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Delay in delivering judgment or a case of “washing” judicial “dirty linen in public”? Reflections on *Myaka v S*

1. Introduction

As much as it is difficult to categorise the judgment of the Full Court of the South Gauteng High Court in the recent case of *Myaka and Others v S*,¹ it is, in pith and substance, a case involving the conduct of judges in adjudication brought to the fore in a somewhat bizarre manner. *Myaka* did not involve those familiar problems encountered in decided cases such as whether, owing to the participation of the judge in the hearing of the case, a party's right to a fair hearing might have been so compromised as to raise the question of the judge's impartiality. It did not involve the question of whether the exchanges between the bench and the bar were in contravention of the right to a fair hearing, or of a judge descending into the arena of conflict.² The issue was not that the judge had muddled the evidence to the extent that his/her views overshadowed the facts of the case, some of which issues afflicted the trial judgment in *Bula v Minister of Home Affairs*.³ *Bula* clearly concerned the very poor performance of the judge in the proceedings in court. *Myaka*, on the one hand, raises the issue of dereliction of duty on the part of a judge of a Full Bench of the High Court and, on the other, the propriety of the other two members of that Bench for bringing that issue to public attention.

While the judgment on the substantive issues argued in *Myaka* is not of concern in this context, it is the comments of the two judges of the Bench about their third colleague, in terms of her not writing the judgment in the case, that is the subject of this discussion. Quite apart from bringing to public attention the problem of delay in delivering judgments that plagues many a judicial system, this case also raises a novel issue in judicial circles, perhaps, of judicial ethics, for want of a better classification. Simply put,

1 [2012] ZAGPJHC 174 (21 September 2012).

2 See the discussion in Okpaluba and Juma 2011:667-685.

3 2012 (4) SA 460 (SCA), discussed in Okpaluba 2014.

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what was the purpose of the unusual step taken by the two judges in this case on the non-performance of their colleague of her judicial duty? Were they compelled by the need to explain the reasons for the delay in delivering the judgment and, in doing so, they ended up the way they did? However compelling the reason might have been, the question that must be confronted in this context is: Was it judicially ethical to foist on the public through judgment the seeming shortcomings of a colleague-judge? It is clear that the answer to this latter question will depend on which side of the dilemma one tilts.

It is thus necessary that the passages in the judgments which provoked this commentary be set out early in this note. After perusing the said passages, it becomes clearer why this note has raised the questions that it has. Meanwhile, the issue of the delay factor in South African courts as well as elsewhere is highlighted. In doing so, attention is drawn to the situation in Namibia where the problem has been tackled through a Judicial Code of Conduct, whereas, in Nigeria, both constitutional and legislative measures have been put in place to deal with the delay factor. Thereafter, questions are posed as to whether the delivery of a court's judgment was the proper context and, the hapless readers of the judgment, the appropriate persons to whom a judge's performance or non-performance of her judicial functions should be addressed.

2. The crucial passages in the *Myaka* judgment

It is important that the crucial passages in the judgments which prompted this discussion be reproduced rather than paraphrased. In a rather unprecedented manner, Satchwell J prefaced her judgment in these words:

This appeal was heard by a Full Bench of the South Gauteng Division of the High Court (Claassen J presiding) on 11 April 2012. The senior judge allocated the writing of this judgment to another member of the Full Bench (Mailula J). In the intervening five month period, which included a five week administrative recess in court sittings, I have not received a draft judgment on which I may comment nor has there been any indication from my colleague that a judgment is in production. I understand from the senior presiding judge that he has made a number of approaches to the judge assigned to write this judgment – at the time of the hearing on 11th April, during the week of 23rd July and in writing on both 1st and 6th August. He has received no indication that any judgment has been prepared or is underway. The attorney for the appellants wrote to the senior presiding judge on 26th July 2012 requesting an indication when the judgment may be expected. There after the appellants' attorney in a telephone call to the senior judge's secretary, made a further enquiry as to when the judgment will be available. The senior judge is not in any position to provide such indication in the absence of any communication or intimation from the assigned judge. This untoward delay in finalizing the judgment is deprecated.⁴

4 *Myaka v S* [2012] ZAGPJHC 174: paragraphs 1-3.

