

Access to justice:

Conference hosted by the Chief Justice 8 to 10 July 2011

BY RASHID VAHED SC, CHAIR OF THE GENERAL COUNCIL OF THE BAR OF SOUTH AFRICA

In his review during 1994 of the rules and procedures of the civil courts in England and Wales, Lord Woolf found that a civil justice system needs to be based on at least eight basic principles. These were:

- 1 It should be just in the results it delivers.
- 2 It should be fair and be seen to be so by:
 - ensuring that litigants have an equal opportunity, regardless of their resources, to assert or defend their legal rights;
 - providing every litigant with an adequate opportunity to state his own case and answer his opponents;
 - treating like cases alike.
- 3 Procedures and cost should be proportionate to the nature of the issues involved.
- 4 It should deal with cases with reasonable speed.
- 5 It should be understandable to those who use it.
- 6 It should be responsive to the needs of those who use it.
- 7 It should provide as much certainty as the nature of particular cases allows.
- 8 It should be effective, adequately-resourced and organised so as to give effect to the stated principles.

(See: Hans Fabricius SC 'Access to Justice: The Woolf Report' 1996 November *Consultus* 108)

'It is inexplicable that we have taken such time to undertake this important work which is central to access to justice.'

During 8 to 10 July 2011 Chief Justice Sandile Ngcobo hosted and spearheaded the Access to Justice Conference, the overriding theme of which was 'Towards delivering accessible quality justice for all.' He very kindly invited me to attend in my ca-

capacity as chairman of the GCB. At the conclusion of the conference the Chief Justice referred to Lord Woolf's eight principles, endorsing them and stating that for him they represented what he wanted for South Africa. Although Lord Woolf's principles applied to a civil justice system, the Chief Justice indicated that with minor modification they also represented his vision for the criminal justice system in South Africa.

The conference was a busy one. The days were long, intensive and provided much food for thought. In his address when he opened the conference the Chief Justice said:

'This gathering is historic and unprecedented in perhaps two ways. It is the first conference in this country to bring together such a cross-section of leaders, from the various spheres and branches of government, to Chapter 9 institutions, non-governmental organisations, academics, representatives from the private sector, and leading duellists and legal academics from across the globe. But it is also a historic gathering because for the first time it has brought together the Heads of our three co-equal branches of government, namely, the Executive, the Legislature and the Judiciary, to collectively reflect on our justice system. This underscores the shared responsibility that all three arms of our government have in upholding and protecting our Constitution. And that responsibility includes

giving effect to the constitutional guarantee of the right of access to justice. Indeed the Constitution requires organs of state, through legislative and other measures, to assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness. So as we reflect on the challenges facing our

justice system, we should also ask what role can and should each arm of government play in making our justice system equally accessible for all.'

The opening session of the conference was addressed by the chairperson of the National Council of Provinces, the Speaker of the National Assembly, President Jacob Zuma and the Minister of Justice and Constitutional Development. In his address Minister Radebe said:

'The need for the review of the civil justice was identified before... 2003. Professor Erasmus, who the Rules Board had commissioned to draft a set of new rules that would bring about the harmonization of the rules with the Constitution responded as follows to the assignment: *'My efforts to prepare a preliminary draft have led me to a conclusion that the development of a set of rules within the parameters of existing legislation and rules (i.e. the existing 'infrastructure') is an impossible task. -What is required is a comprehensive and wholesale review of the system in all its underlying elements... In evaluating the civil justice system and in recommending change, it would be important to bear in mind that it is part of a larger system. Thus, for example, the total cost of litigation embraces more than the cost to the parties. They are also the infrastructural costs provided by the state in the form of the provision of a courtroom, officials and a judge. The wasteful use of time of the court and judges is an abuse of an expensive resource which has an adverse effect on the allocation of judicial resources. An inefficient civil justice system may, for example, adversely affect the allocation of resources in criminal cases. The economics of civil justice, a largely neglected topic in South Africa, should receive attention if an overview of the system is undertaken.'*

