# Civil litigation: who can afford it?

Extracts from a paper delivered by Malcolm Wallis SC, chairman of the General Council of the Bar, at the Commonwealth Law Conference in Vancouver in August 1996*

ONE of the intriguing features of my country's emergence from international isolation has been the discovery that many of the problems we have been grappling with virtually on our own are problems which have a universal dimension. Of these, the cost of civil litigation is in the forefront of the challenges facing our justice system. One hears repeatedly that litigation is the privilege of the very rich, who can afford it, and the very poor, who receive assistance by way of legal aid and similar measures. Particularly with the adoption of the Bill of Rights in our Constitution the question is raised of the worth of these rights in the absence of the means to enforce them by litigation.

Too often it seems to me that the preferred solution advanced by those concerned about this problem is to find more money to throw at it in the hope that it will go away. But our societies and our tax structures are over-burdened and the need for housing, health care, education, care of the aged and social security, justifiably claim a greater priority. When to that is added, as it must be in my country and all developing countries, the need to catch up on historic backlogs in the provision of facilities the western world takes for granted such as electricity, water and sanitation, leave aside roads and telephones, it is apparent that even if money were a solution it is simply not an available solution. We need to undertake a more radical analysis of the problem in order to resolve it.

I return to the question "Who can afford civil litigation?" and examine it in the light of the participants in the civil justice system. In doing so I speak and seek to speak only from the perspective and experience of a South African lawyer. Where I am critical I am speaking only of South African institutions and the criticism should only be taken as applicable elsewhere where it resonates in the experience of lawyers and others from other countries

## The judiciary

The first and most obvious group who can afford civil litigation is the judiciary at every level. They run the process and the combination of judicial independence and control is sufficiently powerful in most cases to mean that it is run preeminently in ways that suit the judiciary. The judges control the court rolls; they decide when they will sit and for how long; they have the power to refuse to hear cases because "the papers are not in order" or to grant adjournments which give them the day off. They decide how long they need to consider the problem before delivering judgment and can afford to be impervious to the problems of delay. The salaries they are paid enable them to afford litigation on this basis.

The lawyers can also afford litigation and the more of it the merrier. Lawyers need litigation because they make a living from it. Among the many rude things which Charles Dickens had to say about lawyers and the law was that –

> *"The one great principle of the English law is to make business for itself."*

That accusation is one which can certainly be made about lawyers in my country and I suspect can be made about lawyers in many others. The adaptation of legal practice to modem business methods has led to the adoption of the heresy that lawyers sell time – a far cry from the traditional view that we provide skill and expertise. In the result those engaged in civil litigation are constantly in search of the billable hour. There can be little doubt that lawyers can afford civil litigation on the present model.

## Corporations and institutions

Turning to the litigants it is facile to say that big business, Government institutions at every level and the occasional rich individual can afford civil litigation. It is true that they can pay the bills which accompany such litigation, but the costs of those bills then become a cost for society as a whole through the prices charged for their products or the taxes they levy. The intangible costs are even greater. Business is disrupted, work put on hold and offices left empty as management and senior officials and staff at every level hang around the corridors of courts, while lawyers argue and negotiate or engage in the rituals of trial. Clients of this type may be grateful at the end of the day where their view has prevailed but it is rare for them to hold the view that litigation has been a profitable and desirable use of their resources.

Some institutions within the business community can of course afford litigation. To some indeed it is their business. This is particularly true of the insurance companies which fund so much of our litigation. The process of litigation becomes an inevitable thread running through their business life. It is a tactic to be used not simply to resist unmeritorious claims but all too frequently >

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by a process of attrition to limit, reduce or defeat the meritorious by using the insurer's greater financial resources.

I suspect that by this stage there are likely to be murmurs of discontent from judges, the legal profession and the business institutions I have mentioned. The position is of course to some degree a caricature. However, it is very strongly how the general public view the process of civil litigation. The fact that in our own eyes we may have a different perspective should not permit us to ignore the view which others standing further away from the problem have of civil litigation.

## The great mass

For those others, the great mass of society, civil litigation is a fearful thing. Far from wanting their day in court the majority of people give thanks if in a lifetime they can avoid having anything whatsoever to do with the law, the lawyers and litigation. For most it is financially beyond them. Without the benefit of legal aid – in other words getting your neighbours to pay for it by way of taxation – any form of litigation is financially prohibitive. People unlucky enough to find themselves defendants are often faced with a choice between capitulation and financial ruin.

Of course disputes are even more likely to arise in the commercial world. There the emotional impact of litigation may, but not necessarily will, be less. The costs may sometimes, but not always, be more affordable. But the view from the business world of civil litigation is as jaundiced as that of the private individual. Any businessman with experience will say: "If I ran my business like that I'd go bankrupt." Litigation is a place where only lawyers can feel comfortable.

The real flaw in all this is that civil litigation does not exist for the judges, the lawyers and a handful of large business institutions. It does not exist for their benefit and their profit but it is widely perceived to do so. A solution to the problem of the cost of litigation will only be found by revisiting the purposes for which it was created.