The appellants were convicted and sentenced to life imprisonment on 22 September 2006 for housebreaking with intent to commit murder, for the murder of two women, and for the unlawful possession of firearms and ammunition. The appellants' liberties were thus involved. Although they were granted leave to appeal four years previously, the hearing of the appeal was delayed over a number of years by reason of the inability of the Registrar of the South Gauteng High Court to find the audio recordings of the trial proceedings, with the result that a transcript of the proceedings could not be produced within the normal time periods.⁵ Having regard to these facts, Satchwell J could not "in good conscience continue to wait upon a colleague to attend to the writing of a judgment in these circumstances".⁶

On his part, Claassen J confirmed that he requested his colleague, "Mailula J, to prepare the judgment in this Full Bench Appeal". He also confirmed that:

... the attorney for the appellants ha[d] approached me, both in writing and in a telephone call enquiring when judgment in this matter may be expected. I passed on to my colleague, Mailula J, the aforesaid letter under cover of my own requesting her to indicate when we might expect her judgment. After receiving no response to my letter, I sent a second letter reminding her of the first and again requesting when we may expect a judgment. Again I have received no response to these requests in writing. It would be a sad day in the administration of justice in this country if the laches of one member of a three bench tribunal, should cause the stifling of the normal appeal procedures prescribed by law. In my view this approach was necessitated by the conduct of Mailula J not responding to the requests made by the senior judge. In my respectful view, a deadlock occurred preventing the finalization of the appeal.⁷

3. Judge Claassen's *New Clicks* analogy

Claassen J called in aid the drastic approach adopted by the Supreme Court of Appeal in *New Clicks SA (Pty) Ltd v Minister of Health and Another*⁸ where there was delay by two judges of a three-bench tribunal in the Cape Provincial Division to hand down a judgment on an application for leave to appeal the judgment of that court. In delivering the court's ruling, Harms JA had observed:

The Supreme Court Act [59 of 1959] assumes that the judicial system will operate properly and that a ruling of either aye or nay will follow within a reasonable time. The Act – not surprisingly – does not deal with the situation where there is neither and a party's right to litigate further is frustrated or obstructed. The failure of a lower Court to

5 On the delictual aspects of this problem, see paragraph 4.3 below.

6 *Myaka v S* [2012] ZAGPJHC 174: paragraph 5.

7 *Myaka v S* [2012] ZAGPJHC 174: paragraphs 2-3, per Claassen J.

8 2005 (3) SA 238 (SCA).

give a ruling within a reasonable time interferes with the process of this Court and frustrates the right of an applicant to apply to this Court for leave. Inexplicable inaction makes the right to apply for leave from this Court illusory. This Court has a constitutional duty to protect its processes and to ensure that parties, who in principle have the right to approach it, should not be prevented by an unreasonable delay by a lower court. In appropriate circumstances, where there is deliberate obstructionism on the part of a Court of first instance or sheer laxity or unjustifiable or inexplicable inaction, or some ulterior motive, this Court may be compelled, in the spirit of the Constitution and the obligation to do justice, to entertain an application of the kind presently before us.⁹

Claassen J agreed with Satchwell J that the matter should no longer be delayed, for judges ought not to be the cause for the adage, “justice delayed, is justice denied” to apply to any case. Claassen J further held that:¹⁰

The rendering of judgment within a reasonable time is not merely a matter of courtesy towards the litigants – the public’s respect for the administration of justice is at stake. It was stated more than half a century ago [that] ‘[m]uch more than a matter of courtesy is involved. By such conduct the administration of justice is hampered, and may be seriously hampered, by an arbiter of justice himself, whose responsibility it is to render it effective and not add judicial remissness to its already irksome delays’.¹¹

