

Access to justice: legal aid and civil litigation

ACCCESS to justice is recognized as a basic right in terms of the new South African Constitution. It is, therefore, gratifying that the Legal Aid Board has embarked on an ambitious programme to give citizens access to justice by providing funds and other facilities for those who cannot afford legal representation. In fact, South Africa is setting an example to the rest of Africa and many other countries by the steps already taken by the Legal Aid Board to provide legal aid, as appears from the following:

- The funding of legal aid has increased dramatically since the early nineties – 24 082 applications for legal aid were granted in 1989/1990 as against 85 231 in 1994/1995 and an estimated 121 178 in 1996/1997! The Legal Aid Board must also be complimented on its efforts to regulate the supervision and administration of legal aid effectively and with a minimum of administrative red tape for the benefit of the public and the legal profession.
- The establishment of legal clinics at nearly all South African universities, and the possible extension of the system.
- The appointment of the Legal Aid Board as the agent of the State to provide legal assistance in terms of the Constitution to those who cannot afford it.
- The proposed extension of the public defender scheme which was launched at the Johannesburg magistrate's court.
- The supplementing of the salaries of candidate attorneys in outlying places in partnership with Lawyers for Human Rights. Pilot schemes have already been initiated in the Caledon and Colesberg districts.
- The proposed extension of legal aid to persons appearing before the Truth and Reconciliation Commission and the Land Claims Court.

Civil litigation

The steps referred to above apply mainly to the criminal courts. They do not even start to fully address the difficulty of providing legal aid in civil matters – the funding of which at this stage is clearly beyond the means of the State. Lack of funding, however, is only one of the problems facing civil litigation. In this issue we publish several contributions which point out shortcomings in the

rules and procedures of the civil courts. The authors' views provide food for thought. If the courts fail to perform the task that the public reasonably expects of them, their legitimacy ultimately comes into question. Inadequacies in the system of civil litigation should be addressed promptly – and cured. Lawsuits should not (to quote a prominent lawyer) "...be dreaded beyond anything short of sickness and death".

Woolf Report

South Africa is not the only country which experiences problems in the field of civil litigation. In several other common law jurisdictions the rules and procedures of the civil courts are under review. In England Lord Woolf was appointed as a one-man commission by the Lord Chancellor in 1994 to review the rules and procedures of the civil courts in England and Wales. The aim of the review was to improve access to justice by reducing the inequalities, cost and delay associated with litigation and by simplifying the rules of practice and procedure.

Lord Woolf's final report was published in July 1996, and contains interesting and far-reaching proposals for change.

His solution, broadly speaking, is to hand over management of the litigation process to the judges. A combination of fast-track procedures and mediation will, according to the report, speed up the current unwieldy procedures, with information technology and the judges providing the platform for the reforms to work on.

Reform in South Africa

Clients want faster access to justice. So do all right-minded members of the Bar. The recent decision of the General Council of the Bar to take the initiative to bring about reform is to be welcomed. Any changes to the system aimed at improving access to justice must be based on evidence in the South African context. There have been various investigations and commissions of inquiry in South Africa into aspects of the court system, e.g. the "first" Hoexter Commission of Inquiry into the Structure and Functioning of the Courts (1983) which identified causes of delay and inefficiencies in the litigation system. Many of the Hoexter Commission's recommendations have, however, not yet been implemented. >

Toegang tot geregtigheid: regshulp en siviele litigasie

TOEGANG tot geregtigheid word as 'n basiese reg erken kragtens die nuwe Suid-Afrikaanse Grondwet. Dit is gevolglik bemoedigend dat die Regshulpraad 'n ambisieuse program geloods het om burgers in staat te stel om toegang tot geregtigheid te verkry deur fondse en ander middele beskikbaar te stel aan diegene wat nie regsverteenvoering kan bekostig nie. Suid-Afrika stel inderdaad 'n voorbeeld vir die res van Afrika en talle ander lande deur die stappe wat die Regshulpraad reeds geneem het met die voorsiening van regshulp, soos blyk uit die volgende:

- Die befondsing van regshulp het dramaties toegeneem sedert die vroeë negentigerjare – in 1989/90 is 24 082 aansoeke om regshulp toegestaan teenoor 85 231 in 1994/1995 en 'n beraamde 112 178 vir 1996/1997! Die Regshulpraad verdien 'n pluimpie vir sy pogings om die toesig oor en administrasie van regshulp effektief en met die minimum administratiewe rompslomp te reguleer tot voordeel van die publiek en die regsprofessie.
- Die daarstelling van regslynke aan bykans alle SA universiteite en die moontlike uitbreiding van die stelsel.
- Die voorgenome uitbreiding van die openbare verdedigerskema wat by die Johannesburgse landdroshof geloods is.
- Die aanstelling van die Regshulpraad as agent van die Staat om regshulp te verleen kragtens die Grondwet aan diegene wat dit nie kan bekostig nie.
- Die aanvulling van die salarisse van kandidaat-prokureurs in afgeleë plekke in vennootskap met Regslui vir Menseregte. Gidsplanne is reeds in die Caledon-en Colesbergdistrikte aan die gang gesit.
- Die voorgenome uitbreiding van regshulp na persone wat voor die Waarheids- en Versoeningskommissie en die Grondeishof verskyn.

