Johannesburg Attorneys Association Judges' functon held on Thursday 7 November 2024

Transcript of speech by DJP Sutherland

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I come to you today with some good news.

Firstly, about the many Practice Directives.

Not only do you have to read them, we have to read them. And unfortunately, even we forget sometimes what's in them.

So, that must come to an end sometime.

So, I am very pleased to announce that in this last week the judicial task team that is going to revise the practice manual and integrate all those directives into one has started working.

This will not be just for one seat this will be for the division.

For the 1st time, at the Judge President's instance, we're going to have one system for both seats. So, you don't have to re-educate yourself every time you cross the Jukskei.

What happens in Pretoria happens in Johannesburg.

The second bit of good news I want to bring to you is something I'm going to pick up again a little later when talking about policy adoptions.

And that is that steps to make mediation more mainstream are well in advance.

The judiciary has engaged with the key players in the mediation market.

And what we're hoping we can bring to the marketplace shortly will be a viable pool of accredited and credible mediators who will offer their services at affordable fees so that that can play a meaningful role in dispute resolution.

I don't think it's possible to emphasize how important it is to grasp mediation as a mainstream technique in dispute resolution.

I have been for a long time involved in mediation.

I was trained as a mediator myself in the early 1980s by the Independent Mediation Service of South Africa which is the pioneer institution that introduced mediation into the labour relations sphere and later was instrumental in leading what was then called the alternative dispute resolution association of South Africa (ADRASA) to spread mediation as a mainstream technique in commercial and more broader civil litigation circles and of course AFSA built on that particular progress in due course.

Mediation is easy to misunderstand and even easier to oversell.

There is no point in being slick or glib about mediation.

What is critical particularly for litigation attorneys is to buy into the fact of the technique not just that it's cheaper because it's not always cheaper.

It can be, but you must take the time to equip yourself with sufficient depth of awareness on what mediation can do for your clients. And not enough work has been done on that.

And we're hoping that this initiative which comes to us from the mediation sector and which we hope as the judiciary that we'll be able to put our stamp of approval on and that we will be able to engage in a meaningful way and on a meaningful scale in the course of 2025.

One of the things in relation to mediation more generally, and that is good news is that habitual litigator the Road Accident fund has indicated through its number one that it is going to commit itself to mediate its disputes.

Now I can hear your cynicism in this respect.

But cynicism, although not misplaced as long as the Road Accident Fund Cases are to be dealt with by the High Court and not by a specialist tribunal all of us who are in the system have to live with that fact that the Road Accident Fund is the dominant litigator and if it sneezes, we all get a cold. If it is in paralysis that paralysis is infectious. And so, any evidence of rational thinking on the part of the Road Accident Fund is to be welcomed. And I certainly congratulate Mr. Letsoalo on having discovered this thought process.

The third thing I want to raise in this context is a speculative consideration because although we are working on it it's yet to mature and that is a more efficient way of organizing the work in the division.

For those of you who have an interest in family law you would have already used in both seats what we call the family court.

Now what we have done in effect is to stream all the family law cases into one channel so that they can be dealt with in a particular context and provide quick turnover and to some extent because we can engage acting judges who are specialists in that field, give you a more effective litigation service.

That is after all what the mission of the judiciary is and that is to provide the litigating public with an effective litigation system.

Streaming work in that way has been very effective there and approaches have been made to us by other professional organizations about streaming work with other respects.

We're exploring the moment the request which has been brought to us by the insolvency practitioners association and I'm sure there are tonight members of that association to ask for a specialist insolvency court. We are keen on streaming insolvency matters into a particular channel where we can offer a motion court with quick turnover and also to integrate those courts with our commercial court project which is not used as much as we would like it to, which is often abused for reasons which one understands but cannot sympathize with.

But it seems to me that there is a large and wide consensus that streaming work where it's able to be done is the way to go because one can tailor make procedure for quick turnover, rapid decision making and in turn support the commercial or other activity that's anterior to the litigation.

