

# ASSESSMENT STUDY ON DELAYED JUSTICE DELIVERY

FINAL REPORT JULY 2010



**Final Report Prepared By:**

Angelo B. Dube, assisted by a team of researchers and legal practitioners.

Email: [angelo\\_dube@yahoo.co.uk](mailto:angelo_dube@yahoo.co.uk)

Cell: (+268) 7602 4064

17 July 2010

<b>Table of contents</b>	<b>Page</b>
Acknowledgment	i
Table of Contents	ii
<b>Chapter 1</b>	<b>1</b>
Overview of the study	
<b>Chapter 2</b>	<b>7</b>
The legal framework within which the Swaziland legal system operates	
<b>Chapter 3</b>	
Identifying possible factors causing delays in justice delivery in Swaziland	18
<b>Chapter 4</b>	
Comparative analysis with similar jurisdictions in the region	32
<b>Chapter 5</b>	<b>39</b>
Recommendations	
<b>Chapter 6</b>	<b>51</b>
Conclusion	
List of Sources	52
Annexures	54

## Chapter 1 - Overview of the study

### 1. Introduction

Swaziland was a British Protectorate until 6 September 1968 when she gained independence and inherited a Westminster-model parliamentary system that provided for a constitutional monarchy, a prime minister and also contained a bill of rights. Swaziland is an independent state whose fully autonomous government falls under the monarch who is also Head of State. Swaziland is a hereditary monarchy governed under the constitution of 2005. Swaziland became a self-governing state in 1967 when King Sobhuza II, the then paramount chief, was recognized internationally as a king and the country acquired its own flag.

The Westminster based constitution was revoked in 1973 and replaced with a system which sought to amalgamate western and traditional styles of government. This structure incorporates the system known as *tinkhudla* and enables the people to elect their parliamentary representatives for specific constituencies. Power is vested in the King who appoints the Prime Minister and consults with the Cabinet which is headed by the Prime Minister. This represents the western system. The Swazi National Council, *Liqoqo*, represents the traditional side. This is headed by the King and Queen Mother in accordance with the constitutional arrangement for a dual monarchy. The Queen Mother's role is mainly to uphold traditional and cultural elements.

Swaziland's legal system also operates on a dual basis comprising traditional Swazi National courts as well as civil courts. They are headed by a Chief Justice to whom all judges and magistrates report.<sup>1</sup>

Constitutionally, the monarch's power is delegated through a dualistic system: modern, the cabinet, and less formal traditional government structures. Parliament consists of the House of Assembly and Senate. The Prime Minister, who is head of government, is appointed by the king from among the members of the House of Assembly on recommendations of the King's Advisory Council. The cabinet, which is recommended by the Prime Minister and approved by the king, exercises executive authority. Members of both houses serve five-year terms.

Constitutionally, the king must approve legislation passed by parliament before it becomes law.

When Swaziland attained independence the British left the country with a dual legal system comprising Roman-Dutch Common Law and Customary Law. This dual legal system still exists in Swaziland today. To a large extent this legal dualism, coupled with a plethora of other factors impact on the delivery of justice.

---

<sup>1</sup> Dube BA and Magagula AS, *The Law and Legal Research in Swaziland*, published with New York University's Globalex, (September 2007).

The different court systems, established under both customary law and civil law both suffer from delays in the delivery of justice, albeit disparately.

## **1.2 Statement of the problem**

As stated above, Swaziland operates a dual legal system, with two distinct court systems, namely traditional courts<sup>2</sup> and modern courts<sup>3</sup> established by statute and the Constitution of Swaziland.<sup>4</sup> The efficacy of the different court systems differs, and is largely influenced by considerations of various factors, such as legislative provisions, jurisprudence, human and fiscal resources.

The disparity in the success rates of the two court systems often leads to forum shopping amongst both accused persons and victims or aggrieved persons. Forum shopping refers to a situation where users of the justice system make preference of one court system over another in the adjudication of their cases, where such choice is influenced by the probability of obtaining a favorable sentence or judgment. Customary courts are largely perceived to provide prompt and affordable justice, in that cases brought before them are in most instances dispensed with timeously. Hence in most cases forum shopping is biased more towards customary courts for quick justice. Further, customary courts may be preferred by a victim of a crime because of the belief that unlike modern courts, there will be no lawyers to derail the proceedings. Thus where both court systems are competent to determine a particular matter, parties might still push to have it heard by the customary court for the above mentioned reasons or for any other. This preference for traditional courts contributes to the strain, and therefore backlog that eventually falls on this sector to deal with the overwhelming number of complaints. However, this backlog and other delays are not limited to the traditional court sector.

Modern courts also suffer from delays in justice delivery. These courts are overly burdened by the ever increasing number of matters they have to adjudicate upon, including matters that would not otherwise fall within the jurisdiction of the customary courts. In some cases, matters that fall within the jurisdiction of both court systems would be referred to the modern court system because of the allure of a fair hearing and the apparent checks and balances this sector provides. As a result, a backlog is created.

Apart from the jurisdictional factors highlighted above, a number of other reasons can be pinpointed at this preliminary stage to explain the delay in justice delivery. One of these could be the power to decide which forum determines which cases. Previously the exclusive preserve of the office of the Director of Public Prosecutions (DPP), there now exists a grey area in relation to case referral (or choice of forum), as practice

---

<sup>2</sup> The traditional court system comprises of Swazi Courts, which are established by the Swazi Court Act No.80 of 1950

<sup>3</sup> These are the Magistrates Court, High Court, Supreme Court, Industrial Court and Industrial Court of Appeal

<sup>4</sup> Act No.1 of 2005.

will show that it is now dealt with by state police. Insufficient resources, financial, human and technical resources, could also be blamed for the delays in the delivery of justice.

However, by way of a thorough examination of the laws, the actual practice on the ground as well as the perceptions of both role players and beneficiaries of the justice machinery, this study reveals a broad catalogue of factors that impede or clog the cogs of the wheels of justice.

### **1.2.1 Implications of delay**

It is trite that justice delayed is justice denied. The effects of a failure to deliver justice on time can have deleterious impact on the lives of all parties involved, in particular the aggrieved party. This can lead to further violations of fundamental rights. The negative effects of such delays are much more pronounced where the matter being litigated or prosecuted involves violation of fundamental rights. Any continued delay of justice constitutes a further breach. The net effect of this is to place the state in bad light in relation to its international law obligations amongst its peers.

The study serves to provide critical information on the major issues on the operations of the justice system, the process of justice delivery and the implications of delays. The study further serves to evaluate all the factors that influence or lead to the delay in justice delivery within the whole justice machinery. It also concludes and makes recommendations on how to improve operations of the overall justice machinery as well as to avoid delays.

### **1.2.3 Overall objectives**

The overall objective of this study was to undertake a comprehensive analysis of the underlying reasons for delayed justice delivery and to outline strategies as well as concrete interventions to address this issue.

## **1.3 Scope of work**

### **1.3.1 The consultant was expected to**

- (a) Develop methodology for undertaking the research including,
- (b) A participatory approach involving actors on both the supply and the demand side of justice,
- (c) The collection of quantitative and qualitative baseline data to facilitate future monitoring activities, and
- (d) The identification of policy targets for effective and efficient justice delivery.

### **1.3.2 Identify and analyze reasons for lengthy court proceedings including aspects such as**

- a) judicial management and internal administration,
- b) relevant mechanisms and procedures for court cases (filing, registering, disposing, preparation of court proceedings),
- c) the adjudication mechanisms between modern and traditional courts with respect to their different scope of jurisdiction and capacities,
- d) professional and ethical standards and other accountability mechanisms,
- e) budgetary control and resource allocation for court administration and training,
- f) differences of justice delivery in urban and rural areas,
- g) Service delivery and user-friendliness perceived by people seeking justice in particular disadvantaged groups including women, children, people living with HIV & AIDS, and people living in poverty.

### **1.3.4 Conduct a capacity assessment of law enforcement agencies, judges and public prosecutors, magistrates including aspects such as:**

- a) pre and in-service training,
- b) access to legal information and reference material,
- c) infrastructure and equipment
- d) Available IT systems and use of systems.

### **1.3.5 Identify strategies as well as concrete interventions to promote timely trials and delivery of judgments taking into account their financial implications and potential to be integrated into existing structures. The analysis should include among other issues:**

- a) Potential areas for streamlining procedures while ensuring quality delivery,
- b) Mechanisms for performance monitoring,
- c) Good practice examples and remedies applied in other countries in the region.

#### **1.4 Deliverables**

The consultant was expected to submit the following in the final report;

- a) A report analyzing reasons for delayed justice delivery and outlining strategies as well as concrete interventions to address this issue.
- b) A matrix of proposed intervention aimed at strengthening the formal judiciary which is prioritized and sequenced taking into account their financial implications and potential to be integrated into existing structures.

#### **1.5 Outputs/Activities of the Study**

In conducting the study the consultant was expected to submit the following documents as agreed in the times contained in the project proposal:

- a) Project Brief Report
- b) Inception Report
- c) Progress Reports
- d) Final Draft
- e) Final Report
- f) Community Consultative Meetings
- g) Meetings with judicial officers
- h) Interviews with role players in the justice machinery
- i) Administering questionnaires

#### **1.6 Engagement of consultant**

To carry out the task, the client enlisted the services of the consultant, Mr B.A. Dube. Mr Dube holds law degrees from the University of Swaziland and postgraduate degrees from the University of Pretoria with a major in human rights and international law. He has worked in various sectors and courts in the jurisdictions of South Africa, Zimbabwe, Ghana and Somaliland. Mr Dube was assisted by a capable team of eleven people with diverse qualifications and experiences. The research team comprised of two fellow lawyers, Maxine Langwenya and Alfred Magagula and a few research assistants drawn from civil society, legal practitioners and law graduates.

## **1.7 Methodology / Data collection**

The methodology employed in this study was a combination of desktop approach and field surveys. Desktop legislative review of national and international legal instruments of relevance to justice delivery was conducted. The project also relied on observations made during administering of questionnaires and interviews with respondents. Special interviews were conducted for senior judicial officers such as judges of both the High Court and Industrial Court. For comparative analysis of similar jurisdictions in the regions, both desktop survey and interviews with in-country consultants were conducted.

### **1.7.1 Component 1**

- This component's main aim was to highlight legal instruments that pertain to justice delivery.

### **1.7.2 Component 2**

- This component sought to assess the general perception of both role players and end users of the justice machinery in relation to justice delivery in Swaziland. To that end a research tool in the form of a general questionnaire was administered to a pool of +/-300 respondents spread throughout the country. It was noted at the preliminary stages of the research that administration of the tool would be met with a mixture of apathy and fear from a large section of the population.
- This component further sought to assess the capacity of role players as well as the availability and impact of infrastructure on the delivery of justice.
- It further sought to and did draw inspiration from other jurisdictions in the region in an attempt to proffer good practice models. It is hoped that these can then be used to shape policy targets for the country for effective and efficient justice delivery.

## **Chapter 2 – The legal framework within which the Swaziland justice system operates**

### **2. Introduction**

The current justice system operates within a legal framework made up of legislation, precedent and international law. Below is an analysis of the key legal instruments within the Swaziland justice machinery.

#### **2.1 Assessing the legal system in Swaziland**

The legal system of any country has an impact on the delivery of justice, be it in the criminal or civil justice sector. Effective, humane, and fair criminal justice systems are essential for the maintaining of the rule of law and for ensuring an environment in which equitable and sustainable development can occur. The principles and institutions established under that system determine its efficacy in relation to the enjoyment of fundamental rights, access to justice, timely delivery of justice, and admission to bail. Unless these institutions are properly set up and properly functioning, security for citizens, particularly the poor and marginalized vulnerable groups, the economic, social and political development of communities is impeded.

A desk top review of the pertinent legal instruments in our judicial system, as appear below, has already been conducted.

#### **2.2 The Constitution of Swaziland Act No.1 of 2005**

- a) Has a bill of rights (chapter 3) which attaches various fundamental rights & freedoms to a human being and accordingly applies to suspects as well. These include the respect for life (section 15), liberty (section 16), right to fair hearing (section 21), equality before the law and equal protection of the law (section 20).
- b) Section 33(1) confers a right to administrative justice and provides that a person appearing before any administrative authority has a right to be heard and to be treated justly and fairly in accordance with the requirements imposed by law including the requirements of fundamental justice or fairness and has a right to apply to a court of law in respect of any decision taken against that person with which that person is aggrieved.
- c) Section 33(2) provides that a person appearing before any administrative authority has a right to be given reasons in writing for the decision of that authority.