Very often, one finds in the law reports judgments such as the *New Clicks* case where appellate courts deprecate the attitude or conduct of trial judges, but it is unusual to find a judge of the same bench criticising the conduct of a colleague. Differences in judicial and individual opinions on legal issues are perhaps the only exception to this rule. The two judges in *Myaka* were not hearing an appeal from the judgment of Mailula J sitting as a court of first instance; they, along with her, heard an appeal from the judgment of another trial judge.¹² Quite rightly, *New Clicks* is authority on the issue of delay in delivering judgment. But, to the extent that it was a rebuke from appellate to trial judges, it is distinguishable from the present case. There was no appellate-trial court relationship between the judges in the *Myaka* situation. Admittedly, however, the two judges were faced with a dilemma. Could they possibly have delivered their own judgments without mentioning the cause of the delay? Or, were they right, ethically speaking, to have, in the process, engaged in the tirades as it were, without falling foul of the respect culture for their colleague judge? These questions are

9 Per Harms JA, *New Clicks SA (Pty) Ltd v Minister of Health and Another* 2005 (3) SA 238 (SCA): paragraph 31.

10 *Myaka v S* [2012] ZAGPJHC 174: paragraph 5.

11 Citing *S v Lifele* 1962 (2) SA 527 (AD) at 531F.

12 No less bewildering is that, on reading the two judgments, the reader is welcomed with the following astonishing notation: “Coram: Claassen and Satchwell JJ (Mailula J *in absentia*)”.

asked bearing in mind that it is not usual for judges on the same judicial level of adjudicative authority to criticise their fellow judge in the manner Claassen and Satchwell JJ did in the case under review. In practice, it is the prerogative of appellate courts, as the Supreme Court of Appeal did in the *New Clicks* case, to comment positively or adversely on the conduct of trial judges or judges of tribunals lower in the judicial hierarchy.

4. Responding to the judges' concern for the delay factor

The concern of Claassen and Satchwell JJ for the delay in delivering the judgment of the court in *Myaka* is a perfectly legitimate one. It is a universal concern. Even from the point of view of an intending litigant, there is a maxim of English equity that "delay defeats equity". It means simply that equity does not assist the lazy, the late comer or the indolent. It means that the legal system cannot assist someone who does not assert his/her right(s) as promptly as it is reasonable to do so.¹³ If the law can take that approach towards a plaintiff, it is, therefore, not surprising that the law would not indulge the lazy or indolent judicial officer or other functionaries of the law. Thus, a fair trial within a reasonable time is the bedrock of the constitutional concept of a fair hearing in the administration of justice. In many constitutional instruments, fair hearing within a reasonable time stands shoulder to shoulder with the fundamental values of independence and impartiality of a court or tribunal.¹⁴ The requirement for expeditious administration of justice in criminal trials is the beginning of wisdom in the jurisprudence of the right to a fair trial – from the inception of the arrest of the suspect, through his/her detention, trial in a court of law as an accused person in a criminal matter, up to the acquittal of the innocent or sentencing of the convicted person. A reasonable time-lag is built into the system to

13 *Allcard v Skinner* (1887) 36 Ch D 145. The Nigerian Supreme Court took this principle further when, in *Newswatch Communications Ltd v Atta* [2006] All FWLR (318) 580 at 601E, while emphasising the two-edged-sword nature of the right to a fair hearing guaranteed in the Nigerian *Constitution*, Tobi JSC for the court, held that it is "not for the weakling, the slumberer, the indolent or the lazy litigant, but it is for the party who is alive and kicking in the judicial process by taking advantage of the principle at the appropriate time". For instance, the Court of Appeal of Lesotho held in *Seutloali v DPP* LAC(2007-2008): 152 that the trial court had properly exercised its discretion when it dismissed the appellant's review application on the ground of undue (six years') delay, hence no miscarriage of justice was involved which could trigger the intervention of the appellate court. See also *Molapo v Molefe* LAC(2000-2004) 771: paragraph 35.

14 See, e.g., section 36(1), *Constitution of the Federal Republic of Nigeria* 1999 which provides that: "In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law in such manner as to secure its independence and impartiality." See also section 12(1), *Constitution of the Kingdom of Lesotho* 1993.

guarantee the fairness of the process. For instance, a person arrested for allegedly committing an offence must be brought before a court of law as soon as reasonably possible.¹⁵ Again, once charged, the accused person has a right to have his/her trial begun and concluded without unreasonable delay.¹⁶ So, it is to a right to a fair hearing in civil litigation from the filing of the action through the hearing of evidence and addresses to the delivery of judgment.

