary. In response the National Commissioner has confirmed that he has referred the matter to the HAWKS. Of the allegations made by Mr Rahube and Mr Lewis, none of them says that any Judge is corrupt. They are complaints or dissatisfactions about how cases were handled or a suspicion that court officials, not Judges, could possibly be unduly influenced in relation to his documentation. Sadly, a newspaper article was even written under the heading "SA JUDGES MISLED TO FACILITATE DE FACTO MONEY LAUNDERING-UK CLAIM". Even if one did not read that "baseless" article, the wide publicity it was given on posters in Johannesburg is sufficient to inflict incalculable reputational damage to the Judiciary as an institution.

37. Sexual offences on gender-based violence cases require an integrated approach by all key stakeholders. What follows are some of the measures that could alleviate the problem:

- a. A public awareness campaign on how to report and a focus on what credible assurances are there to minimise the discouraging and humiliating features of reporting and processing these cases to finality.

- b. A focused and well-trained unit or a cohort of investigating officers that deal only or primarily with sexual offences or gender-based violence. Re-orientation of all front-desk or charge office functionaries to sensitise them to the better and more appropriate handling of these cases. Dedicated officers and Magistrates must be available at all times to also receive complaints as a back-up mechanisms, as is done by the French police.
- c. Prosecutors that are just as specially equipped to handle these cases with the expertise, sensitivity, professionalism and special competence they deserve.
- d. Judicial Officers who are specially trained on the investigation and further handling of these cases with due sensitivity. This must, as is the case with the French experience relating to priority crimes, apply to investigation, prosecution and adjudication as well.
- e. Properly trained intermediaries and interpreters to facilitate or ease the appearance and giving of evidence particularly by young complainants
- f. Revitalisation of Thuthuzela Care Centres and rendering them even more fit for purpose.
- g. All-round resourcing of key players and facilities meant to handle gender-based violence or sexual offences matters.

- h. A fresh, sensitive and more responsive approach to domestic violence matters which extends to special training and inappropriate facilities to enhance privacy and keep the alleged perpetrators in check.
- i. Key role players in the broader justice system and the criminal justice system in particular, especially the Arms of the State must accept that we have been working in silos. This desperate situation demands that from now on we work together in a more deliberate and intentional way, otherwise nothing much will ever change. Panic responses or knee-jerk reactions to these matters, as if they are new, would not help. The need for an integrated approach cannot, therefore, be over-emphasised.
- j. The imposition of firm sentences is indeed but one of the major deterrent factors. But, our engagement with jurisdictions like Germany, France, the Netherlands and Norway revealed that certainty or predictability of detection, prosecution and conviction if the evidence allows is the most effective deterrence.

All of the above factors ought to be an integral part of any process that has the possibility to give real meaning to the Sexual Offences Courts. We would have insisted on the need for at least some of these capacities or reinforcements when the introduction of Sexual Offences Courts were being considered, had we been consulted.

38. It must, however, be stressed that the criminal justice system deals only with the symptoms or offshoots of what really lies at the heart of a deeply

troubled society. The root causes must therefore be programmatically attended to, if a real and lasting solution is to be found. Broadly speaking, it is no exaggeration to say that we are a sick society. Our sickness is responsible for this atrocious behavior. It must be properly diagnosed for effective medication or treatment to be dispensed and for the sickness itself to be permanently uprooted.

39. The Judiciary is alive and sensitive to the economic challenges in South Africa. It is for this reason that the Heads of Court voluntarily passed a resolution on cost-containment measures, with specific reference to travel and subsistence allowances for Judges and Assessors. Many Judges have, over the years, responded positively to the request that they scale down on official vehicles. Few insist on their entitlement to acquire vehicles worth over R1 million, notwithstanding our pleas and the extremely worrisome economic climate we find ourselves in. We have always said that it is a matter of conscience. The Judiciary will, where feasible, continue to implement the cost-containment measures. It bears emphasis that we are acutely underfunded in comparison to the other arms of the State. We cannot afford an annual Judicial Colloquium which other jurisdictions, even the most economically-challenged around the world, hold without fail.

40. We are deeply concerned about persistent budget cuts which are routinely effected without any consultation with the Judiciary. This must be addressed.
41. We must record our disappointments with the extremely poor quality of service or lack thereof by officials of the Department of Public Works and infrastructure. Sadly, this has been going on for far too long without a semblance of an effective consequences management system in place for this acute dereliction of duty. The Deputy Chief Justice and I are highly appreciative of the conscientiousness and deliberate speed with which Honourable Minister Patricia de Lille has intervened when we had been failed by these officials. Systems that we have put in place, in collaboration with them, have simply been disregarded. I am not aware of any Department serviced by them that has expressed overall satisfaction with their performance I believe the time has come to examine very closely the commitment of these officials to discharging the responsibilities their paid for in line with the basic values and principles governing public administration, set out in section 195 of the Constitution.
42. In conclusion, we note with appreciation that the establishment of the OCJ continues to add immense value to the functionality and efficiency of the Judiciary. We remain hopeful that more functions that are intimately connected to court operations would be offloaded to the Judiciary.



43.I am indebted to the collective leadership of the Judiciary, the Judicial Accountability Committee and all other judicial structures, as well as the OCJ for the cooperation, professional and selfless service displayed in running the administrative affairs of the Judiciary, including the compilation and drafting of this Annual Report.

44.Members of the public are invited to engage with the annual report and email questions and comments to [AnnualReport@judiciary.org.za](mailto:AnnualReport@judiciary.org.za)