- d) Section 139(4) provides that the proceedings of every court should be held in public subject to caveats in the Constitution or orders of a court in the interest of public morality, public safety, public order or public policy.
- e) Section 141(1) provides for the independence of the judiciary in the administration of justice.
- f) Section 162 appoints a DPP who is vested with the power in any case to institute, undertake, take over and continue, discontinue any criminal proceedings.
- g) In the exercise of his power, the DPP shall, according to section 162(6), have regard to public interest, interest of administration of justice and need to prevent abuse of the legal process and shall be independent.

### **2.3 The Criminal Procedure and Evidence Act No.67 of 1938**

The Criminal Procedure & Evidence Act (CPEA) deals with procedural requirements in dealing with criminal cases. A criminal court has to decide amongst others whether; an offence has been committed; who committed it; what should be the appropriate punishment to the offender. Answers to these implied questions are provided by the substantive rules of criminal law and the law of evidence.

#### **a) Bail**

Section 16(7) provides that if a person is arrested or detained, without prejudice to any further proceedings that may be brought against that person, that person shall be released either unconditionally or upon reasonable conditions including in particular such conditions as reasonable and necessary to ensure that the person appears at a later date for trial or proceedings preliminary to trial.

#### **b) Plea proceedings**

A plea is the answer which an accused gives to charge. Once the accused has pleaded he is entitled to a verdict. Section 118(2) states that a charge will be read to the accused and, further, that the accused must enter a plea which must be recorded. In addition, section 141 states that on the day

of the trial, the accused shall be informed of the offence alleged against him in the indictment or summons, and he shall be required to plead thereto.

**c) The conduct of criminal proceedings**

The criminal justice system provides for a trial to be held in an open court and in public, as per the provisions of section 172(1). However, section 172(5) provides that the court can direct that trial be held in camera in the interest of good order and morals. Section 172(1) further requires the presence of the accused during the trial, and that he must understand the language in which he/she is tried. Section 141 gives the court the discretion to postpone the trial if it deems fit.

**d) The presentation of the case**

In presenting his case the prosecutor is required to explain the charge and the evidence he will lead very briefly, without elaborating on either, as per sections 174(1)-(3). Section 176(1) permits the court to discharge an accused at his application where the prosecutor does not appear on the day appointed for the trial. After conviction the accused may opt for an appeal or review.

**e) Private prosecution**

In some cases prosecution can be exercised by a private party. Part 3 of the CPEA provides for private prosecution at the instance of private person which could either be the next of kin of the victim of the offence or those persons with a substantial and peculiar interest in the trial. The CPEA imposes certain duties upon the private prosecutor. Before private prosecution can be effected there must be paid a security deposit attesting to the serious intentions of the private prosecutor, and costs connected to the service of process, including those incurred by the accused in the event that he acquitted.

**2.4 The Director of Public Prosecutions Order No.17 of 1973**

This Order's main purpose was to transfer prosecutorial powers from the Attorney General, as given under the saved provisions of the 1968 Constitution, to the hands of the DPP. This was further superseded by the Constitution of 2006.

**2.5 The Magistrates Courts Act No.66 of 1938**

The Magistrates Courts are a creature of a statute, the Magistrate's Court Act. Section 3 of the Act establishes three classes of courts; first class, second class and third class.

### **a) Criminal jurisdiction**

Section 70 deals with jurisdiction of the various classes of courts. Magistrate's courts do not have jurisdiction to try offences like murder, rape, treason and sedition, offences relating to coinage and currency including conspiracy or attempt to commit any of these. Exceptions to the limit of jurisdiction vary with the classes of the courts. Section 71(1) affirmed the territorial principle with regard to magistrate's courts. It stipulated that a person would be tried within the district in which he allegedly committed the offence charged. The other parts of section 71 provide variations to this principle. In terms of punishment, the jurisdiction of the magistrate's court of first class is imprisonment not exceeding 2 years; a fine not exceeding E400.00; and whipping not exceeding 15 strokes. This is according to section 72. The second provision to section 72 stipulates that the criminal jurisdiction of a principal magistrate in terms of punishment would be imprisonment not exceeding 7 years and a fine not exceeding E1000.00. This proviso was amended through section 5 of the Magistrates Courts (amended) Act 1/1988. Instead of the fine not exceeding E1000.00 the principal magistrates can impose such fine as may in accordance with the law be imposed, and instead of the 7 years he can impose a sentence not exceeding 10 years. This is in terms of section 73(1) which allows for increase of the jurisdiction of a magistrate by the minister in consultation with the Chief Justice. In addition, a senior magistrate is empowered to impose a sentence of imprisonment not exceeding 7 years or such fine as may by law be imposed. This is in terms of section 2 of the Legal Notice 57/1988, the Magistrates Courts (increased of jurisdiction) Notice, 1988.

### **b) Civil jurisdiction**

Section 15 confers civil jurisdiction for all matters sounding in money that do not exceed E2000.00.

## **2.6 The Legal Practitioners Act No.15 of 1964**

The Act addresses itself to the educational and practical requirements for the admission of both advocates & attorneys. The Act further attempts to foster confidence and trust in legal practitioners by the general public through provisions calling for an establishment of a trust account to safely keep client's money.

### **2.6.1 Powers of the high court in disciplining delinquent practitioners**

Section 27(1) empowers the High Court to enforce disciplinary measures against legal practitioners for professional misconduct. It further establishes a disciplinary tribunal for making such enquiries. The Act

further establishes the Law Society which serves as a professional body and a watch dog over legal practitioners

### **2.7 The Police Act No.29 of 1957**

The Police Act does not devote itself to administration of justice at the instance of the public at large, it deals with offences committed by members of the police force and the disciplinary measures thereof, that is within the police force.

### **2.8 The Public Order Act No.17 of 1963**

The Public Order Act does not relate itself to administration of justice. Instead it deals with the control of public gatherings, the prohibition of offensive weapons at public meetings and processions, the power to prohibit entertainment and sporting events, acts or conduct constituting an incitement to public violence, jurisdiction in the matter of punishment, saving of other laws as to dispersal of riotous gatherings, intimidation and molestation and wrongfully inducing boycotts.

### **2.9 The Limitation of Legal Proceedings against the Government Act No.21 of 1972**

This Act concerns itself with the limitation of time in connection with the institution of legal proceedings against the government of Swaziland. Section 2(1) provides that subject to section 3, no legal proceedings shall be instituted in respect of any debt-

- a) Unless a written demand, claiming payment of the alleged debt and setting the particulars of such debt and cause of action from which it arose, has been served on the Attorney General by delivery or by registered post;
- b) Provided that in the case of a debt arising from a delict, such demand shall be served within ninety days from the day on which the debt became due;
- c) Before the expiry of ninety days from the day on which such demand was served to the Attorney General unless the Government has in writing denied liability of such debt before the expiry of such period;
- d) After the lapse of a period of twenty four months as from the day on which the debt became due.

### **2.10 Government Liabilities Act No.2 of 1967**

Section 4 prevents the attachment of government property to satisfy a judgment debt but it places an obligation upon the accountant general to make or cause payment to be made out of the revenues of the government.

## **2.11 The Industrial Relations Act No.1 of 2000**

The Industrial Court has exclusive power to deal with Industrial matters and decisions of this court have the same effect as the decisions of the High court. The Act aims to provide a conducive environment for all labour stakeholders to be able to resolve disputes or access justice easily and cheaper. This Act does not apply strict rules of procedure e.g. a party can be represented by any person even non-lawyers. Furthermore, matters of evidence are not dealt with in a strict and technical manner because the Court aims at allowing all people to access justice hence a technical irregularity may be disregarded if that will not lead to the miscarriage of justice.

The Court has exclusive jurisdiction to hear, determine and grant any appropriate relief in respect of an application, claim or complaint or infringement of any of the provisions of this Act, the Employment Act, the Workmen's Compensation Act, or any other legislation which extends jurisdiction to the Court, or in respect of any matter which may arise at common law between an employer and employee in the course of employment, or between employer and bargaining workers formations representatives.

### **a) Right of appeal or review**

An aggrieved party has a right of appeal against the decision of the Industrial Court on a question of law to the Industrial Court of Appeal. The Industrial Court of Appeal, in considering an appeal, shall have regard to the fact that the Court is not strictly bound by the rules of evidence or procedure which apply in civil proceedings. An appeal against the decision of the Court to the Industrial Court of Appeal shall be lodged within three (3) months of the date of the decision.

Interestingly, unlike in other courts, such as Magistrates Court or the High Court, legal representation at the labour court can be provided by any person. Admission as an attorney or an advocate is not a pre-requisite.

## **2.12 The High Court Rules**

The Rules mainly provide for procedures and requirements in civil actions. Rule 15(1) state that no proceedings shall terminate solely by reason of the death, marriage or other change of status of any party thereto unless the cause of such proceedings is thereby extinguished. The Rules of court allow every one to advance his or her case as it states in Rule 19(1) that subject to any direction given by the court, the defendant in every civil

action shall be allowed at least ten days after service of summons on him within which to deliver a notice of intention to defend, either personally or through his attorney.

In furthering the above objective Rule 22(2) provides that the defendant shall in his plea either admit or deny or confess and avoid all the material facts alleged in the combined summons or declaration or state which of those facts are not admitted and to what extent, and shall clearly and concisely state all material facts upon which he relies. In cases where any pleading is vague and embarrassing or lacks averments which are necessary to sustain an action or defence, as the case may be, the opposing party may, within the period provided for filing any subsequent pleading, deliver an exception thereto and may set it down for hearing as provided for in Rule 23(1).

The Rules also provide for the extension of time and removal of bar and condonation as per Rule 27(1) and provides that in the absence of agreement between the parties, the court may upon application on notice and on good cause shown, make an order extending or abridging any time prescribed by these rules or by an order of court or fixed by an order extending or abridging any time for doing any act or taking any step in connection with any proceedings of any nature whatsoever upon such terms as to it seems fit. The High Court Rules also make provision for a Pre-Trial Conference. Rule 37(1) provides that an attorney desirous of having an action placed on the roll as referred to in Rule 55 shall as soon as possible after the close of pleadings and before delivering a notice in terms of Rule 55A(1) and (2), in writing request the attorneys acting for all other parties to such action to attend a conference on a date and at a time stated in the request, being not less than five or more than ten days after delivery of the request, with the object of reaching agreement as to possible ways of curtailing the duration of such trial and in particular as to all. In Procuring Evidence for Trial, Rule 38(1) makes provision for any party, desiring the attendance of any person to give evidence at a trial, as of right, without any prior proceeding whatsoever, to sue out from the office of the Registrar one or more subpoenas for that purpose, each of which subpoenas shall contain the names of not more than four persons, and service thereof upon any person therein named shall be effected by the Sheriff or his Deputy, in the manner prescribed by Rule 4.

Rule 40(1) makes provision for proceedings in *forma pauperis* and (a) provides that a person who desires to bring or defend proceedings in *forma pauperis*, may apply to the registrar who, if it appears to him that he is a person such as is contemplated by sub-rule (2)(a), shall refer him to an attorney. Such attorney shall thereupon inquire into such person's means and the merits of his case and, upon being satisfied that the matter is one in which he may properly act in *forma pauperis*, he shall act therein. Should such attorney at any stage during the course of the proceedings consider that the matter is one which justifies the instructing of an advocate he shall furnish a certificate to the registrar to that effect and the registrar may authorise the attorney to engage an advocate who shall act in *forma pauperis*.

### **2.13 International and national law obligations**

The international law obligations of the state of Swaziland, both under treaty law and customary international law, coupled with its constitutional obligations demand that an effective, prompt and accessible justice machinery should be in place for the enjoyment of all citizens and residents within its territory. This is also in line with the UN's Millennium Development Goals (MDGs). It is in that light that a proper assessment of the current needs of the justice machinery in Swaziland, especially an assessment of the delays, is required. Hence this study will be conducted with due regard to the domestic legal instruments as well as the international law requirements for an accessible justice system.

### **2.14 Common Law**

Swaziland also applies the common law, which refers to unwritten law or law from non-statutory sources, but excludes Swazi customary law. Section 252(1) of the Constitution provides that the principles and rules that formed, immediately before 6 September 1968, the principles and the rules of Roman-Dutch Common law as applicable to Swaziland since 22 February 1907 are confirmed and shall be applied and enforced as the common law of Swaziland except where and to the extent that these principles or rules are inconsistent with this constitution or a statute. The Common Law of Swaziland is primarily Roman Dutch Common law as applied in the Transvaal on 22 February 1907.