Speaking further in the *New Clicks* case, Harms JA mentioned that some judges believe that requests for “hurried justice” should be met not only with judicial displeasure and castigation, but also with the severest censure, and that any demand for quick rendition of reserved judgments is tantamount to interference with the independence of the judicial office and disrespect for the judge concerned.¹⁷ Harms JA considered them to be seriously mistaken on both counts.

First, parties are entitled to enquire about the progress of their cases and, if they do not receive an answer or if the answer is unsatisfactory, they are entitled to complain. The judicial cloak is not an impregnable shield providing immunity against criticism or reproach. Delays are frustrating and disillusioning and create the impression that judges are imperious. Secondly, it is judicial delay rather than complaints about it that is a threat to judicial independence because delays destroy the public confidence in the judiciary. There rests an ethical duty on judges to give judgment or any ruling in a case promptly and without undue delay and litigants are entitled to judgment as soon as reasonably possible. Otherwise the most quoted legal aphorism, ‘justice delayed is justice denied’, will become a mere platitude.¹⁸

4.1 Delay in a non-complex situation

A further illustration of appellate courts’ abhorrence of the delay factor can be found in the observations of Leach JA, speaking for the majority, on the delay that afflicted the progress of the case in *Exdev (Pty) Ltd and Another v Pekudei Investments (Pty) Ltd*.¹⁹ According to the Judge of Appeal, despite the simplicity of the issues involved, it took more than nine months after the exception had been argued on 19 February 2009 before judgment was delivered on 25 September 2009. The excuse, namely that the delay was because the court was waiting for certain judgment to be forwarded

15 Section 35(1)(d), 1996 *Constitution*.

16 Section 35(3)(d), 1996 *Constitution*.

17 *New Clicks SA (Pty) Ltd v Minister of Health and Another* 2005 (3) SA 238 (SCA): paragraph 39. See also *Botha v White* 2004 (3) SA 184 (T): paragraph 55.

18 *New Clicks SA (Pty) Ltd v Minister of Health and Another* 2005 (3) SA 238 (SCA) paragraph 39.

19 2011 (2) SA 282 (SCA). See also per Lord Carswell, *Boodhoo v Attorney General of Trinidad and Tobago* [2004] UKPC 17 (PC): paragraph 14; *Goose v Wilson Sandford and Co* (1998) *The Law Times Report* (19 February 1998) (CA) at 85-86.

by counsel for the plaintiff, was unacceptable as the said judgments had all been reported.²⁰ Leach JA then stated:

Justice delayed is justice denied. The object of an exception is to deal with a case in an expeditious manner, and a delay of nine months in producing a judgment on such a simple matter of no complexity is, at first blush, wholly unacceptable – as is the delay of three months in producing a judgment on a simple application for leave to appeal – all of which led to it taking a full calendar year from when the exception was argued until leave to appeal was granted: and this in a matter in which both judgments could have been delivered almost immediately.²¹

The Judge of Appeal pointed out that:

The Chief Justice is reported to have recently deprecated the number of reserved judgments as well as the delays taken by Judges to deliver their judgments, which he found to be 'utterly unacceptable', and to have remarked as long as such delays existed judges could not avoid the accusation that the justice system had failed to deliver on its promise of access to justice.²²

These observations are justified. Judges are employed to give judgments. They owe it not only to the litigants who appear before them, but also to the public at large to do so expeditiously, and the administration of justice will fall into disrepute if they fail in that regard. The delays that occurred in this case are cause for concern.²³

Although both Pillay and Ebrahim AJA expressed deep regret on the adjudicative delay in handing down judgment in the case and agreed that it was not to be tolerated, they were not satisfied that, on the facts of the present case, the delay attracted such condemnation by the appellate court. For Pillay AJA, whether delay is acceptable in any given case or not depends on all the facts which, admittedly, were simply not apparent on the facts before court in this case. There was, therefore, no room for speculation as to the cause(s) of the delay or to apportion blame on the trial judge.²⁴ On his part, Ebrahim AJA agreed with both Leach JA and Pillay AJA that a delay in handing down a judgment expeditiously is likely to create, in the minds of litigants and the public at large, the perception of a dereliction of duty and responsibility on the part of the judge concerned.

