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ANDREA GABRIEL: SKELETON PRESENTATION

JUSTICE V EFFICIENCY

1. I would much rather be standing before 11 Judges of the Constitutional Court of South Africa than face the pressure of the eminence and wisdom in this room. However, I am comforted by something the Professor who taught me labour law said upon entering his first lecture to us. Professor Alan Rycroft told us that we were not to worry about concentrating too hard because he understood that we would stop listening to him after 10 minutes. He said that research had shown that people in an audience, usually after 10 minutes, if they are hungry start thinking about food and if they are full start thinking about sex. I am comforted by the fact that all of you have just had breakfast ... but do worry that that was some time ago!

2. I want to provide a **practical** perspective on justice versus efficiency. By doing so I hope to demonstrate that the equation presented comprises an infinite number of variables. There is no easy answer to the question whether improving the efficiency of our courts diminishes the quantum of justice dispensed by our courts.

3. When I was approached to deal with this topic I called two people. I called the new leader of our High Court for his perspective as he had just assumed the mantle and had taken over a division of the High Court at a time when we waited up to three years to get a trial date and over six months for an opposed motion date. I also called another judge in our division who will have to remain anonymous because he may or may not be sitting in this room.

4. I asked our Judge President how he had approached the problem presented in improving the efficiency in our division and how he planned to tackle what seemed to be an insurmountable task. He took a deep breath. He said that in preparation for the office he had been given many books, from all over the world about case management and improving the efficiency of courts. Books from Canada, the US, New Zealand, Australia and Europe. He read them, tried to understand them and then closed them all as he realised that nothing in those books would work in our division.

5. He sat back and thought about matters. South Africa, and our province of KwaZulu-Natal in particular, presented unique, home grown and localised challenges. The types of litigation differ from province to province, for example, Gauteng has most of the bigger commercial matters because that is where the stock exchange is while Durban and Cape Town have most of the maritime work because that is where the harbours are. This meant that what had been tried in other divisions would not necessarily work in our division.

6. In addition certain challenges were common to all divisions, which meant that there were some lessons to be learnt from the approaches adopted in other divisions.

7. For example, our trial rolls are clogged by huge numbers of road accident fund matters. Some of the issues discussed yesterday such as the funding of litigation and cottage cheese industries have led the road accident fund in South Africa to adopt a particular combative litigation strategy. But, it is not only the RAF, there are equally errant lawyers involved who have a vested interest in making as much money as they can from the RAF by doing plaintiff's work and often on a contingency fee agreement. Invariably these RAF matters do not settle, every point is taken and matters drag out on end. Invariably, the bulk of them are

settled on the morning of trial after the matters have been called and allocated to judges, have stood down and voila settlement by mid-morning.

8. This means that other matters ripe for hearing, which have been crowded out because of, *inter alia*, these large numbers of RAF matters go back onto the awaiting trial roll and money and time are wasted in the process.

9. Our Judge President identified this and other similar categories of matters and decided to rework the system. He realised that the last time there had been a fundamental change in our division's court procedure was in 1978. We had become so set in our ways. Everyone knew that the trial rolls were clogged, we all knew what the waiting periods were and yet we plodded on. We were 16 years into our democracy and it was simply business as usual. Our Judge President said that when he sat back and thought about these matters he realised that this was a contradiction in terms.

10. Noting that many trials settled on the morning of the case our Judge President introduced two motion court rolls. Instead of the usual daily motion court roll, with its limited number of opposed motions, a second opposed motion court roll was introduced to sit on Tuesdays and Thursdays. This meant that if matters settled on Monday and Wednesday, which is when our trial rolls are called, Judges became available to hear opposed motions on Tuesday and Thursday. That system has been in place for a few months now and I am told that it has already significantly reduced the waiting period for opposed motions.