Siviele litigasie

Die stappe waarna hierbo verwys word, is grootliks op die strafhowe van toepassing. Die probleem om regshulp in siviele sake te voorsien is nog glad nie ten volle aangespreek nie – sodanige voorsiening is op hierdie tydstip duidelik bo die Staat se vermoë. Gebrek aan fondse is egter slegs een van die probleme rakende siviele litigasie. In hierdie uitgawe verskyn verskeie artikels wat tekortkominge van

die reëls en prosedures in die siviele howe uitwys. Die skrywers se menings verskaf stof tot nadenke. Indien die howe hulle nie kan kwyt van die taak wat die publiek redelikerwys van hulle verwag nie, sal hulle legitimiteit op die lange duur bevreemte word. Ontoereikendhede in die siviele litigasiestelsel behoort dringend aangespreek – en reggemaak – te word. Hofgedinge moet nie (in die woorde van 'n vooraanstaande regsgeleerde) "...gevreemte te word bo alles kort duskant siekte en dood" nie.


Woolf-verslag


Dit is nie slegs in Suid-Afrika waar probleme met siviele litigasie ondervind word nie. In verskeie ander Engels-regtelike jurisdiksies word ondersoek na die reëls en prosedures van die siviele howe ingestel. In Engeland is Lord Woolf in 1994 deur die Lord Chancellor aangestel as 'n eenmankommissie om die reëls en prosedures van die siviele howe in Engeland en Wallis te ondersoek. Die doel van die ondersoek was om toegang tot geregtigheid te verbeter deur die ongelykdhede, koste en vertraging wat verband hou met litigasie te verminder en praktykreëls en prosedure te vereenvoudig. Lord Woolf se finale verslag is in Julie 1996 gepubliseer en bevat interessante en verreikende voorstelle vir verandering.

Sy oplossing kom, oor die algemeen, daarop neer dat die bestuur van die litigasieproses in die hande van die regters moet wees. Volgens die verslag sal 'n kombinasie van stoombelynde prosedures en mediasie die huidige omslagtige prosedures bespoedig, terwyl inligingstegnologie en die regters die platform verskaf waarop die hervormings uitgevoer word.

Hervorming in Suid-Afrika

Kliënte vereis vinniger toegang tot geregtigheid. So ook alle reggeaarde lede van die Balie. Die onlangse besluit van die Algemene Balieraad om die inisiatief te neem om hervorming te bewerkstellig, word verwelkom. Enige wysigings van die stelsel wat beoog om toeganklikheid tot geregtigheid te verbeter, moet gebaseer word op getuienis binne Suid-Afrikaanse konteks ingewin. In Suid-Afrika was daar al verskeie ondersoek en kommissies van ondersoek na aspekte van die hofstelsel, soos die "eerste" Hoexter-kommissie van Ondersoek na die Struktuur en Funkisionering >

One trusts, although with a sense of déjà vu, that a further official investigation will be undertaken as a result of the GCB's efforts. Such further investigation is a prerequisite to any reforms aimed at improving access to justice in South Africa. The interim report on the simplification of criminal procedure which was published by the South African Law Commission in 1995 can serve as an example. 

van die Howe (1983) wat oorsake van vertraging asook ondoeltreffendhede in die litigasiestelsel uitgewys het. Heelwat van die Hoexter-kommissie se aanbevelings is egter nog nie uitgevoer nie. Mens vertrou, hoewel met 'n gevoel van déjà vu, dat 'n verdere amptelike ondersoek onderneem sal word as gevolg van die ABR se pogings. Sodanige ondersoek is 'n voorvereiste vir enige hervormings wat gerig is op die verbetering van toegang tot geregtigheid in Suid-Afrika. Die tussentydse verslag oor die vereenvoudiging van die strafprosesreg wat in 1995 deur die SA Regskommissie gepubliseer is, kan as voorbeeld dien. 


The real world of civil litigation

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and often more valuable than "the right answer". Resources should be conserved or directed to the productive rather than the unproductive, the future rather than the past.

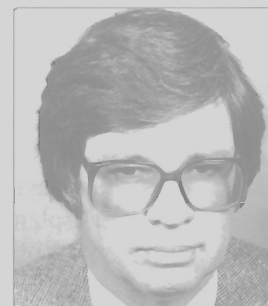
The exploration of these alternatives and the impact they have on our long cherished beliefs is gaining momentum world wide. As in other areas my sense in discussing this with lawyers from around the world is that South Africa, absorbed in more momentous problems, has been left behind. As it has done in the fields of arbitration and advocacy training the Bar now needs to engage in this debate and make up lost ground.

The discussion of these ideas is not novel in South Af-

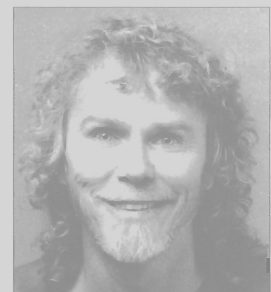
rica but there are few signs here of the fruit which they have borne elsewhere. The time has come for us to shake off our indifference and do something about these problems. The GCB Executive decided at its recent meeting that advocates in South Africa must be in the forefront of any endeavour to meet these challenges in our society. As a result steps are underway to bring together all interested parties to discuss, debate and, we hope, bring about changes which address the costs and delays of our civil justice system. If in the process we can rebut the charge of indifference to the real world around us we will have achieved much in these dying years of the 20th century. 

Juta Prize

Professors JRL Milton and DJ McQuoid-Mason of the University of Natal were awarded the 1995 Juta Prize for their article "The Faculty of Law, University of Natal: Two in one" (1995) 8 *Consultus* 37



Prof John Milton



Prof David McQuoid-Mason