

**OPENING REMARKS
ACCESS TO JUSTICE CONFERENCE:
TOWARDS DELIVERING ACCESSIBLE QUALITY JUSTICE FOR ALL**

**ENHANCING ACCESS TO JUSTICE:
THE SEARCH FOR BETTER JUSTICE**

By Chief Justice Sandile Ngcobo

7-10 July 2011

Hilton Hotel, Sandton, Johannesburg

SALUTATIONS

- **Your Excellency President Zuma;**
- **Honourable Speaker of the National Assembly, Mr Max Sisulu;**
- **Honourable Chairperson of the National Council of Provinces, Mr Mahlangu;**
- **Chief Justices, President Mpati, Judges Presidents, Presidents of the Regional Courts and Chief Magistrates and members of the Judiciary;**
- **Minister of Justice and Constitutional Development, Mr Jeff Radebe and other Cabinet Ministers present;**
- **Deputy Minister of Justice and Constitutional Development, Mr Nel and other Deputy Ministers;**
- **The Chairperson of the Portfolio Committee on Justice, Mr Landers others members the Committee;**
- **Secretary-General in the Office of the Chief Justice, Adv Sizani;**

- **Director-General in the Department of Justice and Constitutional Development;**
- **Members of the legal profession; and**
- **Members of the media**
- **Other distinguished guests.**

On behalf of the Heads of Courts, I have great pleasure in welcoming you to this historic conference on Access to Justice. We are humbled by your presence. In particular, we are honoured by your presence and willingness to deliver the Keynote address Mr President. And Mr Speaker and Chairperson of the NCOP we are grateful to you for agreeing to join me in make opening remarks.

I would like to express my gratitude to all those of you who kindly agreed to deliver papers or to chair various sessions at this conference, and especially our international visitors who travelled all the way to our country to share with us their experiences. We hope to draw from your experiences in fixing our justice system.,

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 jurists 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.¹

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.

OUR NATIONAL GOALS

As we open this conference this morning we should draw inspiration from the Preamble to our Constitution that reminds us of the goals that we fashioned for ourselves as a people. These include to²:

- **establish a society based on democratic values, social justice and fundamental human rights;**
- **Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;**

¹ Section 165(4): Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility, and effectiveness of the courts.

² Preamble of the Constitution.

- **Improve the quality of life of all citizens and free the potential of each person.**

These goals require fundamental changes to the political, social, and economic conditions that previously existed in our country. A commitment to address the disparities of our past and to transform our society into the one envisioned in the Constitution lies at the heart of our constitutional democracy.

To achieve these goals, the Constitution has established the foundational values on which our democracy is built and introduced the Bill of Rights which guarantees, among other rights, civil and political rights. And to alleviate poverty and other devastating socio-economic conditions brought about by our past, the Bill of Rights also makes provision for justiciable socio-economic rights.

The realization of these rights is indispensable to the transformation that is demanded by our Constitution. These founding values and the Bill of Rights are at the heart not

only of the transformation of our society, but also the transformation of our justice system. Courts are given the central role to uphold and protect the Constitution, and give life to the foundational values and the rights in the Bill of Rights.

COURTS AND ACCESS TO JUSTICE

The key to a successful transition into a society where democratic values, social justice and fundamental human rights prevail – – is the *ability of our people to meaningfully assert and claim the rights in the Constitution and in the Bill of Rights*. The constitutional guarantee of the right of access to courts provides a vehicle for our people to vindicate these rights.³

The right of access to court requires both the availability of court facilities in the first instance, and courts that are user-friendly and accessible by all people, including

³ Section 34 of the Constitution provides that: “[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.” Section 34 does not only guarantee the right of access to court; it also contemplates other independent tribunals or forums where disputes could be impartially, fairly and legally resolved.

individuals who are physically challenged, and coherent and user-friendly rules of practice and procedure to facilitate access to justice.

The importance of the constitutional right of access to courts cannot be gainsaid. By providing citizens with forums and peaceful, mechanisms to resolve disputes without resorting to self-help, the right of access to courts acts as a bulwark against vigilantism, chaos, and lawlessness.

PUBLIC CONFIDENCE & JUDICIAL INDEPENDENCE

But if courts are to effectively perform this crucial role, they must be independent and impartial.⁴ They must not only be independent and impartial in reality, but they must also be so in perception.⁵ It is this independence and impartiality that earns the Judiciary the confidence of the public.

Public confidence in the Judiciary is “an essential

⁴ Section 165(2) of the Constitution states that: “The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.”

⁵ *S v Basson* 2007 (3) SA 582 (CC).

condition for realizing the judicial role.”⁶ Our courts, which have neither the purse nor the sword to enforce their orders, have as their “ultimate power... the esteem in which [they are] held within the psyche and soul of the nation.”⁷

It is this public confidence that makes the public to accept the legitimacy of judicial decisions even if it disagrees with the decisions.

Just as public confidence in the courts, in judges, and in the justice system overall, would be undermined if courts are not independent or perceived to be independent, public confidence in the judicial system would equally be undermined by an ineffective, inefficient and inaccessible justice system. To earn and sustain the public’s confidence, courts must function efficiently, and effectively, and must be accessible.