Now that brings me to the realities of our time here in Gauteng. I have said on a number of occasions that the unfortunate circumstances in which we the judiciary find ourselves is that those who are in the leadership and have to organize the work and decide what cases get heard and in what order are effectively operating a triage exercise.

On one hand one has to recognize that an effective judicial system is critical to an effective commercial system: We will not sustain the economy, we will not grow, we will not make new jobs, we will not support the state as such is commerce is hamstrung by an ineffective litigation system.

On the other hand, to take our habitual and industrial scale litigator the Road Accident Fund, why should it be that the starving widow and her children must wait 5 years for her to get her damages? Are they any less important than Investec?

This is why I say we are in a triage exercise trying to balance imperfectly the demands that exist on a macro level and at the same time staring into the face of the unacceptability that men and woman of ordinary means who are dependent in the most poignant way on the system the state provides to look after them when in need, is unable to deliver. There is no point in us pretending.

The Judge President, my colleague Judge Ledwaba in Pretoria and I am not proud of what we can deliver. We have been as transparent as possible so that you understand that we are genuinely doing what we can with whatever we have but we are nowhere near what we want to present to you.

And I want to express our appreciation for your understanding that in these times of resource constraint you have been so supportive of the efforts we have introduced to supplement the number of judges we have and to cope with a number of really tiresome procedures which we impose but which are necessary in order to facilitate a small number of judges dealing with the enormous bulk of matters.

All of these tiresome rules and the directives you have been burdened with are not there because we are intrinsically bureaucratically inclined, but we’ve got to leverage

our judges to get the most out of them and to that end we need the profession to fit in with what effectively is industrial scale litigation done by too few people to do so.

So let me talk about some options which need to come into being:

There are 2 obvious ways in which we can address our resource constraints.

One is the increase in the judicial compliment. And the other is the diversion of work away from litigation.

So lets just deal first of all with the “no brainer”: “Let’s have more judges”.

By my calculation in order to organize the work in the most effective way and to have the judges deal with that work on terms that they can be reasonably comfortable with and not become chronically fatigued, as they are now, I need another 20 judges in Pretoria and another 20 Judges in Johannesburg.

There is no prospect of that whatsoever.

In the time since the Government of National Unity has come to be, there have been engagements with the Minister of Justice before she became distracted with other matters, and in fairness to her: “What is she to do”?

The treasury is the place where she is to get money and do any of us have a legitimate expectation that were she to go and bang on the doors of the treasury they would say anything other to her than “stand in the que with any other state department and come and show me in the bucket here: where is the money, where is the money – there is no money”.

And here’s the chicken and egg situation: Until the economy is growing at a rate which is almost too much to hope for in this time over the next 10 years there is no way in which any solution which requires money to be thrown to it is possible to be conceived.

So however benign the ministry is, however benign the treasury is throwing money at the problem is not going to work.

And we cannot expect the state and the fiscus to produce the wherewithal in order to give us the ideal number of judges which we need.

That leads us then to diversion.

I will come back to increasing the judicial compliment shortly.

Lets just deal with diversion first of all.

There are 2 obvious ways which I think that could be accomplished.

The first is the use of mediation that I have already addressed.

And I want to implore you not to just pay lip service to that but to engage in it, to lobby for it. To conscientize your colleagues and your clients.

There's another way we could divert work: In Johannesburg just to take one example we have 10 judges engaged in criminal work. We could say to the National Prosecuting Authority as of next term we will offer you 2 judges to hear criminal work, send the rest to the regional court, when you've got a treason trial come back and you can invite us to hear it. And we can have 8 judges in 2 months' time available to do civil work. That can be done.

But what is it achieving? Those of you who have experience in the regional courts and the district courts know that they are as overburdened as we are. Shifting the work to some overburdened institution can be done and its rather like chasing squatters away without giving them an opportunity to live somewhere decent.