### **2.15 Authoritative Texts**

Written works of eminent authors have persuasive value in the courts of Swaziland. These include writings of the old authorities as well as contemporary writers from similar jurisdictions.

## **2.16 International Law**

Swaziland is signatory to many international instruments. Although the country is quick to ratify, implementation is often slow or never materialises. Swaziland belongs to the dualist tradition, thus views international law and domestic law as two separate legal systems.<sup>5</sup> Hence domestication of international law by an Act of Parliament is necessary before international law can be applied. This of course excludes customary international law which is binding on all states. The Constitution in section 238 provides that unless an international agreement is self-executing, it will not become law in Swaziland unless enacted into law by Parliament. The Attorney General is mandated by section 77(5)(b) to draft and peruse treaties and agreements the government of Swaziland is party to.

## **2.17 Customary Law**

Since Swaziland is perceived to be a homogenous society with minimal divisions along clan or tribal lines, it is largely believed that its customary law is uniform, taken from practices and customs that have obtained since time immemorial. However, for custom to be worthy of the name, it must be certain, reasonable, practiced by many people and must be notorious. It must attain the recognition of formal law. The custom must be so notorious that it must gain lawful recognition.

The application of customary law is sanctioned by section 252(2) of the Constitution which provides that the principles of Swazi law and custom are recognised and adopted and shall be applied and enforced as part of the law of Swaziland. Subsection (3) thereof provides that the provisions of subsection (2) do not apply in respect of any custom that is and to the extent that it is inconsistent with a provision of the Constitution or a statute and enforced as part of the law of Swaziland. These constitutional provisions buttress those of the Swazi Courts Acts No.80 of 1950 which provides that where customary law is repugnant to natural justice; it shall to the extent of that repugnancy be null and void. However, instances where customary law is declared null and void for its failure to comply with natural justice are hard to come by. The denial of legal representation under customary criminal procedure is a clear infraction of the rules of natural justice and the right to a fair trial.

The customary law of Swaziland is not codified. It is passed down from generation to generation by oral tradition. This has led to varying, almost always conflicting versions of what real Swazi law and custom is. There were moves towards the end of the last decade to codify all Swazi customary law but to this day the code has

---

<sup>5</sup> See further in this regard the authoritative case of *Professor Dlamini v The King* (41/2000) [2001] SZCA 13 (13 June 2001).

not been published. Today Swazi law and custom is interpreted and applied almost exclusively by Swazi Courts established under the 1950 Act, who apply it in cases of minor infractions, such as petty theft and domestic quarrels. Of late, however, the trend has been for these courts to apply customary law in cases of domestic violence, robbery and theft.

### **2.18 Subordinate Legislation**

Subordinate legislation refers to any instrument having force of law made under an Act of Parliament. In terms of section 253(1) of the Constitution. Parliament has power to make such subordinate legislation. This could refer to rules and regulations made under any Act of Parliament.

### **2.19 The Justice System in Swaziland**

At the apex of the Swaziland justice system is the Supreme Court, which is the final court of appeal on all matters. It has a supervisory and review jurisdiction over all the courts of Swaziland. The High Court is second after the Supreme Court, and it is vested with powers to handle matters with a constitutional bearing. It also has unlimited original jurisdiction in civil and criminal matters. Parallel to the High Court are the Industrial Court and Industrial Court of Appeal, which are specialist courts dealing exclusively with industrial and labour matters. Magistrates Courts follow below the High Court. Swazi National Courts were set up to deal with issues involving Swazi nationals under customary law. Over the years the precise definition of a Swazi national has become blurred as more non-nationals were tried and convicted by these courts, presided over by court presidents, who are supposedly well versed in Swazi law and custom. The 1998 Swazi Administration Order set up Chiefs Courts which were to work in similar fashion to the Swazi National Courts, but this Order was struck down by the Court of Appeal. The judiciary faced a number of challenges in recent years, mainly from government's refusal to obey court orders, resulting in the en masse resignation of judges of the former Court of Appeal. Tenure of office was also a challenge, as at the beginning of 2007 only two judges of the High Court occupied office after their compatriots' one-year contracts were not renewed.

### **2.20 The Constitution and the Judiciary**

The 2006 Constitution ushered in a departure from the position laid down by the 1973 Decree which vested all judicial, executive and legislative powers in the King. Judicial power now exclusively vests in the judiciary in terms of section 140(1) of the Constitution. To avoid a repeat of the 1973 usurpation of power by the monarch,

the Constitution further provides that no organ or agency of the Crown shall be conferred with final judicial powers.

To that end section 138 of the Constitution further provides that justice shall be administered in the name of the Crown by the judiciary which shall be independent and subject only to the Constitution. Section 139(1) provides that the judiciary shall consist of

(a) The Supreme Court of Judicature comprising –

(i) The Supreme Court, and

(ii) The High Court

(b) Such specialised, subordinate and Swazi courts or tribunals exercising a judicial function as Parliament may by law establish.

## **2.21 Conclusion**

An accessible, speedy and effective justice machinery is key to the good governance of any country. This is much more pronounced in the era of constitutional supremacy and in light of the obligations that the state of Swaziland has under international law. A fully functional machinery is also key to the realisation of the United Nations Millennium Development Goals with which the country has aligned itself.

It is therefore crucial for this country to overhaul its domestic legal regime to be in line with international law as well as change policies to embrace emerging trends in legal development. Further the users must have confidence in the system in order for it to operate successfully.

## Chapter 3 - Identifying possible factors causing delays in justice delivery in Swaziland

### 3. Introduction

As highlighted in the proposal, the research team collected data via administering questionnaires, conducting interviews and making general observations on public responses during the research exercise. There were pronounced differences in the perceptions of the public in the urban and the rural areas, as well as between the perceptions of court personnel vis-à-vis law enforcement agents. Of note is the blame game between state police and the prosecution, with all citing different causes for the delay in the justice machinery. What transpired from the research was that all the identified areas of concern coalesce to produce the slow pace of the machinery of justice. It further transpired that whilst some of the causes are internal, that is within the judiciary itself, others are external. These include those emanating from the support structures, institutions or role players and the judiciary might not have control over them. As a result, all the cited factors need to be examined holistically, and solutions can only be borne from an integrated approach.

#### 3.1 Key factors identified as possible causes of delay

Several factors were cited as causing or contributing to the delay in the delivery of justice in the country. It is worth mentioning from the outset that the research uncovered that Magistrates Courts are the most heavily impacted upon by the delays, since they deal with a majority of the cases in Swaziland. Magistrates Courts interface with a number of criminal cases, from petty theft to serious matters such as rape, and the large volumes that go through these courts is attested to by the statistical presented evidence below. In Table 1 respondents indicated the Magistrates Court as the court which heard most of their cases (about 66%).

**Table 1: Which court heard your matter?**

	Frequency	Percent	Valid Percent	Cumulative Percent
Valid Traditional	65	20.7	20.7	20.7
Magistrate	209	66.6	66.6	87.3
High	40	12.7	12.7	100.0
Total	314	100.0	100.0	

These are:

##### 3.1.1 Inadequate evidence or information

Certain respondents cited inadequate information or evidence as contributing factors to the delay. Lack of evidence impacts negatively on the prosecution's job and results in suspects who would have otherwise been convicted, being set free. Lack of evidence also leads to delays in the progress of trials as police may push for postponement of cases in order to continue investigations after making arrests. This was

particularly decried by magistrates, who complained about the police practice of arresting suspects before finishing investigations. This eventually leads to acquittals and waste of court time and resources. Table 2 below shows that whilst most respondents were notified of their trial dates within three months (about 63%), there was still a large percentage (about 16%) whose trial dates were only set after waiting for as much as nine months. Interestingly, Table 3 shows a general discontent amongst respondents on the amount of time taken for setting of trial dates.

**Table 2: After how long were you informed of your trial date?**

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	three	198	63.1	63.1	63.1
	six	41	13.1	13.1	76.1
	nine	24	7.6	7.6	83.8
	nine plus	51	16.2	16.2	100.0
	Total	314	100.0	100.0	

**Table 3: Do you think the time taken to set your trial date was reasonable?**

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	yes	148	47.1	47.1	47.1
	no	166	52.9	52.9	100.0
	Total	314	100.0	100.0	

The delays in setting trial dates, coupled with the perceived partiality within the justice machinery amongst members of the public has led to the creation of a major distrust amongst members of the public. Table 4 below shows that most respondents felt that their trials were not fair either for want of bail or delays in setting of trial dates.

**Table 4: Do you think you received a fair trial?**

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	yes	134	42.7	42.7	42.7
	no	179	57.0	57.0	99.7
	4.00	1	.3	.3	100.0
	Total	314	100.0	100.0	

### 3.1.2 Lost or stolen dockets

A major concern cited by respondents was the long and bureaucratic route taken by docket and files to reach the office of the DPP and the AG as well as the Chief Justice's office. This is much more pronounced in matters regarded as serious offences (such as murder, rape etc) which require committal to the High Court.

There is no particular statute regulating the route a docket ought to take for such matters, but there is in existence a long standing practice between the DPP and the police. The docket must first be transmitted to the regional police commander. Upon satisfaction that the suspect has indeed committed a serious offence, the regional commander must further transmit the docket to the police headquarters. From there, the matter is taken to the DPP's office. Meanwhile the suspect is being remanded at the Magistrates Court. This process can take up to a year or more. As a result, court time at the Magistrates Court level will be spent on remands for cases which will eventually be committed to the High Court, causing backlog at the Magistrates Courts level.

As of June 2010, in the Pigg's Peak Magistrate Court alone, there were eight serious cases (rape and murder) pending committal to the High Court. Of these, four of the suspects were arrested in 2009, (i.e., in the months of May, October, and December) whilst the other four were arrested in the first quarter of 2010.

### 3.1.3 Insufficient resources, like cars, staff, finances

The generally low morale of role players in the justice machinery such as within the prosecution and magistracy was cited as a contributing factor. Major morale-killing factors include insufficient resources such as cars, staff, finances etc. There was a noted need for recording equipment and transcription services. It was observed that everything that transpired in court had to be handwritten by the presiding officer(s), before being reduced to typed text, and then further reduced into a written judgment. This takes a lot of time, especially because in most court proceedings at the Magistrates Court level accused persons use SiSwati, leaving the judicial officer(s) to translate in his handwritten recording. Sometimes the meaning of words uttered is lost in translation, requiring a return to the audio or video recording to verify words used. Since there is no recording equipment, certainly justice delivery will be negatively impacted upon as presiding officers would have to substitute their own meaning to missing words in the court record. This is achieved by piecing together the already hazy recollection of the witness' testimony, and chances of wrong words being used are high.

**Table 5: Equipment**

	Frequency	Percent	Valid Percent	Cumulative Percent
Valid yes	7	15.9	15.9	15.9
no	37	84.1	84.1	100.0
Total	44	100.0	100.0	

Note: Only 15.9% of respondents felt they had sufficient equipment and tools to carry out their jobs, whilst 84.1% felt resources were lacking.

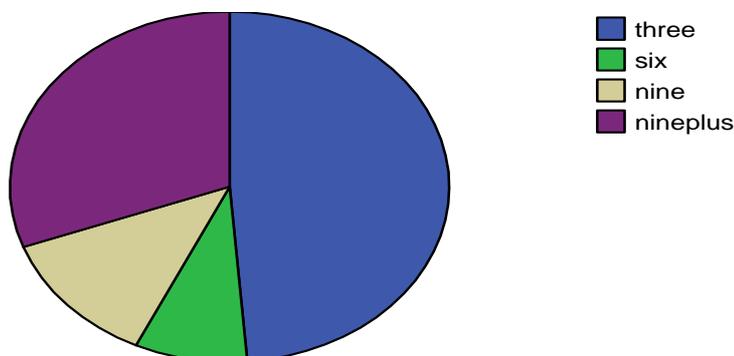
Some role players in the system complained about having unavailability of library resources, resulting in them travelling over 100 kilometers just to research and access information required for their judgments. This was also corroborated by state police who complained of facing similar difficulties in obtaining information required to efficiently discharge their duties. This negatively impacts on the investigations by state police, as they are sometimes hampered by the lack of cars to travel to remote places. Interestingly, lack of vehicles was not cited as a factor amongst judges.

The net effect of these factors leads to prolonged proceedings, and delays in delivery of judgments. Table 6 below highlights the general trend in terms of time taken for cases to be concluded.