'It is inexplicable that we have taken such time to undertake this important



THE AUTHOR

Rashid Vahed SC, chair of the General Council of the Bar of South Africa

- 2 Enhancing court efficiency.
- 3 Judicial intervention and case-flow management.
- 4 Court technology and electronic filing.
- 5 Alternative dispute resolution.
- 6 Restorative justice, small claims courts, community courts and traditional courts.
- 7 Court administration and court services.
- 8 Judicial education.
- 9 Justice and the media.
- 10 Court services (including personnel).
- 11 Prosecution and public defenders.
- 12 The private profession.
- 13 Specialised courts: the Equality Court, the Labour Court, the Land Claims Court and the Sexual Offences Court.

work which is central to access to justice. The Department has provided additional capacity in terms of budget and human resources to fast track the Civil Justice Reform Project. This project is a joint initiative of the Department and the judiciary, and the Rules Board and the South African Law Commission have significant roles to play.'

The project referred to by the Minister was approved of by Cabinet during May 2010. It consists of three phases.

Phase 1, the Audit and Immediate Intervention phase, commenced during April 2011 and is targeted for completion during March 2012. During this phase, what will be analysed is the compatibility of the pre-constitution legislation and rules, case management in the courts, the office and powers of the registrar and clerks of court, and the cost of litigation to people, including sheriffs' fees, court fees, witness fees and travelling costs. During that analysis it is envisaged that audit sites will be identified, focusing on courts and court users by looking at the physical location of courts relative to the communities they serve, the jurisdiction of the courts, the delays in finalisation of cases and the available infrastructure and technology in courts. The implementation of a pilot project for alternative dispute resolution is also envisaged. This commenced during April 2011, is targeted for rollout by April 2012 and is aimed to be fully functional by March 2013. As part of this pilot project it is envisaged that a regulatory framework will be developed to strengthen the pilot project. A court-based mediation and arbitration system will be introduced aimed at reducing cost and promoting expeditious finalisation of cases. The pilot project is aimed to be based on a comparative study of jurisdictions as similar in diversity and needs

as South Africa and will commence in certain selected courts. Also during phase 1, the service of process and execution by the sheriffs' offices and the transformation of the sheriffs' offices will be looked at in similar timeframes. This aspect of the project will target a review and reform of the service of processes by sheriffs and other agencies, the execution against primary residential property and the optimising of auction sales.

Phase 2 of the reform project will consist of a programme of action for the engineering of the civil justice system. This phase will focus on a consolidation of the audit findings including the objectives identified at the Access to Justice Conference, proposing solutions (including a redrafting of the rules and legislation and implementations of the solutions in the immediate/medium/long term), the procuring of funds for implementation of the solutions and a design of systems. Phase 2 is targeted for commencement during April 2012 and is targeted for completion by March 2013.

Phase 3, identified as 'Tapering off and Maturity', is targeted to commence during April 2012 with a final evaluation by September 2013. This final phase will be dedicated to the adaptation and development of infrastructure, systems implementation, monitoring and implementation of the solutions developed in phase 2 and a final evaluation of the outcomes and impact.

The various session topics at the conference provide an insight into the matters discussed. These were:

- 1 Judicial independence and sustaining the confidence of the public in the judiciary.

It is beyond the scope of this report to refer in any detail to the papers delivered at any of those sessions or to single out any particular paper or speaker for special treatment. All were informative, engaging, and will be invaluable to the Chief Justice's reform project. What was discussed emerges in what follows.

It is anticipated that the Chief Justice will shortly release his views on the conference outcomes and its impact on the way forward. It seems very likely that those outcomes will note that our citizens do not enjoy the full benefit of the right of access to justice as enshrined in section 34 of the Constitution. From a draft circulated at the conclusion of the conference, it will be noted that such deprivation is as a consequence of various factors, including systemic challenges in the administration of justice in our courts as a result of inefficient, inadequately-trained and under-resourced administrative personnel. That is also as a result of complex and cumbersome pre-trial procedures and an unreasonably long delay in the finalisation of the criminal and civil trials.

The judiciary, under the leadership of the Chief Justice, will accept primary responsibility for the realisation of the objectives discussed at the conference.

It seems clear that the outcome of the conference will realise that it is the responsibility of government as a whole to ensure that quality justice for all is realised. The judiciary, under the leadership of the Chief Justice, will accept primary responsibility for the realisation of the objectives discussed at the conference.

