

Attorneys to benefit from better case management – KZNLS AGM 2012

The KwaZulu-Natal Law Society (KZNLS) recently held its annual general meeting in Durban, where members were addressed by Deputy President of the Supreme Court of Appeal (SCA), Judge Kenneth Mthiyane, and co-chairperson of the Law Society of South Africa (LSSA) Krish Govender.

Judge Mthiyane spoke on the topic of 'Judicial case management and the role of legal practitioners in the flow and management of cases', which he described as a subject 'close to his heart'.

Judge Mthiyane chairs the Judicial Case Flow Management Committee, in respect of which he said: 'Its main focus is facilitating the quick resolution of cases in the High Courts.'

His aim was to get 'buy in' from the profession on the judiciary's plans to streamline case management.

'This is the route we should go,' he said, as there was currently 'great concern' in the country about the extent to which courts are able to turn over judgments and meet the expectations of litigants and legal practitioners. He added: 'We are under no illusion about the magnitude of what we are facing.'

In his discussion on the objectives of the project and the steps being taken by the judiciary in this regard, the Deputy Judge President highlighted the goal of the judicial system as securing the 'just, speedy and inexpensive outcome of every case', as well as the role of legal practitioners in case management.

'This objective cannot be achieved without the input of legal practitioners,' he said.

'If I as judge delay in giving judgment, an attorney should ... find out what the delay is. Everyone has to be accountable to the public regarding what happened to a particular case.'

Judge Mthiyane said that one of the resolutions stemming from the Access to Justice Conference in July 2011 was that judicial case management would be implemented to ensure that justice is of a high quality and is delivered at a high speed. He said that a monitoring committee chaired by former Chief Justice Sandile Ngcobo and current Chief Justice Mogoeng Mogoeng had been established to 'stem the tide of delay in High Court cases'. Chief Justice Mogoeng had further led a delegation to the United States in 2011 to get insight into how that country deals with the effective disposal of cases. One method they believed could be used to improve the South African system was early judicial intervention in litigation.

Judge Mthiyane said that judicial case management and the resolution of cases without unreasonable delay was about access to justice.

In respect of criminal cases in particular, he said that 'matters should be handled with the requisite promptitude'. He said that the fundamental objective of resolving cases with speed and without delay was to avoid the unnecessary infringement of rights, especially of those in custody and those who approach the courts because they perceive that injustices have been done to them.

He said that a paradigm shift was needed in order to achieve the required change.

'It requires a paradigm shift to achieve this; a change in the way we do business as courts,' he said, adding that lawyers had a role to play in achieving this:

'The early resolution of cases cannot be achieved without the judiciary bringing on board and securing buy in from all role players, including legal practitioners.'

Elaborating on this point, Judge Mthiyane said:

'This responsibility does not lie solely with judges. Court staff, Legal Aid South Africa, legal practitioners, the National Director of Public Prosecutions ...; all stakeholders should hold that responsibility and should support judicial case management systems to assist with resolving delays. The quick and speedy resolution of cases requires a concerted effort from us all.'

Judge Mthiyane added that legal practitioners also stand to benefit from effective case management.

'When you want a trial date, you should not wait six months to get it. Your client wants certainty and you need effective and efficient techniques to satisfy your clients. This will assist you with sufficient turnover of work and you will be rewarded appropriately for the work you do,' he said.

Judge Mthiyane said that the following were necessary preconditions to achieve the required culture shift –

- leadership training;
- skills development;
- performance management and measurement; and
- a careful assessment of the underlying problems in the system.

He said that the current situation in both civil and criminal matters is unsatisfactory as judges only know what has transpired in a matter at the time of case allocation. 'The SCA and the Constitutional Court are in an even worse position – they only become aware some months or even years after the commencement of a case. It would help if those matters reach those courts on appeal much earlier, when they are still fresh in the minds of those involved in the cases,' he said.

'Ideally a judge should be involved at the earliest possible opportunity to cut out unnecessary things that might result in delays,' he said.

While Judge Mthiyane did not provide details of the committee's case management plan, he indicated that it would start 'very soon'.

He said that currently the pre-hearing phase of cases is located in the clerk or registrar's office or in the offices of the prosecuting authorities or legal practitioners, who dictate the pace of litigation.

He said that the planned case management project would commence with pilots at three courts, namely the KwaZulu-Natal, Western Cape and North and South Gauteng High Courts. The project will run for 12 months and thereafter an audit will be performed to measure its success or failure and to identify any improvements before the programme is expanded.

Judge Mthiyane said that the committee had considered the option of practice directives, which would need to be embraced by all stakeholders. He added that the committee did not see this as being in conflict with the rules and it was envisioned that the latter would be amended accordingly. Currently, he said, the rules provide for judges to get involved at an earlier stage, however this was not 'earlier enough'.

Judge Mthiyane said that the committee had proposed the following:

- Cases should be allocated on filing.
- Continuous judicial control over a case through judicial officers and support staff.
- Initial and more pre-trial conferences should be overseen by judicial officers, which he said would assist parties to come to some agreement about the issues. Once there is a commitment to the issues, these are difficult to change, which leads to a quicker resolution of a case, he said.
- Trial dates should be allocated accordingly.
- Settlements should be encouraged.
- Effective information systems should be employed.

He said he hoped that, through the use of the above tools, judicial officers would be able to manage cases more efficiently and effectively, resulting in the speedy resolutions of disputes.

In conclusion, Judge Mthiyane said: 'When cases are delayed, the public loses confidence in the judicial system and takes the law into their own hands. We see what is happening in the mining industry at the moment. Those who lose confidence in the collective bargaining process embark on wildcat strikes. We do not want to experience that kind of chaos.'

LSSA report

Mr Govender spoke on issues currently affecting the legal profession. He said that 2012 had been a 'very important year' for the profession.

'We had to grapple with the Legal Practice Bill, which was in the oven baking for ten years and now we are getting quite far with it. I think that before we end our term as chairpersons [of the LSSA] the legislation will be up for debate and adoption,' he said.

In addition to the Bill, Mr Govender said that the LSSA had to deal with 'serious questions' relating to Competition Commission issues. He said that the relationship between the profession and the commission had improved, and a process had been established that allows for dealing with any disputes that arise in respect of the manner attorneys practise in violation of competition principles in a more conciliatory manner. However, if there is conduct that may be viewed as anti-competitive, the Competition Commission will not come to the defence of unethical attorneys, he warned.

Mr Govender said that after 1994 lawyers had 'gone into shells' worrying about their survival, however they now needed to play an important role in transformation in the country. Referring to legal stalwarts such as Oliver Tambo, Nelson Mandela, Joe Slovo, Mahatma Gandhi, George Bizos and Victoria and Griffiths Mxenge, he said that lawyers were 'the voice of the voiceless'.

'If we do not ask questions and play a role in society, we cannot expect politicians to just do it right. ... As lawyers, we have an important responsibility to this country to build this nation into something more important than it is at the moment,' he said.

Mr Govender also highlighted challenges that black and poor lawyers were facing, which he said were 'very serious at the moment', adding that there was 'not a lot of work going around and people are struggling'.

In conclusion, Mr Govender spoke about ethics in the profession: 'Ethics is seen as a swear word standing in the way of making money. ... Lawyers can be on the right side or on the wrong side. I just hope you make the right choice.'

KZNLS 2013 membership fees:

- Durban and Pietermaritzburg: R 2 120,40
- Country: R 1 995
- Declared: R 1 413,60 (all inclusive of VAT)

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