**Table 6: How long did it take for judgment to be delivered?**

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	three	153	48.7	48.7	48.7
	six	26	8.3	8.3	57.0
	nine	39	12.4	12.4	69.4
	nineplus	96	30.6	30.6	100.0
	Total	314	100.0	100.0	

**Pie Chart Representation of results**



The lack of electronic and information technology (IT) equipment also impacts on the delivery of justice. About 36.4% of respondents indicated that they lack computers and this negatively impacts on their jobs, and by the necessary extension, on the delivery of justice. Case allocation and numbering which could otherwise be improved by an electronic filing system suffers due to non-availability of such facilities. As a result, tracing a case or a record takes long, and at times the record may not be found. More time and resources are eventually spent on re-creating a lost or misplaced record.

**Table 7: What is lacking?**

	Frequency	Percent	Valid Percent	Cumulative Percent
Valid Vehicles	11	25.0	25.0	25.0
Computers	16	36.4	36.4	61.4
Filing systems	5	11.4	11.4	72.7
Recording equipment	7	15.9	15.9	88.6
Other	5	11.4	11.4	100.0
Total	44	100.0	100.0	

Note: 'Other', which accounts for 11.4% includes law books, law reports, and staff.

Statistics in the Magistrates Courts level are presented in general form. They are not disaggregated according to the various crimes. The only divisions appearing on the statistics are criminal, traffic and civil cases. This makes it impossible to determine the exact efficiency of these courts. Whilst they may deal with a thousand cases in any given time period, it is impossible to know how many rape, murder, theft, fraud or corruption cases have been dealt with. In the Manzini Magistrates Court, for the period of April to December 2009, cases brought forward were 472, with 1814 newly registered cases. Out of a total of 2286, only 1233 cases were finalized by December 2009.

Lack of access to internet, textbooks, case law, and other critical resources affects the quality of judgments rendered, and effective delivery of justice. There is lack of induction courses for magistrates and this affects the writing of judgments and civil procedure.

**Table 8: Would use of IT improve your work?**

	Frequency	Percent	Valid Percent	Cumulative Percent
Valid yes	40	90.9	90.9	90.9
no	4	9.1	9.1	100.0
Total	44	100.0	100.0	

Some respondents cited insufficient human resources as the key contributing factor to the slow pace of the wheels of justice. It was observed that there are not enough presiding officers within the Magistrates Courts to try the huge number of cases. It was further noted that some magistrates are committed to other state duties, leading to a slump in their judicial work. Some complained that some presiding officers dedicate more time to other social engagements not related to their judicial functions, instead of deliberating on matters brought before them. It was also noted that some court personnel cannot fully dedicate their energies to their work because of academic constraints.

Lack of infrastructure like court rooms was also cited as a factor that affects justice. There is a serious lack of space, and as a result, in some courts magistrates have to use court rooms in turns. In effect they have to wait for other magistrates to finish and vacate before they can hear matters assigned to them.

Swaziland does not have a forensic laboratory, but relies on South Africa for such services. The country competes for such services with the rest of SADC and east African countries. As a result, specimen sent for analysis spends a long time queuing up before it is processed.

**Table 9: Causes of delay as perceived by specific role players in the justice machinery**

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Inadequate evidence	2	4.5	4.5	4.5
	Lost dockets	2	4.5	4.5	9.1
	Insufficient resources	19	43.2	43.2	52.3
	Incompetent personnel	7	15.9	15.9	68.2
	Corruption	13	29.5	29.5	97.7
	Other	1	2.3	2.3	100.0
	Total	44	100.0	100.0	

The above table represents the perceptions of specific role players in the justice machinery. These role players include amongst others legal practitioners, prosecutors, magistrates, interpreters, state police, correctional services personnel, military personnel, AG's office, DPP's office and case management staff. Leading the pack on the likely causes of delay is insufficient resources at 43.2%, followed closely by corruption at 29.5%. Incompetent personnel accounted for 15.9% whilst the loss of dockets and inadequacy of evidence both sat at 4.5%. A section of the respondents (2.3%) cited other as contributing to the delay in justice delivery. These factors include delays by private practitioners, lack of court rooms, unusable courtrooms, undue delays by suspects on bail, difficulty in locating suspects on bail, postponements due to unavailability of witnesses, failure to refund witnesses their travel costs.

### **3.1.4 Incompetent people or personnel**

There was a general feeling (about 15.9% of respondents) that incompetent personnel contributed heavily to the slow pace of the justice machinery. In the Magistrates Court sector, the incidence of unskilled court interpreters and secretaries was specially mentioned. It was further emphasized that the legal environment requires not just an ordinary secretary, but a qualified legal secretary. The language used in court is different from ordinary English, and sometimes secretaries will try and correct language they perceive to be offensive to the English language. Respondents felt that an entry requirement of at least a diploma in law would improve the current situation in our Magistrates Courts. The same sentiments were held in relation

to court interpreters. It was felt that they too needed to meet certain minimum requirements in terms of professional qualifications.

There was a perceived inclination by prosecutors to frequently postpone matters when they get to court, citing one reason or the other. The effect of this on accused persons is that they have to attend remand hearings for a period of one year on average, before a trial resumes, if at all. Due to the constant postponement of trials, key witnesses tend to die before matters are concluded and suspects walk free.

Incompetence within the prosecution was blamed for lengthy trials and lengthy incarceration of accused persons. Where accused persons are eventually tried, the trial is not handled speedily, and the handing down of judgment for that particular matter takes even longer. In the event an aggrieved person decides to sue the state, the matter drags for extended periods without resolution.

There was also a general perception that some people are employed and placed in positions they do not qualify for. As will appear fully below, this is usually the negative spin-off of corruption within the recruitment sector.

### **3.1.5 Corruption**

A number of the respondents (about 29%) felt corruption was the main cause for delays in the delivery of justice. Some members of the law enforcement agencies felt that most presiding officers and prosecutors were anti-government and as a result they let the government down, allowing the accused a chance to sue the state. Bribery was also cited as another cause in that suspects who are wealthy bribe their way out sooner than expected. Other members of the state police felt that the free operations of syndicates in criminal activities were responsible for the delays. White collar crimes were singled out as the most problematic and prone to delay due to corruption within the judicial system. State police highlighted a decrease in morale as they sometimes arrest suspects knowing that their cases would not be deliberated with finality.

For some respondents, corruption was coupled with carelessness. As a result, both suspects and witnesses tended not to value the current justice system.

The extent of corruption within the justice machinery was discovered to be so high, that state police themselves, declared that there are people whom they cannot arrest because of their connections socially, financially, politically and otherwise.

The link between corruption and a low morale was discovered to be very deeply ingrained within all levels of the justice system. Some members of the public felt that the police are corrupt and were selling dockets. Others felt that the social conduct of magistrates was cause for concern. State police themselves felt the seat of corruption was within the prosecution, whilst prosecutors blame presiding officers for corrupt

tendencies. In one ongoing case involving two court personnel from the Manzini Magistrates Courts, these allegations of corruption came to the fore. In this case the two employees were charged with selling dockets to accused persons for fees ranging from E1000 to E10 000. These would later be classified as lost dockets.

It transpired that in some courts, there is a need to bribe the clerks in order to obtain a trial date quickly. If the trial date is not obtained quickly, clients lose confidence in their legal counsel, and some key witnesses die before the trial resumes. Those who survive tend to forget the details of their testimonies. The other drawback of such a corrupt mechanism is that it has no checks and balances, but holds both accused persons and counsel at ransom. Under such circumstances, delivery of justice cannot be guaranteed and justice itself becomes inaccessible.

### **3.1.6 Training**

The overall sentiment was that there is a huge gap in the provision of on the job training amongst all role players. From magistrates to judges, it was apparent that the country does not currently offer training to judicial personnel and that where this happens, it is infrequent and *ad hoc*. This is further compounded by the fact that Swaziland does not have a justice college. Previous training has had to be done with the assistance of South Africa's justice college. About 47.7% of respondents indicated that training is provided infrequently, whilst 31.8% indicated that training never takes place. Only 11.4% indicated that training occurs once a year, whilst the other 9.1% cited a frequency of one in two years.

The absence of a training schedule has led some within the judiciary to make their own private arrangements for further training. Whilst this demonstrates the zeal to improve and gain more knowledge, such efforts are often barred by time constraints, as the individual has to work around his work load to attend such training. Few judicial officers with links to international organisations and other networks reported using the opportunities presented by these networks to attend refresher courses in the absence of a training programme for judicial officers. The need for further training is more pronounced when it comes to technical subjects like DNA and fingerprint evidence. Currently only the expert called in to testify understand the technicality of the subject matter and as such, judicial officers find themselves unable to follow the professional jargon used by the expert. Presiding officers would have a much better understanding of the evidence presented if they were offered some courses on the technical aspects of these two.

**Table 10: Courses**

	Frequency	Percent	Valid Percent	Cumulative Percent
Valid once a year	5	11.4	11.4	11.4
once in 2 years	4	9.1	9.1	20.5
infrequently	21	47.7	47.7	68.2
never	14	31.8	31.8	100.0
Total	44	100.0	100.0	

Since legal development is key characteristic of the law and of any legal system, the value of workshops, training sessions and seminars cannot be overemphasized. The field of law is a dynamic one, with marked changes being made in similar but much more advanced jurisdictions. Exposure to such training would assist judicial officers comprehend these new legal developments. Apart from making participants aware of the latest development in law, training sessions would also expose our judiciary to the changing attitudes and thinking on legal issues.

It was also observed that in some instances, especially at the Magistrates Court level, workshops are sometimes organized for the support staff, such as those in case management and other administrative sectors. However, where such workshops and refresher courses are provided, these prove futile because the organizers and participants do not have the same goals. The organizers feel they have to stage a workshop not because they identified a certain need but because money was allocated for that, and reporting deadlines are impending. In most instances, the people taking part do not fully understand what they ought to achieve and most often than not there is no implementation and follow up mechanisms to ensure that any skills acquired during workshops are utilized. As a result, a number of those who attended training seminars or workshops did not improve in their jobs.

### **3.1.7 Clerkship programme**

A clerkship programme consists of law researchers recruited to work individually with judges for research and drafting of legal opinions and judgments. Law Clerks are mostly drawn from sharp law graduates holding postgraduate qualifications and possessing sufficient legal research experience. Currently Swaziland does not have such system in place. During the research exercise, it was noted that there was widespread general ignorance on the concept of a clerkship programme for judges. Some respondents felt such a programme was not relevant and would not help. A few respondents felt it would be helpful. Some respondents felt that corruption would defeat the whole purpose of a clerkship programme, because no matter how well researched a clerk's legal opinion can be, some judicial officers would ignore same due to corruption and political pressure from top government officials. Judges would not rely on their secretaries

for information and research, as clerks would be able to provide same. Most respondents who felt that such a programme would work also felt that its implementation would enable speedy delivery of justice.

**Table 11: Clerkship**

	Frequency	Percent	Valid Percent	Cumulative Percent
Valid yes	38	86.4	86.4	86.4
no	6	13.6	13.6	100.0
Total	44	100.0	100.0	

### **3.1.8 Competence of legal representatives**

Users of the justice system are often represented by legal representatives. These are either attorneys or advocates, or labour consultants in the case of the Industrial Court. Attorneys and advocates undertake legal training at tertiary level, and attorneys further sit for additional bar exams. Both are then admitted to the bar and entered in the roll of advocates and attorneys. Labour consultants on the other hand do not necessarily have to possess any form of legal training. The relevant law, the Industrial Relations Act provides a party to the proceedings in the Industrial Court can elect to represent himself, or obtain the services of a lawyer, or alternatively be represented by any person authorized by the aggrieved party. Whilst this was originally designed to ensure that those members of the public involved in industrial disputes could access justice without the expense and technical barriers that lawyers often bring; it has succeeded in achieving exactly the opposite. The primary intention of the legislature was to ensure that even the poor had unrestricted access to justice. However, since many labour consultants are non-lawyers, with no legal training, they end up delaying the proceedings. Most respondents complained about the level of English competence of labour consultants, and their ignorance of court rules. Over and above the lack of English proficiency, law is generally a technical discipline with specific legal language. Quite often, labour consultants do not comprehend the legal jargon used, and procedure followed in court. This negatively impacts on the delivery of justice as lots of time will be spent trying to explain court procedure and the use of terms to the labour consultant. Many of their clients end up losing out on good cases because of the consultants' failure to abide by or to understand court rules and time limits. This to the members of the public gets interpreted as delay emanating from within the court structure.

