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JUDICIAL REFORMS

JUDICIAL REFORMS AS A VEHICLE FOR JUSTICE DELIVERY

(Hon. Chief Justice J.M. Nganunu)

INTRODUCTION

The political independence of Botswana occurred on 30 September 1966. The Independence Constitution of Botswana, as with constitutions of most Commonwealth African countries, ushered in a modern democratic system of governance that consisted of three organs of state i.e. the Executive, the Legislature and the Judicature; and all of them were expected to produce a working system that nurtures the country's nationhood and develop the people's common aspirations and advancement.

For the judiciary its main task was to help maintain the democratic nature of the state, by upholding the requirements of the constitution to have regular, fair, free and democratic elections, so that the people can choose their political representatives and leaders. The second, but most important function was to ensure

that the fundamental rights and freedoms of the people were guarded, properly interpreted and developed. A proper working court system was to be developed by the state and the judiciary, so that all litigation can flow smoothly through the courts. Whilst it was therefore expected that the Executive and Parliament would deal carefully with issues of policy, development and the laws, necessary to run the state, the judiciary was to help the state maintain legality and the rights of the citizen.

From the day of independence until very recently, Botswana was a very poor country, reliant on foreign financial assistance even to balance its recurrent budget. During this period court work was relatively light, as everyone was preoccupied with bare survival.

But the discovery and mining of diamonds steadily changed the situation so that eventually the country increased its own revenues to the point where it is designated a middle income state. Economic success has brought with it rapid urbanization, educational expansion and changes in attitudes of the entire population, like an increase in assertiveness and demand for delivery of services.

These changes have also made their mark in the field of justice because suddenly the courts found themselves full of cases but without adequate resources to give a satisfactory level of disposal of cases, requiring that the courts re-examine themselves, and conclude that their provision of services to the public be jerked up.

Hence the reforms that I want to share with you today. In seeking to understand our judiciary's approach towards the reforms it is engaged with, I must mention two matters i.e.

(i) that Botswana still maintains a separate system of customary courts and laws, that fall outside the common law legal system (which I am talking about). The result is that the common law system is constantly being compared with the customary system which dispenses justice immediately and without any procedural safeguards or legal representation.

(ii) The state of Botswana has established a vision for itself, popularly known as the National Vision 2016, the date 2016, implying that by this period the nation must stand at a certain developmental level, having

achieved minimum key goals that make the Botswana nation more advanced, more self sustaining, caring and compassionate; and relative to the judiciary, a just society.

The advent of the Vision 2016 has required that every government institution be clearly seen to be participatory in the Vision goals.

These two considerations do not necessarily go together, but they and certain policies of the judiciary also form a background which shaped our approach. As to policies, there is a government long standing policy of **Rural development**, which is intended to uplift economically the rural areas instead of rushing to the cities. This policy is implemented on the judicial side, by an undertaking to provide judicial services at the rural areas, and consequently reducing expense and traveling time by the least able to afford, to go to major towns and villages to source services from the judiciary. An apt example is traveling long distances to claim child

maintenance, and or to give evidence of a local event in a village far from the scene of the event.

The Reforms

As is understandable reforms in the Botswana judiciary started a long time ago, generally in response to complaints, and were largely piecemeal, and thus unable, in my view, and in hindsight, to have the impact that they should have had if they were part of a package. The impetus for these reforms though has always been the deep belief in Botswana, which the judiciary shares, that for the general public and the common person, their dividend must be in the form of enhanced service delivery, whether in terms of basic infrastructural services like health clinics, good roads and communication, water and electricity; and from the judiciary, the availability of prompt court services so that the litigant can vindicate his right, say in respect of land allocation, protection of his livestock etc.

The package of reforms which we are engaged in are aimed at reducing and eliminating what was perceived as a backlog in

certain levels of courts of the common law system, as undermentioned.