20 *Exdev (Pty) Ltd and Another v Pekudei Investments (Pty) Ltd* 2011 (2) SA 282 (SCA): paragraph 23.

21 *Exdev (Pty) Ltd and Another v Pekudei Investments (Pty) Ltd* 2011 (2) SA 282 (SCA): paragraph 24.

22 See www.news24.com/SouthAfrica/News/Ngcobo-SA-courts-need-reform-20101113.

23 *Exdev (Pty) Ltd and Another v Pekudei Investments (Pty) Ltd* 2011 (2) SA 282 (SCA): paragraph 15.

24 *Exdev (Pty) Ltd and Another v Pekudei Investments (Pty) Ltd* 2011 (2) SA 282 (SCA): paragraph 28.

However, he dissociated himself from such criticism as the majority levelled against the trial judge as he held that it was unwarranted. Ebrahim AJA reasoned that:

we do not have before us an explanation for the delay from the judge concerned, so that, in the absence thereof, a critical exposé in the judgment, of a failure to act timeously, leads unnecessarily and unfairly to the creation of the public mind-set already referred to, concerning the judge seized with this matter in the court *a quo*, I think such criticism is undue, and should not be encouraged.²⁵

4.2 Delay in concluding an appeal in a criminal matter

Expeditious administration of justice is key in the adjudicative system. Most often, the law does not fix the time frame within which a trial must commence, concluded and judgment delivered; it is often left to the discretion of the court, except that it be done within “reasonable time”. This expression is often associated with the right to a fair hearing in the Constitution.²⁶ Meanwhile, the Supreme Court of Appeal had occasion in the recent case of *S v Ramulifho*²⁷ to comment on the time it took for the appeal in that case to reach the court. The appellant had spent twelve years in custody, two years awaiting trial and another ten years waiting for his application for leave to the Supreme Court of Appeal to be heard.²⁸ The causes of the delay were summarised by the court as follows:²⁹

- the failure of the appellant’s advocate to inform him, immediately after sentence, of his right to apply for leave to appeal and his right to appeal;
- the failure of the legal aid officer who consulted with the appellant in August 2003 to appoint an attorney to represent the appellant and order a transcript of the proceedings to enable the appellant to apply for leave to appeal – there is no explanation for this in the papers, but it indicates a complete lack of diligence and attention to the case;
- the failure of the appellant to follow up his instructions to ascertain what progress his attorney was making – this is not explained, but it was probably due to the appellant’s lack of education and means. Also not explained is the sudden appointment, after the passage of seven years, of Mr Thomu to represent the appellant; and
- the failure of the legal aid officer or attorney appointed by the Legal Aid Board to expeditiously obtain the record for the purpose of the application for leave to appeal and the appeal itself. The record with exhibits is only 81 pages and could be prepared in a day or two. It is

25 *Exdev (Pty) Ltd and Another v Pekudei Investments (Pty) Ltd* 2011 (2) SA 282 (SCA): paragraph 30.

26 Section 35(3)(d), 1996 *Constitution*.

27 2013 (1) SACR 388 (SCA).

28 *S v Ramulifho* 2013 (1) SACR 388 (SCA): paragraph 15.

29 *S v Ramulifho* 2013 (1) SACR 388 (SCA): paragraph 16.

inconceivable that it could take one year to prepare such a record for the application for leave to appeal and the appeal and sixteen months to prepare the record for the appeal in this court.

Admittedly, none of the causes of the delays as itemised was attributable to the trial judge, Southwood AJA, who nonetheless took the opportunity to observe that these failures indicated a lack of diligence and a high degree of negligence on the part of the legal aid officer and the attorney appointed by the Legal Aid Board. The legal aid officer and the attorney appointed by the Legal Aid Board should have followed up the requests for the record and made sure that the appeal was not delayed. On the face of it, the court held that the delays were inexcusable.³⁰ Southwood AJA therefore held that:

Delays of this nature in the prosecution of a criminal appeal when the appellant is serving a prison sentence are not acceptable and run contrary to the ethic which should prevail in the administration of the criminal justice system. Where a convicted person who is serving a prison sentence wishes to appeal, every person involved in the process must ensure that he or she does, with the utmost expedition, what he or she is required to do. The judge or magistrate must hear the application for leave to appeal without delay, the registrar or clerk of the court must have the record transcribed and prepare the record of proceedings and transmit and file all necessary documents without delay, the attorney representing the accused must ensure that everyone involved expeditiously does what is required. And that is because the freedom of the individual is involved and must be safeguarded within the limits of the law. It is an egregious violation of individual freedom to detain a person in prison, and it is the solemn duty of every judicial officer, official involved in the administration of justice, and the legal practitioner representing the accused to ensure that it will happen only with the full authority of the legal process. The judicial officer and every other official involved in the legal process whereby a person is deprived of his freedom are obliged to ensure that that process obtains the full stamp of approval of the law as quickly as possible and the impression must never be created that our courts and judicial officials are indifferent to the freedom of the individual.³¹

It is to be noted that the court ordered the registrar to send copies of the record, the heads of argument filed by the parties, the appellant's application for condonation and the court's judgment to the President of the Law Society of the Northern Provinces and to the Chairperson of the Legal Aid Board "to investigate the reason for the delays referred to in this judgment and to take whatever steps they deem necessary against those responsible".³²

30 *S v Ramulifho* 2013 (1) SACR 388 (SCA): paragraph 16.

31 *S v Ramulifho* 2013 (1) SACR 388 (SCA): paragraph 17. See also *S v Letsin* 1963 (1) SA 60 (O) at 61A-H.

32 *S v Ramulifho* 2013 (1) SACR 388 (SCA): paragraph 18.

4.3 Delay as a cause of action in delict

There is no authority to suggest liability in delict could arise where delay in delivering a judgment emanates from the conduct of a judge. There could probably not be, because it is a well-known common law principle that judges and adjudicators are immune from delictual liability for anything said or done in the course of adjudication.³³ This legal proposition has not been displaced by contemporary constitutionalism, constitutional supremacy or the rule of law that have been in vogue since the 1993 Constitution came into force in 1994.³⁴ On the other hand, there is authority for saying that the wrongful conduct similar to those found in *Ramulifho* could constitute the ingredients necessary for the imposition of a delictual liability – wrongfulness, negligence and damage. The case in point is the Constitutional Court judgment in *Zealand v Minister of Justice and Constitutional Development*,³⁵ where the High Court registrar negligently failed to issue a warrant for the release of the appellant or otherwise inform the correctional centre where he was held that his appeal has been successful. Had this been done, the appellant would have been transferred to the appropriate wing of the prison to await the conclusion of another case pending against him. Langa CJ held that after the appellant’s successful appeal, his legal status changed from that of a “sentenced” offender, which meant a lesser set of legal rights and liberties, as opposed to that of an awaiting-trial offender whereby he would be treated to more legal rights and liberties. Such deprivation of the legal rights and liberties amounted to deprivation of freedom and was in violation of the appellant’s right not be deprived of his freedom arbitrarily or without just cause under section 12(1)(a) of the 1996 Constitution.³⁶ Furthermore, there was no reason why an unjustified breach of section 12(1)(a) of the Constitution should not be sufficient to establish unlawfulness for the purposes of the applicant’s delictual action of unlawful or wrongful detention.³⁷

Similar conclusions were arrived at by the trial judge in *Alves v LOM Business Solutions (Pty) Ltd*,³⁸ where the Minister of Justice and Constitutional Development was held liable in negligence for the registrar’s delays in preparing the records of the appeal, thereby causing the plaintiff to spend a further period in jail. Willis J held that the constitutional rights of the intending appellant could not be rendered

33 *Fray v Blackburn* (1863) 3 B & S 576 at 578; *Anderson v Gorrie* [1895] 1 QBD 668 at 670 (CA); *Penrice v Dickinson* 1945 AD 6 at 14-15; *Hoffman v Meyer* 1956 2 SA 752 at 756 B.

34 *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standard Authority of South Africa* 2006 (1) SA 461 (SCA): paragraph 26; *Claassen v Minister of Justice and Constitutional Development* 2010 (6) SA 399 (WCC).

35 2008 (4) SA 458 (CC).