### **3.1.9 Postponements**

Postponement due to unavailability of witnesses – witnesses are not reimbursed for expenses incurred in travelling to court, leading to delay in the delivery of justice. The key role players in this regard, i.e. state police, highlighted that this is compounded by lack of transportation to ferry witnesses from their respective home areas to testify in court. In cases where witnesses are successfully brought to court, there

is no provision to offer them refreshments, despite some having left their homes as early as 3 am. This impacts on the quality of the testimony they eventually give in court. Some witnesses disappear and cannot be traced by the time of trial, leading to negative impact on the delivery of justice.

Sometimes accused persons will demand postponements in order to obtain legal representation. At other times postponements will be requested by lazy or disorganized lawyers. They sometimes overload themselves as they take more cases than they can handle at any given time. Sometimes they fail to call the necessary witness, or fail to prepare him or her, and yet at other times they do not advise the witness on why they have been called. When the matter comes up in court, the attorney is then under pressure to secure a postponement, delaying the case further.

It also transpired during the research that some delays are caused by legal representatives being double-booked. This occurs where one attorney is scheduled to appear before two or more courts for different matters at the same time. This was found to be particularly rife within lawyers from the DPP and AG's offices. This anomaly exists because at the time of set down, all that is indicated for the court is the firm that will be representing the litigant, and not the particular attorney or advocate who will be appearing in court. As a result, one attorney becomes double-booked.

#### **3.1.10 Evidence**

Evidence is key to the healthy functioning of the judiciary and proper deliberation of cases. Lack of evidence is a factor that delays the conclusion of trials and most respondents interviewed cited this as an integral problem. State police were discovered to be in the business of arresting suspects before investigations are concluded, which means they arrest before sufficient evidence has been collected. They then request to have the accused remanded into custody whilst they finalize investigations. This flies in the face of the principle of legality, and the presumption of innocence until proven guilty in that the accused person gets incarcerated even before evidence pointing to his or her guilt can be established.

There were also concerns of evidence being tempered with in order to throw a case off. This was linked to the allegations of corruption amongst the state police and the prosecution.

#### **3.1.11 Interference in the working of the judiciary**

Swaziland operates a dual legal system, with the Constitution and Roman-Dutch common law on the one hand and customary law on the other. This duality permeates through the judicial mechanisms into the general governance of the country. As a result, conduct which is objectionable constitutionally often finds affirmation in custom. This opens a leeway for the executive arm of government to interfere in the work of the judiciary. Whilst in some instances this interference is bold and conspicuous, it is often done clandestinely. This clandestine interference by the executive and the dual nature of the system of governance brings into question the autonomy and fairness of the Judiciary.

### **3.1.12 Legislation related factors**

Legislative provisions that are outdated can also contribute to the delays in the delivery of justice. One such piece of legislation is the Legal Practitioners Act. The bicameral nature of our bar precludes clients from dealing directly with advocates, requiring instead that they be routed through an attorney. This can cause unnecessary delays for the client who wishes to engage an advocate in their matter.

### **3.1.13 Overloaded judges**

Judges have no time to write judgments. They are forever in court presiding over cases. This opens up the possibility of error as they may confuse the facts of one case with those of another. It also leads to short judgments which do not deal with all the elements of the cases. This kills the jurisprudence of the country and erodes confidence in the judiciary. It also increases the number of matters that go on appeal as the unsatisfied litigant seeks further clarifications.

The research also uncovered that there is a directive that rape cases involving minors should be determined by the High Court is also leading to the current backlog of cases. Most of these cases which should ordinarily be heard by the Magistrates Courts now end up at the High Court in terms of this directive.

### **3.1.14 Miscellaneous**

The backlog created by poor case management has given birth to a new underhanded method of bringing matters to court, which method further worsens the current slow pace of the justice system. Unscrupulous practitioners have found a way of masquerading their clients' matters as urgent applications in order to obtain a trial date. By the time the court pronounces on the urgency of the matter and sends it back, so much time would have been wasted.

Worth noting in the Swaziland judicial bottleneck is that the current status of the backlog cannot be ascertained. For instance, cases turning on judicial review from Magistrates Courts are currently not on the roll. They are dealt with as and when they come. But practically they are treated as though they do not exist, as long periods of time go by without any court ventilating on them. This in effect means that the extent of the backlog cannot be ascertained and that any statistical analysis is flawed.

## **3.2 Impact on vulnerable groups**

### **3.2.1 Disabled people:**

People living with disabilities (PWDs) are human beings like people without disabilities. As result, they are entitled to the same fundamental rights that all human beings enjoy, including equality, non-discrimination, right to a fair trial, right to legal representation and the right to be furnished with reasons in writing for the determination of any matter affecting them. The justice machinery ought to be equally accessible to PWDs, and owing to their social status as a marginalized group, the system ought to offer maximum protection. To

that end, the justice system ought to provide a service without barriers, be they environmental, legal, or linguistic.

The study interrogated issues faced by PWDs and unearthed certain areas of concern. It is currently very difficult for PWDs people to understand the justice system, they are actually not exposed. Disabled offenders are discriminated against, for example a person's crutches are confiscated upon arrest since they are regarded as a weapon, despite the same being a walking aid.

Deaf people find it difficult to express themselves due to shortage of sign language interpreters. If a PWD is called to court as a witness and cannot fully express himself, in the absence of a sign language interpreter, the court cannot benefit from the testimony. Police are not trained in sign language, hence it is difficult for them to deal with cases involving PWDs. In dealing with sexual offences, where the complainant is a PWD, police tend to take them lightly and perceive PWDs as asexual beings, therefore incapable of being raped. There are no laws and policies catering for disabled people. The only protection they can enjoy is laid out in section 30 of the Constitution of Swaziland, which enjoins the state to take appropriate measures to ensure that PWDs realize their full mental and physical potential. It further calls upon parliament to enact laws for the protection of PWDs. Unlike section 28 which protects the rights of women, the clause on PWDs is a weak one in that it does not contain affirmative action provisions. It also leaves the substance of disability rights to parliament. The net effect of this is that the justice system fails to adequately protect the rights of PWDs since they are not succinctly laid out in either legislation or the constitution. The lack of a governmental policy in this regard further compounds the problem.

### **3.2.2 Women**

Women fall within the marginalized sector in most societies. This is much more pronounced in a patriarchal society like Swaziland. Women also play a role in the judicial service machinery in a number of ways, such as complainants, victims or witnesses. Delays in the delivery of justice impacts on women differently than it does on men. For instance, some women kept in custody for a long time while awaiting trial may be separated from their children over whom they are primary care givers. In some instances, children end up growing in prisons where their mothers are incarcerated. Custodial sentences thus have the tendency to impact negatively on minors who are robbed of the nurturing of their mothers.

The slow pace of our justice machinery also has deleterious effects on women as victims of crime. Most women who undergo violent attacks or are subjected to sexual abuse end up waiting for justice for extended periods. This is manifested in the long and uncertain route that dockets take from Magistrates Courts to the High Court for committal in cases regarded as serious such as murder and rape. Sexual offences are by their nature invasive and individualistic. In other words, there may not be other witnesses

to the actual act of sexual assault. The delay in setting a trial date and commencing proceedings often leads to the victim forgetting the details of the crime. The trauma of going through memories of violent sexual assault months, and sometimes years after it occurred, cannot be overemphasized.

### **3.2.3 Children**

Children are the most vulnerable group in the marginalized sector. As a result, the principle of the best interests of the child has become of paramount importance in dealing with children. According to this principle, in all transactions involving the child, the best interests of the child must come first. This is contained in most international instruments that Swaziland has signed and ratified.<sup>1</sup> Currently Swaziland does have a child friendly court in the High Court premises which allows children to participate in the justice system without intimidation or fear.

### **3.2.4 People Living with HIV**

The HIV/AIDS pandemic was declared a national disaster in Swaziland. People living with the virus are in special need of medication, and are greatly affected by both environmental and nutritional factors. About 40% of the population live with the virus, and these interact with the justice system at different levels, either as victims, witnesses or complainants. As a result, the performance of the justice machinery either positively or negatively impacts upon them. The medication regimen of most people living with HIV require a religious consumption of immune boosting or other anti-retroviral medication, and this routine can be broken where the HIV+ person is incarcerated for prolonged periods of time. There is currently no fully fledged HIV treatment programme within the country's jails, and the situation is worse for individuals awaiting trial.

## **3.3 Conclusion**

There is a broad range of factors that either cause or exacerbate the slow pace with which justice is delivered in the country. Whilst some are the primary causes, others have a secondary effect, which once mixed with the causative elements of the primary factors coalesce to produce a stagnant judicial system. Some of these factors fall within the control of the judiciary itself and can be remedied by positive action on the part of the head of the judiciary. Other factors will require a multi-sectoral approach, such as collaborative work between the judiciary and civil society, academia, the law society, law enforcement agencies as well as the other arms of government. These will be further ventilated upon in Chapter Four below.

---

<sup>1</sup> Such as the United Nations Convention on the Rights of the Child and the African Charter on Human and Peoples' Rights.

## **Chapter 4 – Comparative analysis with similar jurisdictions in the region**

### **4. Introduction**

The research team was tasked with drawing parallels between the Swaziland's judicial system with those of her neighbours. The aim here was to look for best practices in the region, that the country could draw inspiration from. To that end, the states of Botswana, The Gambia, Ghana and South Africa were selected as comparators for the project.

#### **4.1 Comparison with South Africa**

South Africa obtained independence in 1994, after years of white minority rule. In the same year, a constitution was adopted which sought to end years of marginalisation and usher in an open, egalitarian and democratic society based on the principles of equality, non-discrimination and human dignity. This called for a complete overhauling of the court structures, the judicial machinery and an attempt to change public perceptions about law enforcement and justice delivery. This necessitated civic education not only on the constitution but also on fundamental rights and the systems of redress available under South African law. To that end, both civil society and the Government of South Africa engaged in activities and programmes aimed at disseminating information on the inner workings of the courts.

##### **4.1.1 Legal aid scheme**

South Africa has in place a national legal aid scheme, which helps indigent individuals access justice. The Constitution of South Africa, Act No.108 of 1996, sets out the legal framework from which Legal Aid South Africa derives its mandate. The Bill of Rights outlines the right to equality (section 9), the right to access to courts (section 34), the rights of arrested, detained and accused persons (section 35), and the rights of children (section 28). These constitutional rights provide substance to Legal Aid South Africa's core mandate of providing legal services to the indigent at the expense of the state. It operates in terms of the Public Finance Management Act No.1 of 1999. The constitutional obligations of the Legal Aid South Africa are further defined in terms of the Restitution of Land Rights Act No.22 of 1984, the Extension of Security of Tenure Act of 1999, and the Criminal Procedure Act No.51 of 1997. Legal Aid South Africa is an independent statutory body established in terms of the Legal Aid Act No.22 of 1969 (Amended by Legal Aid Amendment Act No.20 of 1996).

The Legal Aid South Africa also serves as a forum or institution for candidate attorneys to serve their articles. This has the added effect of ensuring that the legal sector of that country is developed, as the state invests in the training and empowerment of future lawyers. It also instils in legal practitioners the spirit of *pro bono* work, by exposing candidate attorneys to the plight of the marginalised, poor members of society.

#### **4.1.2 Clerkship programme**

South Africa's Constitution has been hailed as one of the best in the world. Judicial independence has been guaranteed and the political will to ensure same is manifest. There are few instances of complaints of interference by external forces. Judicial autonomy allows the courts to regulate their own procedure and business. To that end, judges have managed to set up a clerkship programme that allows them to recruit highly competent lawyers with postgraduate training to act as law clerks or law researchers. The qualifications of law researchers include a postgraduate qualification, with a doctoral qualification as an added advantage; extensive experience in research; practical experience in related court work; evidence of published work and research capability.

South Africa's clerkship programme recognises the need to learn from the experiences of other jurisdictions. To that end, her clerkship programme includes a component known as Foreign Law Clerk Programme (FLCP). FLCP allows lawyers from foreign jurisdictions to spend six to 12 months in the South African courts on internship, working as law researchers. As a result, South Africa benefits from expertise of budding lawyers from across the continent, and as far afield as the United Kingdom, Canada and the United States of America. The entry requirements for the FLCP programme are equally high. This ensures that South Africa learns a lot from other jurisdictions, and this adds into the ever developing body of jurisprudence.

The usual day to day tasks of law researchers include the following:

- Drafting pre-hearing and post-hearing memoranda for the judge.
- Recording proceedings in court.
- Conducting a read-through of all judgments rendered by the judge. This eliminates any spelling or grammatical errors.
- Conducting research for authorities to be used in judgments.
- Conducting research for comparative jurisprudence.
- Compiling draft judgments under supervision of the judge.
- Formatting and presenting final judgment for update online and for transmission to publishers.