Arising out of the session discussions

and the Chief Justice's closing remarks, it is clear that under his leadership the judiciary will resolve to:

- 1 implement judicial case management;
- 2 set up a case flow management monitoring committee under the leadership of the Chief Justice and the heads of court;
- 3 take all measures necessary to enhance access to justice which would involve sufficiently restructuring and reasonably resourcing the Small Claims Court, community courts and traditional courts;
- 4 ensure that justice of a high-quality is delivered at a reasonable speed to all South Africans;
- 5 prioritise education and training for both judicial offices and court support staff;
- 6 foster a closer cooperation between the Ministry and Judiciary in relation to programs and all important matters of mutual interest;
- 7 find ways to ensure that the three branches of government continue to carry out

their constitutional mandate in a manner that is sensitive to the doctrine of separation of powers;

- 8 take steps to introduce alternative dispute resolution (preferably a court annexed mediation or a CCMA type of ADR);
- 9 make more use of restorative justice;
- 10 empower leaders (heads) of courts;
- 11 explore ways and means to suggest amendments to or replacements of rules and legislation that impede access to quality justice;
- 12 devise or set up structures, at national, provincial and other levels, for the monitoring of access to justice and the functioning of the courts;
- 13 focus more attention on sexual violence cases and cases affecting children;
- 14 suggest and/or implement the steps to be taken to facilitate the functional and institutional independence of the judiciary;
- 15 enforce judicial integrity, collegiality

and accountability;

- 16 suggest and/or implement the steps to be taken to introduce advanced Court technology, audio-visual postponements and electronic filing;
- 17 suggest and/or implement the steps to be taken for the rendering of pro bono services to the poor;
- 18 suggest and/or implement innovative ways of raising public awareness about access to quality justice;
- 19 suggest and/or implement structured interaction between the judiciary and the media;
- 20 suggest ways for and/or encourage the participation of the prosecutors, public defenders and the private profession in all efforts designed to enhance access to the delivery of quality justice to all South Africans.

In my view, it is the Bar's duty to support the Chief Justice in his efforts. 

GCB chair's annual report 2010/2011

Report to the 66th annual general meeting of the General Council of the Bar of South Africa by Rashid Vahed SC, chairman

THE 65TH ANNUAL GENERAL MEETING

At the 65th annual general meeting held on 23 and 24 July 2010 in Bloemfontein I was elected chairman of the GCB with the other members of the executive committee being Semenya SC (deputy chairman), Smuts SC (vice-chairman), Hassim (honorary secretary), Platt (assistant honorary secretary), Aboobaker SC, Pretorius SC, Moroka SC, Muller SC, Motimele SC, Mtshaulana SC (*ex officio* past chairman) Findlay SC (*ex officio* NBEB), Sutherland SC (*ex officio* finance) and Madlanga SC (*ex officio* JSC).

During the year under review the executive has worked and interacted well. All decisions were either unanimous or established within an atmosphere of cordial consensus. I am grateful to the members of the executive for this and it would be remiss of me not to record my appreciation to my predecessor for wise counsel from time to time.

At that annual general meeting the following were elected as chairs or convenors of various standing committees or subcommittees: Bruinders SC (Advocacy Training), Goosen SC (Pupillage), Findlay SC (NBEB), Kuper SC (AFSA), Moroka SC (Human Rights Committee), Pretorius SC (National Bursary Fund Committee), Aboobaker SC (PPS), Sutherland SC (Finance). In addition Hennie Mellet was retained as editor of *Advocate*

and various Bars were reappointed as constituting a number of subcommittees.

EXECUTIVE COMMITTEE MEETINGS

Two executive committee meetings were held during the year, the first on 13 November 2010 and the second on 12 March 2011. Both were at the Southern Sun Hotel situated at the airport in Johannesburg and both were attended by what I conveniently refer to as being the 'expanded executive committee.' By that I mean that they were attended by the members of the executive committee as provided for in the Constitution as well as by bar chairs. That wider attendance works well and is a practice that I hope will continue. The minutes of both those meetings appear elsewhere on the agenda for the annual general meeting and speak for themselves.

STATISTICS

The Bar has continued to grow from strength to strength. See below the membership statistics and the race and gender statistics for the Bar, both expressed as at 30 April 2011.

THE LEGAL PRACTICE BILL

Regrettably the Department of Justice has continued to interact