

Treating judges properly

B Wunsh

Judge of the High Court, Johannesburg

To function efficiently and productively judges must be equipped with adequate resources. The lack of them can undermine the quality of judicial work or, at least, impose undue strain on those who have to perform it.

Judge B Wunsh was a leading South African commercial attorney and a senior partner in a prominent Johannesburg firm before his appointment to the Bench.

Adequate remuneration is necessary to ensure that capable people will be prepared to accept appointments as judges and that, once having been appointed, they can maintain a standard of living which is commensurate with the judicial office. The requirement that judges be properly remunerated and that the determination of their salaries be removed from the province of the executive is recognised in the Constitution, section 219(5) of which provides:

"National legislation must establish frameworks for determining the salaries, allowances and benefits of judges, the Public Protector, the Auditor-General, and members of any commission provided for in the Constitution, including the broadcasting authority referred to in section 192."

While it has enacted legislation to deal with the remuneration of the Public Protector, the Auditor-General and various office-bearers, Parliament has so far taken no steps to comply with the constitutional mandate with regard to judges. Over the years the annual adjustment of judges' salaries to cope with increases in living costs has given rise to some tension. Each year representatives of the judiciary have had to make submissions to the Minister of Justice, from whom we are supposed to be independent, and who has from time to time publicly expressed dissatisfaction with judges. To the extent that he agrees with requests, he submits a proposal to the Minister of Finance. The recommendation is considered by a "mandate committee" on which are representatives of the Department of Finance and other departments and they, in turn, make a recommendation to the Cabinet. Every year since I became a judge in July 1995 annual increases in judges' salaries, which are supposed to take effect in July, have been approved about six months later and then granted with retrospective effect. In the

1999-2000 financial year the money for the increases had to be taken from the furniture budget of the Department of Justice. In a time when efforts are made to increase black representation on the judiciary, several successful black practitioners are not interested in the bench because of the much higher rewards of private practice and commerce and industry. This leads to the danger that those who will be attracted to judicial office (this applies to all races and both genders) are people who will find the remuneration package very attractive compared with their existing income from practice which, generally, must be commensurate with their ability.

Last year the judges proposed to the government that it act in terms of section 219(5) of the Constitution. A detailed memorandum was

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submitted to the Minister of Justice by a committee of judges appointed for the purpose by their colleagues. The suggestion was that the function of determining judges' salaries be assigned to the Independent Commission of the Remuneration of Public Office Bearers established under Act 92 of 1997. There had earlier been a suggestion, emanating from the Department of Justice, that a separate commission be established to determine the salaries of judges and magistrates. Apart from the objection to the salaries of judges and magistrates being dealt with by one commission, it is not clear why, when there is legislation and a structure in place, a new commission should be necessary.

Remuneration

I have made some inquiries from colleagues and lawyers overseas regarding the remunera-

tion levels of the equivalent of High Court judges. Generally the salaries are adjusted by commissions or tribunals, not by the executive. There is not much point in comparing judges' salaries in this country with those in other countries because you have to have regard to the purchasing power of the remuneration and also to the comparisons between salaries of private sector senior executives in other countries and their peers in South Africa. To give an example, a High Court judge in England earns about R1 280 000 a year, compared with a South African judge's R416 982 (in each case there are other benefits). On a recent visit to London I paid £1,50 (at the time of writing equivalent to R15,30) for an ordinary cup of coffee for which I would expect to pay about R6,50 in Johan-

nesburg. However, the price of a book here does not compare so favourably with its price in England.

The average age of judges who are appointed to the equivalent of High Courts in the countries I inquired about is about 50. Because of the quest for transformation and the low level of remuneration compared to the private sector, we will, I think, more and more, find people well below this age being appointed in South Africa. Apart from the dangers inherent in this, the long-term effect of judges holding office for periods which far exceed their years in practice remains to be seen.