The tenure of office for law researchers is usually one year, renewable at the discretion of the judge under whom the clerk was serving. This allows for more competent law researchers to come through the system and impact on the delivery of justice.

#### **4.1.4 Small claims courts**

The financial jurisdiction of certain courts leads to many cases being sent to higher courts because they exceed that limit. Currently, the Magistrates Courts in Swaziland have a limit of E2000 for matters

sounding in money, hence any suit that involves a higher claim than E2000 must be referred to the High Court. As a result, the High Court will be heavily imbued with matters above E2000. In today's financial market, E2000 is not a very high figure and most matters sounding in money will be far above that region. There are very few cases in which the claim is below E2000. This precludes some aggrieved persons who would have otherwise want to litigate from doing so because of prohibitive costs of High Court litigation.

To counter this problem, South Africa introduced what are known as small claims courts. The social mischief that these courts sought to remedy was the inaccessibility of the justice system for those individuals who get deterred by high litigation costs from seeking justice for small amounts of money. These courts are established in terms of the Small Claims Courts Act and allow for cases involving amounts up to R7000 to be deliberated by these courts. This financial cap may be increased by the minister in the gazette. No legal representation is allowed here, which means aggrieved persons will not be losing much resources in securing legal representation.

In these courts, only natural persons may institute proceedings, against anyone, with the exclusion of the state. Juristic persons can only participate as defendants and can only be represented by a duly nominated director. Small claims courts are presided over by commissioners appointed by the minister of justice. The law requires that for a person to be appointed as a commissioner, that person must be qualified to be appointed as advocate or attorney.

The procedure in these courts is informal, and pursuing a claim here is flexible. For instance, even though the financial jurisdiction runs up to R7000, a party may institute a claim for a lesser amount in order to pursue his or her case in the small claims court.

Small claims courts employ any of the official languages of South Africa, and arrangements for an interpreter are made with the clerk of the court beforehand if evidence is to be given in a language with which one of the parties is not sufficiently conversant.

The procedure for instituting a claim in the small claims courts is simplified and user-friendly. At the outset, the aggrieved party has to contact the opposing party in person, by telephone or in writing, and request him to satisfy the claim. If the opposing party does not comply with the request, a written demand has to be addressed to him. This demand must set out the particulars of the facts on which the claim is based, and the amount of the claim, and must afford the opposing party a minimum of 14 days from the date of receipt of the written demand. Delivery of the demand can either be by hand or by registered post.

At the expiration of the 14 day period, the aggrieved party has to report in person to the clerk of the court with proof of delivery of the demand to the opposing party. The clerk and a legal assistant stationed at the court will examine the documents and assist in the drawing up of a simple summons, whilst at the same

time informing the aggrieved party of the date of hearing. The aggrieved party can either serve the summons personally or engage the services of a sheriff.

There are, however, matters that fall outside the jurisdiction of these courts, and these include:

- Claims exceeding R 7000 in value.
- Claims against the state (including Municipalities or Local Governments).
- Claims based on the cession or the transfer of rights.
- Claims for damages in respect of defamation, malicious prosecution, wrongful imprisonment, wrongful arrest, seduction and breach of promise to marry.
- Claims for the dissolution of a marriage.
- Claims concerning the validity of a will.
- Claims concerning the status of a person in respect of their mental capacity.
- Claims in which specific performance is sought without an alternative claim for payment of damages, except in the case of a claim for rendering an account or transferring.

The enforcement of orders of these courts somehow envisages the engagement of a lawyer. If the judgment debtor fails to comply with an order the matter is transferred to the Magistrates Court and the execution procedure as appear in the South African Magistrates Courts Act No.32 of 1993 is followed. AT this stage, legal representation cannot be avoided.

#### **4.2 Comparison with Botswana**

Botswana also applies Roman-Dutch common law alongside customary law. The country makes use of customary courts which have limited jurisdiction. These courts are structured in much similar fashion to those in Swaziland, with legal representation disallowed. These courts are manned by non-legally trained individuals and apply customary law that is not codified. These courts cannot hear matters such as rape, murder and divorce. The number of cases that are heard by customary courts is very high, estimated to be at 80% of all cases. As a result, over 500 customary courts are spread throughout the country to meet this demand.

Unlike the Swaziland customary courts, Botswana's customary courts do take cognisance of tribal divisions. To that end, each court uses the language of the ethnic group most prevalent in each area. Further, there is no single customary code applied, but the traditions and attitudes of the local community are reflected in the proceedings of these courts. The Swaziland customary court system operates on perceived ethnic homogeneity, with the assumption that all members of the Swazi nations belong to the same ethnic grouping. It thus fails to take care of the needs of non-Swazi ethnic groups, who would otherwise love to have their matters ventilated upon by a customary court.

Not much can be borrowed from the Botswana system in terms of choice of forum. The same problem currently gripping the Swazi legal system, i.e. forum shopping obtains in Botswana. Cases before the customary courts are only likely to be transferred to senior courts in the event that they raise a constitutional issue or where the parties indicate a desire to have legal representation.

#### **4.2.1 Court of Appeal Bench**

Like Swaziland, Botswana still employs an expatriate bench to preside over the highest court in the land, the Court of Appeal. Again in this regards Swaziland cannot copy much. However, Swaziland can draw inspiration from the composition of the Appeals Court bench in Botswana.

Swaziland should be in the process of training a Swazi bench to eventually populate the Supreme Court bench. At least one or two high court judges should be sitting in the Supreme Court as a form of training for the future. This should not be done only where there is a vacancy in the Supreme Court, but must be adopted as a matter of practice. In Botswana, one or two High Court judges sit with the court of appeal bench. This allows for skills transfer, and to create a pool of competent local judges to choose from when the time comes for a Supreme Court bench made of locals. Further, judges sitting in the Supreme Court bench should also be permitted to write their own judgments, whether concurring or dissenting, as a method of preparing them for higher office. This also has the added effect of exposing High Court judges to jurisprudential thinking and legal thinking from other jurisdictions, and would help speed up our legal development. The other spin-off of a Swazi Supreme Court bench is that the regimented seating period currently observed by the expatriate Supreme Court bench would come to an end as all the judges would be locals and would not be required to sit on an *ad hoc* basis.

#### **4.2.2 Recruitment of judges and procurement of resources**

Botswana has 18 judges of the High Court as well as sufficient court rooms. Swaziland only has nine judges. The problem of insufficient court rooms in Swaziland means that there is no certainty that a matter set down for hearing on a particular date will eventually succeed. Judges at times do not have access to court at all, as all rooms are occupied. The country can therefore copy from Botswana and increase both the number of judges and construct more court rooms. Further, the country can move towards the regionalisation of the High Court, and have one in each of the four regions.

Swaziland can also copy from Botswana in relation to resources such as books, journals and law reports. In that jurisdiction, there is a standard issue of books for every judge, both in physical and in electronic form. The current library is not accessible to junior staff. It then becomes costly for the client as his legal representative has to reproduce all authorities relied upon for the court.

### **4.2.3 Setting of trial dates**

Swaziland currently suffers from lack of good pre-trial systems. What currently happens in practice is that counsel for litigants agree on certain issues and then call consider that telephonic consultation a pre-trial conference.

In the Botswana system, contested matters are placed before judge the judge at pre-trial , who then does not preside at actual trial. This leads to a good rate of settlement of disputes, and there is no need for setting of trial dates. Parties to the suit must be there as well, not just the lawyer. This encourages out of court settlements. The current practice in Swaziland is that sometimes trials are set without reading he accompanying files.

Sometimes staff responsible for the setting of trial dates do so in ignorance of the rules. For example, before a matter is set there is a requirement for a bound book of pleadings to be in place plus a notice of set down ten days before hearing. Currently matters are placed on the roll prematurely. When the date arrives, such matters are not ready to be heard, and have only served to clog the roll.

The adoption of pre-trial mechanisms in like fashion as the Botswana one would help ease the congestion on the roll at the Swaziland High Court.

### **4.3 Comparison with other jurisdictions in the region**

Most jurisdictions train their appointees before they occupy office either as magistrates or judges. This was found to be lacking in Swaziland, save for a brief orientation session. Training not only prepares the office bearer for the duties they are about to assume, but it also helps prepare them mentally by socialising them into the dictates of their new duties. This is crucial since judicial officers are often drawn from either prosecution or private practice. To dispel years of socialisation towards legal defence or towards seeking to obtain a conviction, pre-service training is required.

Some jurisdictions employ certain strict timelines within which judgments must be finalised and handed down. Failure to comply with these timelines would render that particular judgment void. In Ghana for instance, unless a civil judgment is delivered within three months from time of conclusion of the trial, it becomes void. The cut-off time for criminal cases is six months. In The Gambia, the cut-off is six weeks for a civil matter and one month for a criminal matter.

#### **4.3.1 Appointments to the office of judge or magistrate**

Jurisdictions like Ghana and The Gambia employ recruitment mechanisms aimed at developing staff to move within the ranks. This has the added benefit of boosting employee morale and improving their work ethic, therefore positively enhancing the delivery of justice. These two jurisdictions have removed the

ceiling between Magistrates Courts and the High Court. Magistrates in these jurisdictions can transition from magistracy to being judges of the High Court, by way of promotion and career development over the years.

These jurisdictions created a higher echelon above that of magistrate and called it 'circuit judge', a position equivalent to acting judge. The work of a circuit judge is to deal with cases which should by statute go to a High Court judge. Judgments delivered by a magistrate sitting as a circuit court judge are subjected to external moderation to monitor and regulate progress and promotion. This would be training ground for future High Court judges. Such a system would require a coordinated attachment regime, where the circuit judge is assigned a mentor. The mentorship programme would require a close working relationship between the mentor and the circuit judge, including sitting in with the mentor and discussing upcoming cases.

This model, which has already been adopted by The Gambia and Ghana would create a system of ascending from magistracy to judgeship. Since senior judges would monitor and mark the work of circuit judges, less cases would be sent to the High Court. It would further make the mentors sharper as they would have to revise to effectively mentor their subordinates.

In Zimbabwe, to beat the problem of delays in handing down of judgments, judges sit in court for three weeks within a month, and use the remaining week for drafting judgments. In Swaziland judges sit in court throughout the month. There is no time for research and compiling judgments. This negatively affects the development of our jurisprudence, which is crucial to the efficient delivery of justice.

## **Chapter 5 - Recommendations**

### **5. Introduction**

The TORs for this project required that the research team should come up with recommendations on how the Swaziland justice system can be overhauled or improved. Several recommendations were made by both beneficiaries and service providers within the justice machinery. Some recommendations were drawn from observations made during the research. These appear and are fully explained below.

#### **5.1 Secure transport for witnesses' attendance.**

Witnesses are often brought to court by the state or where they make their own arrangements, there is a compensation system in place. This compensation schedule, however is not without its problems. First, state police who are responsible for transporting witnesses often complain about lack of vehicles to carry out their duties. Secondly, compensation for witnesses who have made their own transportation arrangements is sometimes not forthcoming for one reason or another. The government must put in place a proper system of securing the attendance of witnesses as well as identifying the causes of failure to compensate those who make their own arrangements.

#### **5.2 Set up a witness protection programme.**

Swaziland does not have a witness protection programme. As a result, cases get derailed due to lack of evidence as potential witnesses shy away from testifying for fear of reprisals. This negatively impacts on the delivery of justice in the country. To eliminate this problem, the state must ensure that witnesses have confidence that their safety and protection can be guaranteed, most likely through a witness protection programme.

#### **5.3 Recruit more prosecutors.**

Some of the respondents both during the public scoping phase and the interview phase indicated that lack of personnel within the prosecution department was a contributing factor to the slow pace of justice delivery. There is therefore a need to recruit more prosecutors, as well as provide further training for those who are already on the job.

#### **5.4 Provision of legal aid**

Swaziland currently does not have legal aid, save for *pro deo* counsel in capital crimes. Legal aid eliminates the disadvantage that unrepresented accused find themselves in, and ensures equality of arms between the parties. It further ensures fair and unrestricted access to justice by all, from the wealthy citizen to the poor and marginalized citizen. Setting up a system of public defenders who can represent indigent accused, after undergoing a means test, would ensure that the courts do not spend too much time on cases with

unrepresented accused, since all representatives would be competent, legally qualified lawyers. In order to excite interest in the provision of legal aid in a profit-inclined legal fraternity, the amount of time served in the employ of the legal aid board could be counted towards the necessary credits required for serving articles. This would arouse the interest of LLB graduates. However, there would be a need to install a retention system that ensures that experienced counsel are retained to mentor incoming budding lawyers.