In addition, it is intended that there shall, subject to any change issued by the Chief Justice, be a maximum period within which a registered case must be completed. This period is calculated from the date of registration to judgment. I am not here talking about the completion date for a case by delivering a judgment after it was tried. That cannot give satisfactory assurance. I am talking of the completion of a case by delivery of a judgment from the time it was brought to court. That is what matters to litigants – the total time the case has taken.

As was remarked in this conference criminal justice is sometimes too slow to arrive. This is because of the large volume of such cases starting with magistrates court to the Court of Appeal. But in assessing the period the case has taken to finality one should really also deal with the period taken during investigation to the time it is registered in court. The judiciary has taken a resolution to discuss this issue with the government and other stake holders, it being the

intention that there must be a agreed prescribed period within which a case must be completed including the period of investigation assessment and registration at court.

The backlog was deemed acute as follows:

(i) In the magistrates courts situate in the cities of Gaborone (the capital) Francistown and Selibe Phikwe and the Village/towns of Maun, Palapye, Serowe, and Mochudi, in varying degrees of acuteness.

(ii) Our two high Court Divisions of Lobatse and Francistown.

There are no long standing cases in our Court of Appeal, or in most village Magistrates courts. The immediate and long term objectives of our package of reforms are encapsulated in the theme of our 2006 Annual Judicial Conference headed "**Moving the Judiciary into the 21st century"**

The Reform measures

These constituted of

(i) Change Leadership

This phrase consisted of two ideas, namely a leadership for change; as well as changing the attitude of the leadership, so that it can conceive and bring the required changes in the approach to the business of the whole organization.

The idea here was that the leadership of the organization of the administration justice be inclusive, embrasive and shared; and that leadership should run from top to bottom and horizontally, so that it should achieve “a busy in” by everyone into any reforms; and that at every level of the judicial ladder there are leaders to drive and explain the changes sought. In short the idea was of a strong embrasive co-leadership not just of one person or three, but a leadership at every level that is coordinated, which would plan and lead the reforms throughout the various cadres of the organization.

(ii) **Information Technology**

It was recognized that a 21st century judiciary must rely on information technology as the tool to increase productivity and improve performance. We therefore introduced a computerized Case Record Management System (CRMS). We had to be careful and chose a computer system that is configured to give us multi

functional from the immediate requirements to long term. But the first basic requirement was that our system should handle the computerization of our court files and other records so that (1) we know how many files exist, say at the High Court level, and where they are what sort and where they are, what sort and their ages.

(i) We wanted to eliminate losses of files when required to show us at any stage where a file is.

(ii) The system is also so designed that it should show the stage at which each file stands i.e. at pleading, trial stage or where it is.

Judicial Case Management System (JCM)

The idea and meaning of Judicial Case Management, is simply that soon upon registration a case should be allocated to its own judge who will set and control its progress through court. The control would be exercised in consultation and with the agreement of the parties and their counsel. But the essence of this reform was to remove the progress and fate of a case from the lawyers, after a realization that so often one side would be aiming for quick progress of the pleadings and hoping to set down the case for trial as soon as

possible; but the other side would also aim at slowing down progress as much as it can. We also found out that even plaintiff's attorneys were often so busy that they forgot to keep going, so that it could delay by months or even years.

The beneficial effects of Judicial Case Management are many e.g.

(i) by having an agreed timetable for the case, the age old culture of endless postponements which had in fact become a big factor in the delay of cases, attorneys can no longer delay cases by postponements.

(ii) With regular meetings on the case the parties were encouraged to settle – a settleble case or at learnt part of it. In practice this actually works and a large number of cases are settled even before trial.

(iii) With the computer registration of cases it is now possible to agree a period when a case should remain unfinished in court.

At our recent annual judicial conference we agreed that criminal cases should be tried and completed within 2 years of their

registration, and 3 years for civil cases. We have set this period on a preliminary basis and it shall be reviewed.