PRINCIPLES OF AN IDEAL JUSTICE SYSTEM

⁶ Aharon Barak, “The Judge in democracy” Princeton University Press, 2006 at 109.

⁷ Mr Justice Mahomed, “The role of the judiciary in a Constitutional State” 115 SALJ 111 (1998) at 112.

The question which arises then is what are the principles that are essential to a justice system in order for it to be efficient, effective and accessible? I hope that this conference will provide an answer to this question.

We owe the people of South Africa a justice system that is just in the results that it delivers; that is fair to all litigants regardless of their station in life; that is inexpensive; that delivers results in the shortest possible time; that people who use it understand; that responds to their needs; and that is effective. To be effective, it must be adequately resourced. This of course requires adequate funding. I was hoping that the Minister of Finance would be present to hear this.

This morning I would like to suggest that we have a real opportunity to make history in South Africa and develop an ideal justice system. The question is how to get there from here. And that is the question that this conference can help us to answer.

But where are we? We can only know where we are if we know the challenges facing our justice system.

CHALLENGES FACING OUR JUSTICE SYSTEM

These can be reduced to three key challenges that I identified in July 2003: they are firstly, to equip our courts with properly trained administrative personnel and adequate facilities. We need personnel that can handle with competence the rapidly increasing volume of complex litigation in our courts; secondly, we must address the twin problem of cost and delays in our justice system; and thirdly, we develop a civil justice system that is just, fair, inexpensive, understandable and responsive to the needs of its users.

These challenges require us to probe for fundamental changes to three key areas of the administration of justice that can easily conspire to make our justice system inefficient, ineffective and inaccessible. These are:

- (a) the provision of administrative and other services to our courts;**
- (b) the absence of a single rule-making authority; and**
- (c) the accessibility and the efficiency of our justice system.**

GOVERNANCE AND ADMINISTRATION OF COURTS

In relation to court administration, I would like to make three propositions that I have previously made:

First, the efficiency in dispensing justice should not be influenced by decisions in which the needs of the administration of justice are not the overriding factor;

Second, the involvement of the Judiciary in decisions relating to the provision of administrative functions connected with the administration of justice is essential to the efficient functioning of our courts; and

Third, the capacity of the courts to deliver justice can best be secured by placing the administration of the courts under the ultimate control of the Judiciary, which is responsible for the delivery of justice.⁸

I hope this conference will reflect on these propositions.

While significant progress has been made in this regard, there is still much work to be done.

Since I took office as Chief Justice in October 2009, my Office has been considering reforms in the governance of the Judiciary. These have focused on the establishment of an independent Office of the Chief Justice, and researching a court administration model that is compatible with the independence of the Judiciary.

⁸ Delivery of Justice : Agenda for Change SALJ at p 705.

The first step towards the establishment of a truly independent Office of the Chief Justice has been achieved. In September 2010 the President issued a Proclamation that gave the Office of the Chief Justice the status of a national department, thus giving the Office the autonomy that is essential for bringing about the necessary reforms relating to the Judiciary.

In June this year, I also appointed a committee comprising experts to develop recommendations on institutional models of a truly independent Office of the Chief Justice. This committee, under the able leadership of our two former Chief Justices, Justice Chaskalson and Justice Langa, is expected to provide a report later this year.

Parallel to this process, the OCJ will also be researching the appropriate model for court administration. In his budget speech delivered about a month ago, the Minister of Justice and Constitutional Development announced that a framework for court administration that is

compatible with the separation of powers will also be under consideration by his Department.⁹

This is a complex and delicate process which requires extensive research and consultation. However, I am glad to be able to say to you today that we are making progress in relation to improving our governance and court administration.

What of the accessibility and the efficiency of our courts?

ACCESSIBILITY AND EFFICENCY OF OUR COURTS

Our civil justice system is still characterised by cumbersome, complex and time-consuming pre-trial procedures, overloaded court rolls, which necessitate postponements, delays in matters coming to trial and, at times, compels litigants to conclude settlements not

⁹ Budget Vote Speech by the Minister of Justice and Constitutional Development (7 June 2011).

acceptable to them. It is expensive, slow, complex, fragmented, and overly adversarial.

A preliminary investigation that I have conducted since my appointment as Chief Justice suggest that while significant progress has been made in enhancing the accessibility and efficiency of our courts, there are still persistent problems.

The preliminary findings indicate that among the causes of delays in civil litigation are long waiting periods for the allocation of trial dates; missing court documents; courts that lack adequate equipments, facilities, and staff; and practitioners who do not cooperate with one another or who deliberately engage in delaying tactics; insufficient court rooms for hearings and trials and some of the court libraries are not adequately resourced.