It is therefore recommended that a legal aid system be established to counter the delays in the delivery of justice.

### **5.5 Too many cases few judicial officers, congested roll.**

There were also complaints of too few judicial officers for the ever escalating number of cases. It is recommended that the state should facilitate the recruitment of more judicial officers to counter this problem. However, this must be accompanied by the construction of more court rooms and offices, in other words the up scaling of the current infrastructure.

### **5.6 Regionalization of the High Court**

The expansion or up scaling of the existing infrastructure to cater for the ever increasing number of cases also envisaged a regionalization of the High Court. Accompanied by the recruitment of more judicial officers, prosecutors and interpreters each of the four administrative regions of Swaziland should have its own High Court. This would act as a platform for grooming a pool of judges that could in the future be appointed to the Supreme Court, having honed their skills at the High Court level.

### **5.7 Forensic laboratory**

Swaziland currently does not have a forensic laboratory. As a result, most specimens required for the prosecution of criminal cases have to be sent to the Republic of South Africa for analysis. This often takes a long time since South Africa herself has her own backlog in terms of demand for analysis. There is a need for the state of Swaziland to prioritize the establishment of a forensic laboratory and the recruitment of competent staff to run it. This would cut down the number of years spent on waiting for samples sent to South Africa to a few weeks. The net result would be speedier conclusion of trials.

### **5.8 Reporting of corruption**

Until recently, there was no concrete reporting mechanism for corruption in the country. The recently launched Anti-Corruption Commission is yet to gain the confidence of the public. Since corruption was found to be deeply ingrained in the justice machinery in Swaziland, there is a need to encourage the use of such a forum. The judiciary should take the initiative to teach the public on how this commission can be utilized to fight corruption within the justice machinery.

## **5.9 Subscription to e-resources**

There is a pronounced need for the judiciary to subscribe to legal databases available both in the region and globally. Such resources as SABINET, LexisNexis etc would mean legal information is just a click away, and that judges do not have to rely on advanced law firms to source information for them. Apart from causing delay, this arrangement has the potential of creating a perception of bias. Such an intervention is, however, dependent on a proper information technology system being installed in all judicial offices.

## **5.10 Vehicles for judicial officers**

The most cited factor that hampers delivery of justice, especially in relation to the role players such as magistrates is lack of vehicles. Therefore there is a need for the head of the courts to engage the Ministry of Justice with the view of ensuring that vehicles are available to the judicial officers as required.

## **5.11 Use of IT**

There is currently minimal use of IT within the judiciary in Swaziland. A large number of judicial personnel do not have basic access to email or the internet. This negatively impacts on their research capability as well as their communication. Information sharing is hampered yet access to information is fundamental in this sector. Court personnel in remote stations, such as in magistrates court in small towns have to travel over 100 km to the Attorney General's law library to do research. This severely slows down the pace with which they can approach their duties.

### **5.11.1 Procure necessary equipment**

There is a need for the judiciary to ensure that equipment like computers, laptops, printers, scanners and faxes are in place. This would allow court personnel to do research and share information with ease.

### **5.11.2 Train personnel on use of IT**

Procuring the necessary equipment and software alone would not solve the problem. A large section of the current staff is blasé if ignorant in relation to IT. Some even harbor a phobia that can only be cured by training and empowerment. There is a need to train staff on the use of computers, scanners, the internet, email and electronic filing.

The Registrar should therefore facilitate the recruitment of a competent systems administrator to manage the technology in use within the judiciary.

### **5.12 Procurement procedure**

The current procurement procedure defeats the perceived financial independence of the judiciary. Even though the judiciary has its own budget and the autonomy to administer it, that autonomy is not necessarily absolute. When it comes to procurement the main state machinery comes in. An instructive illustration would be the procurement of computers and other IT related machinery or gadgets. This has to be done through the Computer Services Department, which insists on laying down the specifications of the machinery and identifying the supplier. This defeats the whole purpose of procuring necessary equipment for the judiciary, since some machinery is peculiar to this sector, and can best be understood by the role players rather than technicians. Further, the current procurement system is slow to deliver, and since the judiciary has no control over it, it cannot influence or accelerate the outcome. As a result, procuring basic equipment like a desktop computer can take well over a year. This negatively impacts on justice delivery as it means the tools required for the job are not in place. It is recommended that the current procurement system needs to be abandoned, and instead replaced by one where the judiciary itself can assert its own financial independence. This would speed up the purchase of required equipment.

### **5.13 Publication of Judgments**

Swaziland has not published its law reports for a while. The last known volume of law reports dates back to 1986. Since then access to superior court judgments has at best been intermittent. These have either been accessed through visits to the High Court and Industrial Court registry. In recent years, some decisions were selected for publication online through the website of the Southern African Legal Information Institute (SAFLII). Despite this momentous leap of providing Swaziland legal resources online, the country still lag behind in that even the cases on the SAFLII network are old, there are no newly uploaded decision.

Similar jurisdictions are quick to upload decisions and their sites are kept updated. The Constitutional Court of South Africa is an illustrative example here. Within five minutes of a judgment being handed down, that decision is immediately available both on SAFLII and the court's institutional website. Swaziland should move towards that direction as well, especially in relation to judgments from the Supreme Court, since these are not as many as those from the High Court. It must be noted that the judgments posted online are not necessarily going to be reported in the law reports; they therefore do not need to go through the selection committee. However, for public consumption and researchers within the justice system, it is crucial that decisions of superior courts are publicized as soon as they are delivered. The South African Constitutional Court approach could be replicated in Swaziland, but it requires a dedicated IT person to be in place.

To allow access to information in the form of court judgments, as an interim measure, the Registrar should devise a system of photocopying all judgments handed down by the High Court and Supreme Court and

making these available to legal practitioners and other members of the public at a nominal fee. Such fee could be used to recoup costs incurred in reproducing the judgments.

Access to judgments – since lawyers can no longer have access to judgments for use in court, it is now easy for the court to contradict itself and speak with two voices. Access now depends on the benevolence of the photocopier operator. This cultivates commercialisation of a public service and opens the door to corruption. It is therefore recommended that for every judgment delivered a copy must be kept at the High Court library. Also the numbering of judgments is currently not systematic. Since the cases are unreported, the numbering relies on the case number, which in most cases does not tally with the date of delivery of judgment. This makes research difficult. There is a need for a systematic numbering system to be developed based on the date and year of delivery for each case. A case in point here would be SAFLII's Medium Neutral Citation (MNC).

#### **5.13.1 Law Reporting Committee**

There is currently a law reporting committee drawn from a number of disciplines. It was observed however, during the data collection exercise that the appointment procedure for this committee was not transparent, leading to individuals without the research and publication drive being roped in. This impacts on the work of the committee as determination of cases to be published will not be done speedily, and the nature of cases to be reported might not reflect the newest trends in legal development. There is therefore a need to appoint into the committee competent individuals based on their academic, practical and research profile.

#### **5.14 Establishment of website**

Both the High Court and Supreme Court need to have their own institutional websites, autonomously managed by the judiciary. Currently the Computer Services Department requires that anything that has to do with IT, including institutional websites should be managed by the Department. This is counter-productive because while the Department has the technical knowhow, they do not have the legal expertise. The risks of leaving a legally inclined website in the hands of non-legal persons are huge. For example, legal language is esoteric, and as a result a non-legal person tends to attempt to correct that language, thereby losing its appeal and grammatical finesse.

There is a need for the Registrar to facilitate the establishment of an institutional website for both the High Court and Supreme Court. Further, there is a need to recruit an IT expert to be stationed at the High Court to set up, edit, manage and oversee the websites and email system.

As an interim measure, there is a need to take at least two court personnel through a crash course on web-design and management. Since web-design and management does not necessarily require technical or

scientific expertise, any sharp employee within the High Court can be equipped, as an interim measure on setting up and managing a website for the court. The benefit of such an arrangement is that a legally disposed person will be managing the legal content to be posted on these websites.

### **5.15 Disaggregated statistics**

Statistics from the courts do not currently paint a vivid picture of the nature of cases dealt with. It seems to be focused on numbers and the segregation between civil, criminal and traffic offences. It makes it difficult, if not impossible to know the exact nature of cases dealt with. For example, a statistical record might indicate 100 cases, only to find that of those, 99 were remand cases. This gives the false impression that productivity is high and there are no delays. There is a need to produce disaggregated statistics, which will reflect the nature of the cases handled. To that end, there is a need for the Registrar to engage the services of competent statisticians to design and implement data capturing schedules to be used by all courts. These should be designed to indicate the number of cases, the various sub-divisions in terms of the nature of the case, the duration of the case, percentage of represented versus unrepresented accused etc. This would allow for future monitoring of cases and serve as an early warning device for slow progress.

### **5.16 In-service training courses**

Swaziland does not have a judicial training institute and currently offers training for judicial officers on an *ad hoc* basis, albeit infrequently. It transpired from the research that there are no fixed training schedules, and most respondents had not undergone further training on the job. Some driven respondents within the judiciary indicated that they pursue further training on their own, but since these are not scheduled, they are faced with time constraints. There is therefore a need for the registrar to establish a working relationship with training institutions, both locally and in the region in an effort to develop training schedules for members of the judiciary and court support staff.

### **5.17 Competence of legal representatives**

Public perception of the justice machinery revealed that some members of the public do not have confidence in the services of some legal practitioners. Some perceived practitioners to be corrupt. This translates to complete apathy towards the justice machinery as a whole. There is a need for public education on remedies available in case of corrupt practitioners, so that the public can regain confidence in the justice system

#### **5.17.1 Competence of legal or labour consultants**

The Industrial Relations Act provides that any person instructed by a party to a dispute before court can offer representation for that party. This means that both admitted legal practitioners, i.e. advocates and attorneys as well as private persons known as labour consultants can appear before court. Whilst this was

designed primarily to ensure justice to the poor without the hindrance of financial wherewithal that legal practitioners often demand, it is now counter-productive. Labour consultants lack the legal skills that lawyers obtain through years of study at tertiary institutions. As a result, labour consultants do not comprehend or appreciate the legal strictures and procedure of the Industrial Court, and this leads to delays. This therefore hampers access to justice by the marginalized poor employees. There is a need to move for an amendment of the law to require at least a certain level of academic qualification for representation before the Industrial Court. This requirement could either be that the representative must have passed the third year of the Bachelor of Laws Degree or be in possession of a Diploma in Law. This would ensure that the procedure of the court and the technical terms are fully understood. It would also, to some extent ensure that the equality of arms is met, that no side is incongruously stronger than the other.

This problem further manifests itself in the perceived unenforceability of labour court judgments. The research uncovered this perception amongst members of the public. In most instances, labour court judgments cannot be enforced simply because the labour consultants will sit with a good judgment in their hands, not knowing what to do next. This is a direct result of their ignorance of the procedure and remedies the law provides. The recommendation above equally applies here.

#### **5.17.2 Interpreters and legal secretaries**

There is a need to recruit more court interpreters. The SiSwati-English ratio appears to be fine. However, there is only one Portuguese-Shangaan interpreter for the entire country. There is a need to recruit more interpreters for the Shangaan speaking community, given their large numbers in the country. For the other languages, there is a need for the judiciary to maintain good relations with local diplomatic offices so that they can help facilitate in identifying translators for other languages in the future. The currently existing rapport between the judiciary and the South African High Commission must be maintained.

The judiciary currently does not use legal secretaries, but employs, in some cases, secretaries with ordinary secretarial certificates. There were also concerns raised during the research that some secretaries do not even have basic secretarial training. Some respondents complained about secretaries who do not have a clear comprehension of the legal language used, and who would constantly attempt to correct documents they are tasked to type. This eventually causes delays in the completion of tasks they are given, and by the necessary extension delays in the delivery of justice. There is therefore a need for secretaries to judges and magistrates to be trained to be competent legal secretaries. This would allow them to properly discharge of their duties, since law is a technical discipline.

#### **5.18 Establishment of small claims courts**

Swaziland has to copy from her neighbours and establish small claims courts. This would take away the pressure from the Magistrates Court, which are currently overwhelmed with the highest number of cases.

This should be done simultaneously with increasing the financial jurisdiction of Magistrates Courts. Aggrieved persons with minor matters will not have to burden the already overstretched Magistrates Courts as a speedy, cheap and accessible forum would already be in place. The fact that no lawyers are involved in these courts would also mean the poor can access justice without financial hindrance.