Those criminal cases have to be heard somewhere, and quite frankly the Regional court were they to be burdened with it will simply be taking over our problem without solving our problem.

And then there's a third option, a radical option one that requires the law to be changed. One in which you the profession one would be able to argue has a particular role to play. And that is in arbitration. There is already a very healthy and large arbitration market in this division, both in Pretoria and in Johannesburg.

But what there seems to me to be is a market for an expanded arbitration realm.

At the present moment by very definition the attraction to arbitration is that the only remedy is review if you are dissatisfied with that.

But we know from many commercial arbitrations there are agreements to go to an appeal arbitration, often heard by 3 retired judges, at great cost.

I want to argue for an amendment to the arbitration act which enables parties to buy into an appeal to the full court of the division, which will be a free appeal.

Not in order to syphon of those arbitrations which are already in the arbitration sector, but to expand their market so that many more trials which is really the greatest burden we have, can be heard in that private forum and we can hear the appeals.

We cannot hear 100% of the trials that need adjudication within a reasonable time, that's why matters are being set down in 2023.

But we can 10% of the appeals and I am on a mission now to bring about a reform in the law to provide for that option.

I do not see how it is possible for the state to reasonably reject that option when for all the reasons I have already described it is incapable of rendering the litigation service the public need: An effective litigation service.

So let me go back to what I said about increasing the judicial compliment.

Judges do not grow on trees.

And to go back to my point about needing another 20 judges, let us suppose that the Minister of Justice and the Minister of Finance as a result of very cunning blackmail have now been persuaded to provide all the money we need to give us 20 judges tomorrow. The money is there.

Where are these 20 judges?

We struggle to find judges to fill the judges places who retire or go to the SCA or the ConCourt.

We just appointed 6 new judges, there are still 7 vacancies.

We would take at least 5 years to add to our compliment if we were to fill 20 new places over and above having to fill the spaces of all those who are retiring to go to the other courts. It's not a short-term option.

But what I do want to argue for is once again another change in the law, and that is to have permanent judges appointed by the JSC on the same strict terms that are used now for all other judges, but on a part time basis.

This is not an original idea thought up by me. This has been the practice in England and Whales for many years. It offers a great many advantages both operationally and fiscally.

1st of all a part time judge would say for argument's sake be appointed for 10 years, which is what was done with redeployed judges in the labour appeal court so there is a president there and they would serve a term in a year – 9 or 10 weeks. They would be paid simply the stipend a judge would get on a monthly basis. Without any undertaking to fund pension benefits or other perks. I would think that the cost of such as judgeship is probably less than half and probably close to a third of what it would cost to engage a new judicial post. I think we can impose on our political masters to find that kind of money.

It also offers another advantage which to some extent is being exploited now, certainly in my own personal experience in recruiting acting judges and that is those senior practitioners who are quite capable of doing judicial work but either for financial or just reason of preference do not want a permanent appointment can serve.

There are many talented senior practitioners both at the bar and in the attorneys' profession who would be eligible to be put into that category.

Moreover, those practitioners who despite their talent and their experience find themselves functionally ineligible to take a permanent appointment because what they know about is only 1 field of law.

Those specialists could come as specialists to sit in matters in their specialty for their one term a year.

And we would be able to draw on the talents which are now being stored up and unused in the profession at large.

So, things like insolvency, things like family law, intellectual property and so forth.

This is an opportunity which the state given its inability to provide fully an effective litigation system cannot legitimately say no to.

And they need pressure to be brought to bear on them in order to do so.

Of course, the great innovation which would relieve much, much pressure on us is the one that's been staring us in the face for the last 25 years.

Ever since Cathy Satchwell, our retired colleague was called upon in a commission of enquiry to submit a report on Road Accident Fund litigation.

Her report went straight into the dustbin.