11. The next change introduced was a radical practice directive. Parties are required to hold a pre-trial conference five weeks ahead of the trial with a signed minute in the court file demonstrating this. If not, matters are simply struck from the roll. The objective is to force parties to confront the issues way ahead of the trial and try to settle or limit issues then rather than on the morning of trial.

12. Unfortunately we are in the early stages of implementing this practice directive and because the Registrar's office is so understaffed, trial rolls are only being released six weeks before trial.

13. This has resulted in some reports of matters simply being struck from the roll because there is no five week old pre-trial minute in the court file. There have been reports of cases in which severely injured people and young children who have waited for years for compensation from the RAF and in which counsel were ready to proceed in recent weeks have simply, without more, had their matters struck from the roll.

14. We understand from other jurisdictions which have grappled with the problems of case management that rigidity yields injustice. On Thursday night I heard blood curdling tales from some of our colleagues from Northern Ireland about statutorily imposed pre-trial deadlines and processes. These deadlines emanate from the guarantee to a speedy trial in the European Convention. I was told that these deadlines compounded by budgetary restrictions are proving to be impossible to work with. For example, prosecutors in lengthy criminal trials which are adjourned not only have to comply with backbreaking deadlines but in some instances must proceed with adjourned trials without a transcript because the prosecutions authority has a reduced budget and cannot afford transcripts. So prosecutors are forced to proceed not only with impossible deadlines but with a summary of the evidence. How is justice to be served in this manner? Imagine if prosecutors were forced to proceed without transcripts and only summaries of evidence in South Africa, a land with 11 official languages and in which the presence of interpreters in court rooms is an all familiar feature.

15. Coming back to the new practice directive in our division, it remains a work in progress. We have yet to see whether ultimately it will work but it must be monitored and tested over the next few months.

16. The messages I received from our Judge President were this. We cannot wholly import models from elsewhere. We have to step back, jump out of the comfort or anxiety zone, as the case may be, and critically and regularly asses what is working and what is not. Ultimately what will work for us will be a product of who we are and the problems confronting us. Our Judge President told me that the question of court efficiency cannot be approached purely philosophically or academically, it has to be approached practically and with a regular system of assessment. Is this working or is it not, rather than becoming comfortable in our old habits and the soothing lament of our problems.

17. What we have in our division is certainly a golden opportunity to invent a square wheel. Ironically, the only reason we have this opportunity is because we became stuck in our ways, because we have never looked at adjustments and just continued as we were.

18. The other anonymous judge I called also gave me his views on case management. He pointed to a particular problem that often when trials are allocated, the caller of the roll usually has no indication of what the case is about besides the bare bones in pleadings. The complexity or potential complexity of matters is often not understood. This leaves little room for a complete understanding of how long a matter will proceed.

19. So, a trial set down for three days may well turn out to require six days, depending on a range of often unpredictable variables. For example, an expert witness may change his or her mind after time. I am told that there is a reported case in England, possibly in the Court of Appeals, where an expert witness did change his mind but the presiding judge refused to

let a new expert report in because the case had already taken too long. The new report was material, relevant and germane to the case and counsel were in agreement that it had to be admitted but the presiding judge refused to admit it and insisted that the trial proceed without it. Where is the justice there?

20. This means that rigidity in case management could easily yield inequity and injustice.

21. In South Africa, section 34 of the Bill of Rights guarantees access to court to settle justiciable disputes. But, if we apply a rigid system of "I am the case manager and you will do as I say" then international experience demonstrates that we may have problems on our hands. We heard some examples of this yesterday and this morning.

22. Complexity of cases is a concern. Consider the following story emanating from our Constitutional Court in 2008. Mr Sidumo was a security officer at Rustenburg Platinum Mines. After a clean employment record of 15 years, Mr Sidumo was dismissed for negligently failing to apply established security procedures to prevent theft at the mine.