Rules of the courts

To remove unnecessary prolix and wasteful procedure the rules of trial courts need to change. We thus changed our High Court Rules to accommodate Judicial Case Management and the central role of the judge. But foremost, the new Rules state expressly state that they are designed to expedite the progress of cases through the courts; and that they aim at substance and justice rather than procedure. Rules of the magistrates courts are now under review by a committee appointed for that purpose.

Training

The new systems introduced by the reforms call for trained and educated manpower to implement them. That is absolutely crucial for the fate of these and other reforms. In our case we did not start with much trained material. Training of such manpower was part of the tender for the provision and installation of the machinery. In respect of our case there was and still exists an inadequacy in

trained manpower. For any jurisdiction planning to introduce such reforms my advice is to have enough manpower already trained and or available for training. Computerisation of the files at the magistrate level has only just finished. The application of Judicial Case Management is at its infancy, but we see no reason why it would not be successful.

Though the government understands and supports our reforms; it has still applied to the judiciary, the same ceiling in the increase in the manpower establishment as it has adopted for the civil service. This is a serious handicap.

Small claims courts and others

Batswana are a litigious lot despite the appearance of an outer crust of tranquility; and unprovakable self assuredness. The result is that in the big cities of Gaborone and Francistown the magistrates courts are clogged by small cases on affiliations, traffic accidents and small claims. We have introduced small claims courts along the lines in South Africa and Zimbabwe, with a view that they shall relieve the magistrates of some of the small claims,

and also take up small cases that their owners do not litigate, for various reasons. These courts will start only this month.

The unique features for our Small Claims courts is that no legal representation will be permitted and proceedings shall be pretty summary. They should enable self actors to obtain quick justice.

Some years ago, a visiting Zimbabwe businessman bemoaned that Batswana are afflicted by a cattle post mentality which inhibited their complete dedication to commercial businesses. That was a controversial and perhaps a provocative way of putting it. Nevertheless, Batswana are still dedicated farmers and are owners of large herds cattle. Now, the crime of stock theft has ballooned; and the public has demanded an efficient and quick way of dealing with stock theft. In re-action the judiciary has identified in some districts some magistrates who should form stock theft courts, so as to concentrate some resources on this crime. Such courts have only recently been formed; and I cannot say at this stage what their effect will be. What however we hope for is that the thieves will

soon realize that they cannot escape justice; and that they shall re-think.

Conclusions

All of the reforms I have described above are of recent origins. Judicial Case Management started officially on 1st February 2008. It is still early to pass a final judgment on it; and yet in the High Court it has already succeeded beyond our expectations, mainly because we tackled firstly old cases and got rid of them quickly. We also managed to get the parties to settle quite some cases and this device will continue to be of help.

We have in mind that ADR has succeeded elsewhere; but whilst we encourage it our next project pursuant to Judicial Case Management is to the introduction of Court Annexed Mediation.

The Computer Record Management System (CRMS) is a real help. It enables accuracy in knowing the workload for all the courts; and keeping trends of completions and cases in waiting. CRMS is now central to our operations, and is a useful tool as to the level of

manpower the judicial system should have at all levels of operations, in checking the number of Judges and Magistrates and in due course we shall bench mark our performance against that of our region. One cannot begin to tackle these issues without such technology.

The efficiency of our courts is very much influenced by – and perhaps a hostage to – the level of manpower and its quality in the legal profession.

Our private attorneys and advocates have welcomed the above reforms and supported them. But we have a shortage in attorneys dedicated to the court system. I fear that this shortage may have a sustained drag effect on the efficiency of the courts. The pace of training to support these systems and the ability to retain trained computer personnel remains one of our major challenges.

Attitudinal changes and the ability to utilize computers to their full potential shall remain a major challenge to us for a long time. It is nevertheless wonderful to see the scale of change and progress that

has taken place in such a short time. I am amazed at the grasping powers of the youth, in whom we must have everlasting faith.