In a country with a serious lack of funds in fields like education, health and crime prevention, one is hesitant to complain about the inadequate resources available to judges. But the amounts required to remedy the position are not great and, to an extent, could be provided by re-allocating funds that are less effectively spent or which it is intended to spend less effectively elsewhere. The creation of High Courts in Mpumalanga and the Northern Province, announced by the Minister of Justice as

being a priority, will involve capital expenditure running into hundreds of millions of rands and large recurrent expenditures. It does not deserve to rank ahead of the enhancement of the resources of the existing courts. The needs of these provinces for the trial of civil matters and applications in superior courts and appeals from the magistrates' courts, can be met by circuit courts.

I speak of my own court. Each judge has a registrar or clerk. The annual salary of mine is R37 427. Her other benefits could increase this to about R52 000. The annual package of a competent dictation (not the most senior) typist employed by attorneys in Sandton is over R90 000. Often, registrars are law students. They are, generally speaking, not able to type dictated judgments and even manuscript judgments that are not very simple. Whatever I want typed, such as letters and brief memoranda, I write out in longhand and usually have to correct at least once. Between 32 judges who are on duty at any time (that is, excluding those on circuit duty) we have no pool typist for dictated or manuscript judgments. However, her work is not confined to judgments. It embraces also,

subject to the typing of judgments enjoying priority, other documents arising from judges' official duties, typing work for judges' clerks relating to their duties and for the office of the registrar. She compiles and types the list of judges and their secretaries with their office telephone numbers and the list of judges' vehicles with registration numbers for the security personnel. She also types the registrar's personnel list and telephone numbers of the different officers. So that generally there is a long wait after you submit a judgment for typing. To avoid the problem judges often deliver their judgments orally in court; this is less desirable than a written judgment which you have had the opportunity to review and correct. Another person was appointed in this division to help with judgments but the salary level that could be paid was only about R30 000. I will not burden this article with my vain effort to have a manuscript judgment in an appeal typed by her which extended over two weeks and six drafts. I eventually made other arrangements. You cannot blame my handwriting because even passages from previous drafts (the disc having been lost) and the transcripts of the record, in-

cluding exhibits, could not be typed with any accuracy.

Staff

In the countries about which I inquired, the judges' support staff are substantially more qualified than ours. In several cases there are graduate research clerks. As an example, a colleague in the Supreme Court of New South Wales says:

"Each judge has an associate and a tipstaff. The Associate is a senior position. Requiring considerable discretion and skill as well as knowledge of computers and word-processing. However, it does not require any legal qualification, though an associate such as mine would become generally familiar with the kind of work that is done in our Division and of associated procedural requirements.

The tipstaff is a law graduate, fresh out of University usually, who does research tasks and otherwise assists the judge and the associate." An associate's annual salary is about R200 000 and a tipstaff's about R130 000.

Each justice of our Constitutional Court has two research clerks. They are law graduates >

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who serve terms of a year. Their responsibilities include:

- preparing the judge's papers in each case
- doing detailed research on particular topics
- preparing pre-hearing memoranda (identifying the key issues in matters to be heard)
- preparing draft text for judgments
- assisting the judge in Court
- assisting the judge with court-related work (writing speeches, committee work)
- assisting the judge with other work (organisational work, committees, international human rights work) and
- administrative work.

They also review judgments written by their principals. This last task involves not only proof-reading but also cite-checking. This includes:

- reading a case cited to ensure that the reference or quotation is proper authority for the proposition for which it is cited
- ensuring that an authority cited is still good law – that is has not been overruled or modified
- ensuring that cited material has not been taken out of context and that paraphrases accurately reflect the cited authority.

An overseas donor has provided funds for the engagement of six research clerks to be shared by the members of the Supreme Court of Appeal and they are already functioning. The Land Claims Court has two research clerks and each judge of the Labour Appeal Court has an associate whose functions are similar to those of a research clerk.

I hope that this programme will be extended to other courts. The benefits to judges with heavy case loads and to the public to ensure the accuracy of the contents of judgments are obvious. The Witwatersrand Local Division has, for example, a heavy appeal workload. There are appeals to a full bench (the practice of directing appeals to a full bench rather than the SCA is gaining momentum all the time) against judgments of a single judge and weekly an average of about 25 appeals from judgments in the magistrates' court in criminal and civil cases. Appeals in criminal cases are likely to decrease since the introduction of section 309B into the Criminal Procedure Act, but then there are likely to be large numbers of petitions for leave to appeal where magistrates have refused leave. In many cases the appellants in criminal cases are not represented and no heads of arguments are filed. There are about 25 reviews of judgments in criminal cases in the magistrates' court every week. Often the record in appeals are very bulky. The assistance of graduate clerks, not

only to undertake research and to assist with and review judgments, but also to sift appeal records to identify the material documents and issues would be of great value.