### **5.19 Forum shopping**

The prosecutorial discretion of the DPP to determine which court a particular matter goes to is carried out within the guidance of various pieces of legislation. For example, since the Swazi Courts Act prohibits legal representation, that negative provision has come to be used to denote that once a person indicates a desire to be represented the matter is moved from the jurisdiction of the customary court to that of the Magistrate Court. Because of the nuances of legal practice, this system has seen a lot of abuse over the years, resulting in a grey area around the exact procedure for case referral. The research uncovered a system whereby the prosecution department of the state police makes a list of cases to be taken to each court and then bounce these off the clerk of court at the Magistrate Court. The clerk of court serves as a check and balance to the work of the state police and makes the final determination by either endorsing or altering the choice of forum. This system is open to abuse, and has in fact been abused in reality. Customary courts are favoured by victims of crime for their quick and certain justice. As a result, some cases do get sent to the customary courts without going through this informal process. Further, state police do not enquire of suspects upon arrest whether they will be represented or not. Hence some cases do find their way at the customary courts even if the accused person had desired that his or her matter be heard by the Magistrate Court. Unless the presiding officer in the customary court is courteous enough to enquire of the accused's choice of form, or whether they would like to be represented, the case continues at the customary court. This might lead to a long legal battle to move the case to the desired forum and this consumes a lot of time.

There is also no guarantee that once an accused indicates a desire to be represented his case will automatically be transferred. This is so because the statute does not indicate that the case must be transferred, but only prohibits legal representation. Case transfer therefore occurs by way of a favourable interpretation of the prohibitory clause.

There is therefore a need to revise all the law relating to choice of forum, and put in place a transparent mechanism based on human rights considerations, such as the right to a fair trial.

### **5.20 Corruption at the recruitment stage**

Several respondents within the justice machinery complained about the corrupt recruitment procedures currently being implemented. They mourned the fact that sometimes incompetent people are seconded to work within the courts when they hold no legal or other relevant qualifications at all. In such recruitments,

they contended, it is always apparent that the new recruit is a relative or has some other ties with an influential person at the recruitment stage. This hampers justice in that from the onset the person lacks the desire and drive to work. Further in that almost a year at a time will be spent orienting the new recruit, who has no legal education, on the inner workings of the courts and the judiciary. The person orienting the new member of staff thus ends up doing the tasks of two people. The major concern with corrupt recruitment is that it overlooks already existing expertise in the form of staff members who ought to have been promoted. This also has the effect of killing the morale of existing staff members, thereby negatively affecting their productivity within the justice machinery.

It is recommended that the current recruitment processes should be scrutinized, and a system where the judiciary can actually detail the requirements of the post and the capabilities and experience of their desired candidate be put in place. This would serve as a check and balance on the recruitment agency's activities. It is further recommended that the Chief Justice should arrange and facilitate an in-house platform to encourage and sensitize court staff and other personnel to report activities which smack of corruption, especially in the employment of staff.

#### **5.21 Clear job descriptions and evaluation mechanisms**

Most interviewed respondents working within the courts showed a lack of appreciation of what their actual roles and responsibilities are. This leads to duplication of functions, where more than one employees focus on a particular area in the belief that it is their key portfolio. In the result other critical areas are left wanting. In some cases, employees do not deliver at all in certain areas simply because they do not know it falls within their job description. It is recommended that a clear and detail job description and reporting and evaluation mechanisms must be put in place in order to task and assess employee performance.

#### **5.22 Effects of police torture on access to information**

It also transpired during the research that most members of the public have developed a profound fear of law enforcement agents, especially state police. As a result, most are too scared to even volunteer information on criminal activities to the police, owing to recent deaths in police custody and allegations of torture. So deep-seated is this fear that the whole data collection exercise almost failed to materialize as members of the public refused to answer questions, citing fear of victimization by state police. The fears currently harboured by the public mean that the prosecution's witness base is dwindling as more and more people shy away from having any interaction with law enforcement and the court system. Whilst this is not entirely within the control of the judiciary, there is a need for public education-cum-dialogues on the symbiotic relationship of the law enforcement agents, the judiciary and members of the public, if confidence in the whole justice machinery is to be restored.

## **5.24 Appointment of assessors for Industrial Court**

Currently the employers and the employees' formation each furnish a name for candidates who will be appointed as assessors of the Industrial Court. These ought to be people with considerable knowledge on industrial relations and they assist the judge in deliberations. Whilst the current appointment procedure is working fine, there are sometimes problems with the appointment of certain individuals, who may make it to the office of assessor simply because of popularity, and not legal competence. This impedes justice in that this kind of appointee will not serve any purpose or add any value in court, leading to delays. There is therefore a need to revise the nomination procedure, such that the judiciary could also be allowed to nominate certain names to be considered by the appointing authority. This would ensure that the names of competent people who have gained sufficient experience in the field are put through. However, this would require so much finesse and caution as to avoid appointing trophy assessors who will not serve the interests of justice.

It is further recommended that assessors should also be taken through refresher courses on a frequent basis.

### **5.25.1 Setting of trial dates**

Delays in the setting of trial dates have been blamed on a number of reasons, from lack of training and expertise on the part of lawyers to cases brought to court prematurely. At times lawyers have been accused of failing to bring the necessary evidence or witnesses to court, and end up asking for postponements because their research is wanting. Yet still corruption often rears its ugly head in the delays in this sector. Court personnel complained that in some instances, corruption would see a matter without a certificate of urgency, getting an earlier date than other more deserving matters. There is therefore a need to root out corruption in the setting of trial dates, and to ensure proper procedure is drafted into the curriculum of the bar exams.

As pointed out earlier, some attorneys find themselves double-booked due to poor administration. In such instances, the same attorney is scheduled to appear before two or more courts at the same time. This can be remedied at the time of setting a trial date by the law firm indicating which particular attorney will be handling each matter. It can also be taken care of during pre-trial conference.

### **5.25.2 Amendment of CPEA dealing with bail**

In some cases Magistrates Court are denied jurisdiction for bail only, yet they have jurisdiction for the rest of the case. As a result, on Fridays the whole country descends on the High Court to apply for bail, for cases which will be heard by the Magistrates Courts. The problem with this is that it makes the High Court a court of first instance, leaving the Supreme Court as the only forum for appeal should the litigant wish to appeal.

This also has an economic impact, as relatives of accused persons have to travel half-way across the country to be on hand to pay for bail should it be granted. Had such matters been heard at the Magistrates Courts, these expenses would be avoided since these courts are spread all over Swaziland.

#### **5.26 Short term contract employment**

The research also uncovered the practice of short term contractual employment within the judiciary. Employees on these short term contracts often lose the zeal for their jobs, especially towards the end of their contracts. This coupled with an absence of proper handover and reporting mechanisms means that once the employee is gone, it is difficult, if not impossible for follow up work that they began but could not complete. Files and other records become difficult to trace in the absence of a handover report, and this creates room for remaining staff to engage in unprofessional conduct and cover it up by citing the departed employee. It is recommended that the judiciary should move away from short term contracts and should implement a monitoring and handover mechanism.

#### **5.27 Allocation of cases - Judges in conference**

Currently the allocation of cases to specific judges follows a primary division of the cases into civil and criminal, before being allocated to judges accordingly. This is the responsibility of the Registrar, although in practice this is done in conjunction with the Chief Justice. There is a need to revise the apportionment of cases, in order to ensure a more participatory approach by all judges. Similar jurisdictions allow for judges to decide the apportionment of cases amongst themselves during their weekly conference where they discuss case allocation and other pertinent issues.

The current method of case allocation allows for political interference, albeit unwittingly, in the sense that particular matters could either be channeled away from or towards particular judges, depending on their jurisprudential convictions or their perceived political inclinations.

#### **5.28 Taxing master of the Supreme Court**

There is currently no taxing master of the Supreme Court. This leads to the current taxing master of the High Court being heavily imbued with taxing tasks. This obviously impacts on the speed with which tasks can be carried out. There is therefore a need to establish an office of the taxing master of the Supreme Court.

#### **5.29 ID tags and access control**

Currently access to court buildings is free and unhindered for everyone. Whilst this should be the case, there are portions of the court buildings which should be restricted to personnel only. This is done for the safety of both personnel and equipment. Given the rise in loss of equipment such as computers, scanners

and other electronic gadgets, there is a need to install access control locks on all doors, entrances and exits of restricted areas of court buildings. Court personnel can access these restricted areas by swiping their ID cards and this helps in logging information on who had access to which part of the court premises. These could also be assisted by CCTV cameras to clamp down on theft of equipment needed in the delivery of justice.

### **5.30 Exchange programmes**

There is a need to strike a rapport with civil society, research institutions and the judiciary in other jurisdictions with a view to encouraging exchange of staff. Such an arrangement would allow highly competent foreign experts, chosen from academia, judiciary, and other fields to spend a year or such other fixed period working in the High Court of Swaziland. Tasks that can be undertaken by beneficiaries of this programme could include research, monitoring and evaluation, case management etc. A programme of this nature would also allow Swazi personnel to spend a fixed period of time in a foreign jurisdiction learning alternative approaches to case management, research and case adjudication. Skills developed during this period of attachment would prove valuable for Swaziland. The recommendation for the judiciary to partner with civil society is borne out of the fact that civil society is capable of raising funds to cater for the expenses of running such a programme, thereby limiting costs on the part of the state. The research fellow would be based at the partnering civic organization, and work for the courts for a fixed period of time.

## **Chapter 6 – Conclusion**

It is obvious that the Swaziland justice machinery is heavily clogged and suffers from an unascertainable number of years of backlog of cases. It is also trite that the extent of the current backlog cannot be readily determined due to lack of proper case management, statistical determination and availability.

However, it must be borne in mind that the current problems in the justice sector cannot be blamed squarely on one individual or one institution. The problems occur because of a coalescing matrix of factors, both from within the judiciary and externally. As a result there is a need for a holistic approach to address the current barriers in access to justice in the country. Of note is the immediate need to uproot all forms of corruption, from recruitment processes, to corruption within the police, the prosecution, the judiciary and legal fraternity, and registry staff. There is also a need for the Swaziland Government to prioritise capacity building initiatives for personnel within the judiciary, and to incentivise the work done by personnel in an attempt to boost the now decayed morale. Further there is a need to conduct a multi-stakeholder consultative process, including both service providers and consumers of the service, if a sustainable overhauling of the justice system is to be achieved.

## **List of Sources**

### **Books, Journals and unpublished papers**

Dell G, *Anti-Corruption Conventions in Africa – What civil society can do to make them work*, (Berlin: Transparency International).

Dube BA and Magagula AS, *The law and legal research in Swaziland*, Globalex (New York: New York University) September 2007.

Feltoe G, *Criminal Defenders' Handbook*, (International Bridges to Justice: Zimbabwe) 2009.

Hoffmann LH and Zeffertt DT, *The South African Law of Evidence*, 4<sup>th</sup> Ed, (Durban: Butterworths), 2001.

Joubert J (Ed), *Criminal Procedure Handbook*, 4<sup>th</sup> Ed, (Cape Town: Juta and Company) 1999.

### **Legislation**

The Constitution of Swaziland Act No.1 of 2005.

The Criminal Procedure and Evidence Act.

The Legal Practitioners Act.

The Magistrates Courts Act.

The Swazi Courts Act No.80 of 1950.

The Industrial Relations Act 2000.

The Director of Public Prosecutions Order No.17 of 1973.

The Police Act No.29 of 1975.

The Public Order Act No.17 of 1963.

The Limitation of Legal Proceedings Against the Government Act No.21 of 1972.

The Government Liabilities Act No.2 of 1967.

The High Court Rules.

### **International Instruments**

United Nations Convention on the Rights of the Child.

African Charter on Human and Peoples' Rights.

**Case law**

*Professor Dlamini v The King Case No 41 of 2000; [2001] SZCA 13 (13 June 2001).*

**Foreign legislation**

Small Claims Courts Act No. of 19 of South Africa.

The Constitution of South Africa Act No.108 of 1996.

Public Finance Management Act No.1 of 1999.

Restitution of Land Rights Act No.22 of 1984.

Extension of Security of Tenure Act on 1999.

Criminal Procedure Act No.51 of 1977.

The Legal Aid Act No.22 of 1969.

The Legal Aid Amendment Act No.20 of 1996.

**Websites**

[www.transparency.org/global\\_priorities/international\\_conventions/readings\\_conventions#un](http://www.transparency.org/global_priorities/international_conventions/readings_conventions#un)

[www.abanet.org/intlaw/hubs/programs/Annual0316.03-16.06.pdf](http://www.abanet.org/intlaw/hubs/programs/Annual0316.03-16.06.pdf)

[www.saflii.org.za](http://www.saflii.org.za)