It is a truism that conflict and dispute are part and parcel of any society. If these cannot be resolved in the ordinary interplay of life civil litigation is the means provided by society for their resolution in the interests of a stable social order. It is, however, insufficient for society to say that it has provided a means for resolving disputes without any regard to the outcome of that process. Our intention is surely deeper in any country adhering to the rule of law namely that our laws should be just and balanced and equitable and that litigious disputes should be resolved in accordance with the law. In the language of lay people the processes of law must give the right result – a result which the community finds acceptable and to the enforcement of which it will lend its support.

## Procedures and rules

An essential component of community acceptability is that the legal process should be seen to be fair. Not surprisingly that is a value which is enshrined in human rights instruments throughout the world. Lawyers with fairness as their goal engage in a constant process of elaboration of the rules of fair trial. Like any process a case can always be made for extending the boundaries. There are always new instances which seem to cry out for more elaborate procedures, greater disclosure, more pre-trial meetings. Once accepted in one case and seen to be helpful there the exception becomes a rule. Five years later the inertia of lawyers will demand its retention, whatever its consequences.

The problem is that the procedures and rules which we formulate are always formulated for the worst case. Like protective measures in a building which allow for hurricanes, earthquakes and one hundred year floods, the rules under which we conduct civil litigation are designed to deal with major litigation, involving millions of rand, or dollars or pounds, depending upon your jurisdiction, multiple parties and complex questions of law. What we have overlooked is that most civil litigation involves simple disputes between neighbours, motorists, builders and building owners, businesses and customers over the price and the quality of the goods sold. Yet these too are conducted by the same complex rules because fairness must extend to all.

It is in the pastures so created that the creatures of delay and cost feed and frolic and gambol. Here are the means whereby the recalcitrant debtor, the pig-headed neighbour, the difficult businessman or the hard-nosed insurance company can seek to delay and obstruct justice. These are the means employed by the unscrupulous plaintiff or even the downright fraudulent to force a settlement merely to get rid of litigation.

Although every judge and every lawyer is aware of this phenomenon we close our eyes to it pleading fairness. In the day of the photocopier and the fax machine demands for discovery become evermore onerous and the failure to produce documents however trivial is made a ground of further delay. The production of every new document sets the stage for "further investigations" which at the trial have turned up nothing. We all know that these abuses occur and yet nothing is done to stop them. We salve our consciences with the soothing mantra that "there is no prejudice so great that it cannot be assuaged by an appropriate order as to costs".

## Professional duty

It is not surprising that lawyers go along with this because all these procedures and rituals add up to more billable hours. We justify it to ourselves by saying we are carrying out a professional duty to act in the best interests of our client. But that approach – enshrined in the rules of virtually every bar association throughout the world – conveniently avoids any obligation to the wider community. Should we not be asking the question whether the community, which established and funded the institutions at which we trained and the courts in which we practise, is entitled to demand of us that our ethical standards should acknowledge that fact? Is a duty to act in the best interests of one's client incompatible with a professional duty not to pursue unmeritorious cases or unduly delay the determination of disputes?

My comments should not be construed as a call to throw the rules of civil procedure away and adopt the simple epistolary rules of access of the Indian Courts in all matters. The concern is that

every review of civil procedure brings with it more not fewer rules and compliance with each of these new rules takes more time and costs more money. The current trend is towards more pre-trial procedures especially written ones; the idea being to save valuable court time. The experience is that more paper is generated at greater cost and trials get longer. If lawyers are incapable of stripping a trial to its bare essentials in court why should we believe that in the relative calm of their offices with a dictaphone or word processor in front of them they will ignore the urge to put everything in (after all you never can tell which part the judge will fancy) and be in the words of our Constitutional Court rules "brief and succinct."

## Tiered approach

My own view is that costs can only be saved, delays avoided and obstructive tactics overcome by adopting what I call a tiered approach to rules. Most cases should proceed on simple rules involving little more than a statement of claim and defence, limited discovery and a basic pre-trial procedure. In more complex cases the option to add additional procedural layers should be there but subject to strict judicial control to be exercised informally and relatively summarily (one must avoid endless, costly and time-wasting interlocutory proceedings).

This of course demands a change in attitude by lawyers and judges. I have already suggested that this calls for a review of the traditional concept that the lawyer's obligation is to his or her client and, beyond such obvious things as not misleading the court, not to the public interest in expeditious resolution of disputes at the least possible cost. Can I be even more heretical in these days of computers and time sheets and suggest that the priority given to time rather than value in fee charging practices is an imbalance which is worth re-visiting.

Ultimately the change in attitude will have to be even greater. It will require a recognition that we exist to provide a service and you cannot and do not provide that service by structuring it to suit yourself. The supermarket owner knows that over-long queues at the checkout eventually drives business away. Our civil justice system has created even longer queues but nothing effective has been done about it. Our own experience in establishing a national arbitration facility in South Africa has released a pent-up explosion of fury at the civil justice system and that is ultimately bad for the country. We cannot talk of scarce judicial resources when the way we structure court hours and court terms makes those resources unavailable for much of the time. We cannot bemoan delays in proceedings when we close the civil justice system for the summer holidays. We cannot claim to be worried about costs when trials which could finish in eight hours take two days in court because we are the only enterprise in the world which doesn't work an eight hour day. The problems of who can afford civil litigation will not go away until we recognise that the fault is not just in our stars but in ourselves.