Libraries

While the government intends to establish two new High Courts which will have to have libraries, funds are not available to provide existing courts with adequate libraries. The position is aggravated by the weakening of the South African currency and the escalation in the prices of imported books, reports and journals.

The following are the amounts which were budgeted library of the Witwatersrand Local Division for the last five years:

	BUDGET	AMOUNT SPENT
1995/1996	R337 000	R404 173
1996/1997	R340 000	R490 206
1997/1998	R250 000	R539 088
1998/1999	R420 000	R580 000
1999/2000	R380 000	

The amounts spent exceed the budgeted figures because of transfers from the Land Claims Court and other reallocations. The annual expenditure of a leading firm of attorneys on its library is R630 000. The partners and staff have very few text books in their offices and do not receive law reports so that far more is spent on their general library than ours. Our budget has to cater for statutes, law reports and a selection of text books in each judge's chambers.

The following are examples of increases in prices since 1994 (recent depreciation in the value of the rand will aggravate the problem):

	1994	1999
<i>Company Law/Palmers</i>		
(Annual subscription)	R3 112,19	R7 781,73
<i>Law Quarterly Review</i>		
(Annual subscription)	R799,90	R1 079,59
<i>Law of Restitution/Goff</i>	R781,59	R2 300,00
<i>Digest</i> (per volume)	R626,43	R1 473,41
<i>Halsbury's Laws of England</i> (per volume)	R811,00	R2 071,04
<i>Chitty on Contracts</i>		
(I paid in 1996)	R1 777,85	R3 811,23
<i>Statutes of the RSA</i>		
(37 sets)	R20 572,45	R48 000,00
<i>South African Law Reports</i> (38 sets)	R25 290,00	R64 194,00
<i>Meskin on Insolvency</i>		
(36 copies)	R5 519,80	R13 132,80

In the Witwatersrand Local Division we have only much earlier than the current editions of, for example, a number of important foreign books. We have no text books other

than some Australian publications and volume 2 of *Halsbury's Laws of England* in the field of foreign income tax. We have only a few volumes of the *American Restatement of the Law*, and do not have the *American Jurisprudence* at all. We do not have any company law reports from overseas (such as *Butterworth's Company Law Reports*) or *Simon's Tax Cases*. We do not have the *British Tax Review*.

The answer to this problem lies not only in increased funding, but also in more effective co-ordinated management of court libraries on a national level.

Basic to the problem of salaries (this aspect would fall away if they are determined by an independent commission) and resources is that the judiciary does not have any influence or role in the budgeting process. It has to depend on what can be negotiated on its behalf by the Department of Justice and Public Works, parts of the government. When I raised this issue at a judicial training conference a few years ago, the Chief Justice pointed out that we have no taxing power – we cannot raise our own revenue. There lies the rub.

This is what appears in a report "Understanding the Federal Courts" published by the Administrative Office of the U.S. Courts in 1999.

The Judiciary's Budget

In recognition of the constitutional separation of powers among the three branches of the federal government, Congress has given the judiciary authority to prepare and execute its own budget. The Administrative Office, in consultation with the courts and with various Judicial Conference committees, prepares a proposed budget for the judiciary for each fiscal year. The proposal is reviewed to the Congress with detailed justifications. By law, the President must include in his budget to Congress the judiciary's budget proposal without change. The appropriation committees of the Congress conduct hearings at which judges and the Director of the Administrative Office frequently present and justify the judiciary's projected expenditures.

After Congress enacts a budget for the judiciary, the Judicial Conference approves a plan to spend the money, and the Administrative Office distributes funds directly to each court, operating unit, and program in the judiciary. Individual courts have considerable authority and flexibility to conduct their work, establish budget priorities, make sound business decisions, hire staff, and make purchases, consistent with Judicial Conference policies."

This is the type of system and authority we need in South Africa. 