23. Little did Mr Sidumo know that after an internal disciplinary inquiry, an internal appeal and litigation in three courts over a long period of time, his dismissal dispute would be considered by the highest court in the land almost seven years later because the case involved issues of great concern to employees and employers alike. In the end it was a large trade union which took up the cudgels for Mr Sidumo, ably represented by that anonymous judge I was telling you about, the one who may or may not be in this room. That case established ground breaking principles in our jurisprudence in employment law.

24. But it is so much more than court based procedure and complexity of cases. Resources are a problem. How is our Registrar to cope with the new practice directive and advising parties of trial dates more than six weeks in advance when she is the only one doing all the work?

To make the system work she needs at least two additional staff but there is no budget for it.

25. Difficult clients are a problem: has anyone ever observed how rich adults turn into unreasonable idiots when it is time to part ways. What ought to be simple divorce suddenly turns into a lengthy case over principle and the clients demand their day in court. They want to hear lengthy cross-examination of their enemies and they want to see blood on the floor at the end of it. Limiting counsel by any means may result in a perception if not perpetuation of injustice and an unreasonable limitation of the guarantee of access to court.

26. There is yet another problem. Counsel are a problem. I with Stewart SC had the misfortune of spending a month last year as an acting judge in our mother division. I had no idea up to then how much advocates and barristers, present company excluded of course, like the sound of their own droning voices. I had the misfortune of having to listen to two silks argue at length over an opposed summary judgment application. At the end of it, I resolved the matter on well entrenched legal principles which had been established as far back as at least 1964. I came to realise later that the reason the matter had been so vociferously argued was that work was hard to come by in that division. It seems the recession has even affected South Africa.

27. Let me give you two case studies of matters I have been involved in to demonstrate the problem. The first involved a group of prisoners who were dying of AIDS at a local prison. Despite Constitutional Court decisions directing the supply of anti-retroviral medication and despite government policies directing such supply the prisoners were simply denied the medication. We brought an urgent application on behalf of 12 deadly ill prisoners and a class action for all others who were similarly situated at that prison.

28. Government threw the rule book at us. They adopted every strategy they could in the book including asking the presiding judge to recuse himself on the basis that the correspondent attorney, not the instructing attorney, was his daughter. We won. They appealed. We sought urgent interim relief pending appeal. They appealed that as well even though our jurisprudence does not permit such an appeal. I do not blame counsel involved for those were his instructions and the South African government, like any other government I suppose fights like a vixen when it's back is up against the unconstitutional wall.

29. It was said yesterday that litigation can be a heavy burden and that the resulting cost and anxiety can exact a heavy toll. By the time the matter was finally resolved, well over 12 months later – all 12 prisoner applicants were dead.

30. Then I had to be a junior in a very unpopular matter last year. It involved corruption charges against the current president of South Africa. A brief of some controversy not unlike the Hansie Cronje brief that the anonymous judge told you about yesterday.

31. In the space of six months, the matter had been argued and decided in the local division, argued and decided on by our supreme court of appeal and ultimately by the time the charges were quashed, a date had already been set for hearing in the Constitutional Court.

32. Why did the prisoner's case take so long and the president's case not? In the latter case, there was full co-operation between counsel and the parties involved. Everyone knew the matter was of some urgency and importance because of pending national elections and even the courts knew this and accommodated the matter urgently and efficiently. In the former case despite urgent and efficient accommodation of the matter justice was not done. It was ultimately achieved for all prisoners at that prison but not for the dead.

33. We heard Dame Hazel speak just now of the new formula being applied with numerous variables such as complexity of cases and importance of the issue to the parties in an attempt to achieve equitable proportionality in the mix of justice versus equity. I agree with Dame Hazel that what is required is a system that is flexible enough to support an approach which yields such proportionality. The question is, who gets to decide?

34. I hope that I have by now demonstrated that the conundrum of justice versus efficiency comprises a complex and sometimes unpredictable set of interlocking variables beyond simply court based processes. Thank you for listening to me.

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