But clearly again a political decision is needed. If Road Accident Fund litigation could be moved to a special tribunal it would relieve the pressure on the rest of the system, such that fewer radical intervention is needed.

And let's be frank, for those of us who are familiar with Road Accident Fund litigation it borders on the absurd to ask judges to make the decisions which there are made.

When the decision was made to remove from the decision-making role of the judge whether or not general damages would be applicable unless you got the medical council to say it was a serious injury it was one tiny step.

But is there any more reason why I should be called upon to assess the effectiveness of an actuarial calculation, or whether the future loss of earnings can be determined this way.

These are all things which require specialist expertise, and many practitioners and many judges have developed that expertise.

But surely it is irrational to think that the volume of litigation that we have to deal with would not be better dealt with by a specialist tribunal.

But there again we would have to bring pressure to bear on our political masters to recognize that and overcome as we well know, very, very entrenched interests.

What in fact you might ask are we the judges doing who now so largely encourage you to engage these other things, are we doing anything? And what might we do?

Well there are 2 things that I am working on imposing on you.

The 1st is the way that trials are run needs a radical shape-up.

I would like to see a development in which all matters start on notice of motion. All the evidence is on affidavit and once whatever disputes of fact are shaped out of that they go to a trial court.

No more dancing around Plaintiff's particulars of claim and all the rest of it. Let's get straight to it.

In the meantime, I am encouraging judges to insist on exactly that: its exactly what we do in the commercial court. One of the important features in the commercial court is that the evidence comes on affidavit.

Puzzling, notwithstanding the fact that the profession clamored for the specialist commercial court I think many litigation attorneys are apprehensive about litigating in that way and having all the evidence on affidavit.

We need to learn new habits, be comfortable to litigate on those terms and in that way radicalize much of the precious court time we have.

The next thing that I think we need to do is to move to a single expert system.

This story of having 6 experts arranged on one side and 8 on the other etc. is a self-evident cottage industry which wastes millions of millions of rands.

This is one respect where the head of the RAF has a perfectly legitimate grievance. To watch all those billions go out is obviously something that sticks in his throat, and it should stick in all of our throats.

We've got to move to a situation where this parade of pointless expertise and padded reports and sometimes sheer unadulterated nonsense is curbed.

So who is going to do anything about this?

The reality of life is that when you become a judge one of the things you have to put up with is having to shut up.

The judges speak with a muted tongue.

I would speak for more forcibly tonight were it not for the wholly appropriate scriptures that lie on me as a judge.

But you are not so restricted.

And I am looking around here and I can see people who will be practicing law 30 or 40 years from now.

You need to take upon yourselves the opportunity to craft a litigation system that will work for you and the people you serve.

That means an overtly political role.

Political both in the sense of organizing the profession, using the Johannesburg Attorneys Association as a vanguard of a professional revolution and to engage not only your colleagues but your clients, many of whom have the ear of our political masters. Bring home to them what is needed for us to stop pretending that we have a first-class system and to actually put one together.

And I want to solicit from you to engage with that thought that you have an opportunity in your professional lives to reshape the way that litigation is conducted for the better.

And it's not someone else's job: It's got to be your job.

And you need to galvanize those who sit on the periphery.

Those of you who believe in belonging to an association, understand the value of collegiality, can grasp the force that collective action can bring about, are the very people who need to take this to wherever it needs to be taken: to your colleagues, to the business community, to the media, to the politicians. Our country was not built by people who sat on their backsides.

The revolution of 1994 was not brought about by taking resolutions.

We have what we have because people got up on their hind legs and they did something about what they felt passionately about.

And I invite you to do the same thing.

We may be in trouble.

We must consider not to bemoan our troubles, but how we can eliminate our troubles and on that score I want to wish the association and all of you the best for the future and I look forward as I soon will be in my retirement watching all the activists from this association making some of these dreams I've spoken about come true.

Thank you for listening to me.

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