Case management in South Africa*

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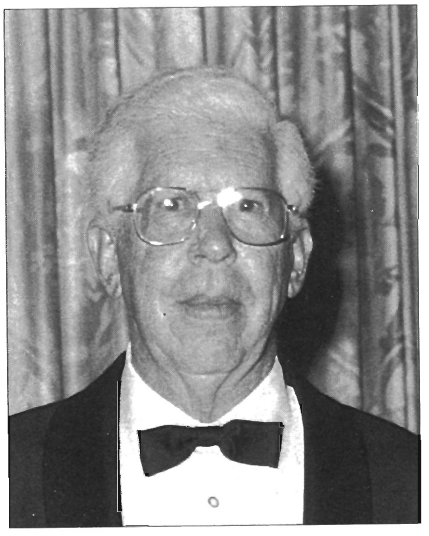

Judge President Gerald Friedman

IN the preamble to its Report in 1995 to the Chief Justice of Ontario, the Civil Justice Review Team said:

> "Traditionally, in Ontario, members of the public have resolved their civil disputes through the court process. This process – based primarily upon the adversarial method of dispute resolution – has ultimately led to justice. In recent times, however, because of the pressures of modern litigation, such justice has come at great expense to the litigants, and, too often, after numerous and lengthy delays."
>
> The members of the public require a more efficient, less costly, speedier and more accessible civil justice system".

These words apply with equal relevance to the situation in South Africa today.

Pilot schemes involving systems of case flow management had, of course, already been implemented in certain areas in Ontario from the 1950's and the Team analysed the results. It found that managed cases were disposed of far more expeditiously than nonmanaged cases. On the basis of its findings the Team recommended that a system of case flow management be implemented on a province-wide basis in Ontario.

I do not propose to elaborate on the details of those recommendations. Suffice it to say that they had as their objectives, as indeed any system of case management has, the speedier resolution of disputes and reduction of the cost of litigation.

These objectives coincide completely with those of the Woolf Report which was recently published in England under the title *Access to Justice*.

Is case management necessary?

Before turning to the question of how case management could be employed in South Africa, it is important that the question as to whether a system of case management is needed in this country, first be answered.

To my mind the answer to this question is undoubtedly "yes". There has been in the last few decades a vast movement of the population from the rural to the urban areas. This, coupled with the growth of the economy, has led to a tremendous increase in civil litigation. The Bench has been increased in size but there has been little correlation between the increase in litigation and the increase in the number of judges. And it is correct that it should be so because no justice system can permit vast increases in the size of the Bench without an accompanying loss of prestige and with it, credibility.

The result of all this is that, despite the fact that judges have to work much harder than they had to, say, 20 years ago, they can only get through a certain number of cases in a given period of time. Hence the delays in getting cases to trial, with the concomitant addition to the costs.

Added to these problems are those arising from the fact that we operate under an adversarial system where, traditionally, it is up to the lawyers and their clients to decide if and when litigation should proceed and when the various steps required to be taken under the rules should be carried out. The major problem about this system as it operates at present, is that the litigants, through their lawyers, are able to agree to vary the time periods laid down by the rules for the taking of the steps required to bring litigation to finality. Once the parties' consent is required, the system breaks down.

In this regard South Africa is no different from other countries which practise under an adversarial system and where it has been realised that what has been referred to as the "laissez faire approach" to the processing of cases cannot be allowed to continue.

In my view it would be quite wrong for South Africa to lag behind those other jurisdictions which have taken positive steps to remedy the problem by introducing a system of case management.

Employment of case management in South Africa

Having said that, it is now necessary to consider the question of how case management should be employed in South Africa.

In my view, in introducing case management in this country, there are a number of points which require emphasis.

Firstly: I think we must acknowledge that *what might suit one division may well not be suitable for another*

* Speech delivered at the case management seminar of the General Council of the Bar on 17 January 1997.

division. In the Cape Provincial Division we realised that the Uniform Rule 37 which was introduced following upon the Van Winsen Report in 1965, was not achieving its objective. And so in 1993 we prevailed upon the Rules Board to allow us to implement an experimental rule 37A for a two-year period from 1/12/93 to 30/11/95. This period was subsequently extended.

Rule 37A was drawn up after full consultation between the Bench, Bar and attorney's profession.

This was the first real attempt at the introduction of a system of case management, involving the intervention of the judiciary at an early stage of litigation with a view to attempting to ensure that litigation proceeded with a minimum of delay. Although rule 37A involves a very rudimentary system of case management, it nevertheless has, to a certain extent, been successful and has led to quite a number of cases being settled at a much earlier stage than would otherwise have been the case.

Having operated under this system for some three years, we came to the conclusion that the time had arrived for the introduction of a more sophisticated case management system. We have now redrafted rule 37A completely and we are in the process of negotiation with all the various branches of the profession in our division with a view to reaching consensus on the terms of a new rule.

What we are seeking to achieve is a system in which there will be judicial intervention at various stages but particularly shortly before the trial.

Timetables will be fixed which will have to be adhered to, subject to stringent sanctions. Parties who co-operate will be given an early trial date. Those who do not will be taken out of the system so as not to impede the progress of others. In order to avoid parties being caught by surprise at the trial, the draft provides for the exchange of witnesses' summaries.

But what I wish to emphasise is that if we succeed in reaching consensus, the result will be a rule which is satisfactory for the Cape Provincial Division. It would be presumptuous of me to suggest that it would be appropriate for other divisions. Each division must, in my view, work out for itself a system which is suited to its own requirements.

Secondly: Whatever system of case management is introduced will require *a change in the mind-set of both the judiciary and the profession*. The judiciary can no longer play the role of the neutral umpire in a game played by the litigants.

The judiciary, for its part, will have to accept responsibility for implementing the system and the profession, for its part, will have to accept that, although it will continue to operate on an adversarial basis, its approach will have to be modified so as to accommodate the new system. All role players need to acknowledge that without case management, the system is going to collapse.

Thirdly: Any system of case management that is introduced must be *properly resourced*. It will therefore be necessary for up-to-date information technology to be made available and for the requisite support staff to be properly trained.

Fourthly: I do not think that the *magistrates courts* should be overlooked. Their civil jurisdiction has now been increased to R100 000. The importance of the cases which they can now hear is manifest. Yet there is effectively no form of case management in the magistrates courts.

Section 54 of the Magistrates Court Act provides that a magistrate may at any stage of the proceedings *mero motu*,or at the request of one of the parties, direct the parties or their representatives to appear before him in chambers for a conference to consider a number of matters aimed at the most expeditious disposal of the matter. This is, for all practical purposes, a dead letter as it is never used. And even if it were to be used, it is far too simplistic to be effective.

Fifthly: Any system of case management should be *introduced experimentally* to start with, i e for a period of two to three years, in order to determine how it can be improved.

To sum up, then, I am firmly of the view that if the points which I have mentioned are borne in mind there is no reason why case management systems should not be introduced in all the divisions of the high court, as well as in magistrates courts.

I am also satisfied that if we do so, we will be rendering a better service to the community than we have been doing up to now and that we will be making justice far more accessible than is the case at present.

"Cross-examination"

Q: What is your name?
A: Ernestine McDowell
Q: And what is your marital status?
A: Fair.

...

Q: Mrs Jones, is your appearance this morning pursuant to a deposition notice which I sent to your attorney?
A: No, this is how I dress when I go to work.

...

Q: ...and what did he do then?
A: He came home, and the next morning he was dead.
Q: So when he woke up the next morning he was dead?

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