The problem is not confined to our civil justice system. Our criminal justice system suffers from certain deficiencies. I am concerned about the reports that I have received that

suggest that there is persistent failure to adequately respond to the problems of violence against children and sexual violence. In 2009/10, over 56 000 children were reported to be victims of violent crimes; over 27 000 of those related to sexual offences.¹⁰

Statistics show that nearly 30% of all sexual offences against children involved youngsters under ten years old.¹¹ The successful conviction rate for sexual offence cases on the roll is very low – I am told that it is under 10% – most perpetrators are said to go free, and cases can drag on for years in court.

The challenge facing our criminal justice system is its failure, perceived or real, to address problems faced by child complainants and other complainants in sexual offences and to stamp out these crimes. The question I hope this conference can answer is how can we make our criminal justice system more accessible, effective and

¹⁰ *South Africa's Children – A Review of Equity and Child Rights* South African Human Rights Commission and UNICEF South Africa at 55 (March 2011).A Review of Equity and Child Rights

¹¹

compassionate in how it serves the needs of our people who seek justice, particularly vulnerable groups in our society such as our children?

A justice system that does not function efficiently and effectively has a substantial negative impact on the delivery of justice, particularly for those who are vulnerable. Access to justice suffers when court-users, such as children, have to contend with poor and inadequate services; it suffers when the costs of litigation are prohibitive; when the procedures and processes are unduly complicated or burdensome; and the delay too long for the average person.

Various courts under the leadership of the Judges President, Presidents of the Regional Courts and Chief Magistrates and with the assistance of the Department of Justice have taken steps to address the delays and backlogs in our justice system. Some have explored alternative dispute resolution mechanisms to alleviate backlogs. Others have introduced case-flow management. Others are taking advantage of information technology to improve the

efficiency of our courts. Court personnel are encouraged to improve their skills.

This is then where we are. And this is not ideal justice system that the people of South Africa are entitled to expect of us. They are entitled to a justice system that this underlined by the principles that Lord Woolf identified as essential to a civil justice system in order for it to ensure access to justice.¹² These are that the system should:¹³

- (a) be *just* in the results it delivers;
- (b) be *fair* in the way it treats litigants;
- (c) offer appropriate procedures at a reasonable *cost*;
- (d) deal with cases with reasonable *speed*;
- (e) be *understandable* to those who use it;
- (f) be *responsive* to the needs of those who use it;
- (g) provide as much *certainty* as the nature of particular cases allows; and
- (h) be *effective*: adequately resourced and organized.

¹² Rt. Hon. the Lord Woolf, Master of Rolls, Final Report to the Lord Chancellor on the civil justice system in England and Wales (July 1996).

¹³ Id at 2.

WAY FORWARD

I hope this conference will demonstrate the need to review our justice system on an ongoing basis, and explore ways and means of enhancing access to justice. It is about time that we re-examine the fundamentals of our justice system.

While we have had a number of commissions of enquiry into our justice system in the past – the Hoexter Commission and the Galgut Commission come to mind – a review of their reports demonstrates that we have been tinkering where comprehensive reform is needed. To date, we have not sufficiently explored whether there are mechanisms and procedures we could implement to meet the needs of our society today and into the future.

So looking to these next two and a half days, I hope that the focus of our deliberations and the outcome of this conference will include concrete measure to:

First, review our justice system and develop the principles for a justice system that is just, fair, inexpensive, expeditious, understandable and responsive to the needs of our people today and tomorrow.

Second, review the administrative machinery and management of our courts and develop a model for the court administration that is compatible with the independence of the Judiciary.

Third, establish a commission on Access to Justice to pursue long term fundamental improvements in our justice system so that it is truly accessible for all regardless of income or language, and to review our justice system on an ongoing basis.

Fourth, explore other mechanisms to improve the efficiency of our courts, including case flow management, exploring the use of more advanced information technology in our courts, and the use of the alternative dispute resolution mechanisms to alleviate backlogs in our courts.

Fifth, make our criminal justice system more accessible, efficient, effective and more compassionate in dealing with vulnerable groups such as children.

This conference will not solve all the problems, but we hope that it will unsettle some of the assumptions about our justice system that are no longer valid. Our objective is to stimulate future research, dialogue and conferences to explore in detail the needs we hope to identify in these two and a half days. And we hope that this conference will generate new ideas and further initiatives to promote the accessibility, efficiency, and effectiveness of our courts.

The success of this conference will not be measured by its historic nature but by what it stimulates for the years to come.

CONCLUSION

In conclusion, we have many pieces in place that we need to make a real difference in enhancing access to justice

in South Africa. I am encouraged by the enthusiasm and commitment that has been displayed by my colleagues on the bench, the Department of Justice, the Portfolio Committee on Justice, the legal profession and non-governmental organisation for the transformation of our justice system. Your very presence at this conference is a manifestation of that enthusiasm and commitment.

The challenge now is to keep the momentum going, to keep striving to find new and better ways to the need and to set clear goals for what we want to accomplish and for measuring whether we are getting there. This conference can help us to chart a roadmap to an ideal justice system and ultimately to the achievement of the new society contemplated by the Constitution, a society based on democratic values, social justice and fundamental human rights.

I want to thank everyone who worked so hard to make this conference a reality, and everyone who is attending this conference for your commitment to access to justice.