36 *Zealand v Minister of Justice and Constitutional Development* 2008 (4) SA 458 (CC): paragraphs 34-35.

37 *Zealand v Minister of Justice and Constitutional Development* 2008 (4) SA 458 (CC): paragraphs 52-53.

38 2012 (1) SA 399 (GSJ).

nugatory by unreasonable delays in the offices of which the defendant was responsible and in control.³⁹ A reasonable person in the position of the Minister could have foreseen the harm the delay would cause and would have taken reasonable steps to prevent such harm.⁴⁰ Damages were accordingly awarded for the negligent conduct of the officials involved.

4.4 Delay in the context of labour adjudication

Both the Supreme Court of Appeal and the Constitutional Court have had occasion to comment and condemn the so-called “systemic delays” in the labour adjudicative system. In *Shoprite Checkers (Pty) Ltd v CCMA*,⁴¹ a dismissal dispute lasted for more than eight years and the issue before the Supreme Court of Appeal was the correctness of the remedy of reinstatement with retrospective effect afforded the plaintiff to the time of dismissal. The court had to show its concern about the “long and gruelling journey” the case had travelled and “the long delays in finalising especially labour matters”.⁴² It accordingly had to remind the parties, the CCMA and labour adjudicators that the very essence of the compulsory labour arbitration system was speed, fairness and accessibility. Indeed, the court held that the entire scheme of the *Labour Relations Act 1995* and its motivating philosophy were directed at cheap and easy access to dispute resolution procedures and courts. There cannot be any doubt that labour matters have serious implications for the employer and the employee, while dismissals affect the very survival of the employee. It is thus “untenable that employees, whatever the rights or wrongs of their conduct, be put through the rigours, hardships and uncertainties that accompany delays of the kind here encountered. It is equally unfair that employers bear the brunt of systemic failure”.⁴³

Commenting in *Strategic Liquor Services v Mvumbi*⁴⁴ – a constructive dismissal dispute which substantially concerned the equally “lamentable” failure by the Labour Court to supply written reasons for its decision⁴⁵ – the Constitutional Court endorsed the foregoing observations of the Supreme Court of Appeal in *Shoprite Checkers*, having regard to the lamentable delays that had occurred in the present case. Some two and a half months earlier, the court had dealt with a matter where the Labour Court of Appeal delivered judgment in a dismissal matter more than two and a half years after oral argument was concluded. In *Netherburn Engineering CC t/a*

39 *Alves v LOM Business Solutions (Pty) Ltd* 2012 (1) SA 399 (GSJ): paragraphs 20–21.

40 *Alves v LOM Business Solutions (Pty) Ltd* 2012 (1) SA 399 (GSJ): paragraphs 27–29.

41 *Shoprite Checkers (Pty) Ltd v CCMA* 2009 (3) SA 493 (SCA).

42 *Shoprite Checkers (Pty) Ltd v CCMA* 2009 (3) SA 493 (SCA): paragraph 2.

43 Per Navsa JA, *Shoprite Checkers (Pty) Ltd v CCMA* 2009 (3) SA 493 (SCA): paragraph 34.

44 2009 (2) SA 92 (CC): paragraph 12.

45 *Strategic Liquor Services v Mvumbi* 2009 (2) SA 92 (CC): paragraph 14. See also *Mphahlele v First Bank of SA Ltd* 1999 (2) SA 667 (CC): paragraph 12.

Netherburn Ceramics v Mudau,⁴⁶ the court was considering whether it was in the interests of justice for the court to entertain an application for leave to appeal to it on the ruling of a commissioner to allow Netherburn legal representation at the CCMA arbitration hearing. The court was not persuaded that it was in the interests of justice for it to entertain the application. The section of the LRA from which the issue in contention arose was repealed and replaced some seven years ago. However, the court previously held that, where a legislative provision has been challenged, but since repealed, it may be in the interests of justice to determine the constitutional challenge if it would have any practical effect.⁴⁷ On the contrary, seven years having elapsed since the repeal, it would be extremely unlikely that determining its constitutionality at this stage would have any practical effect on the pending proceedings, neither would it be determinative of rule 25(1) which substituted the relevant section as the provisions of the rule were not in identical terms.⁴⁸ The court refrained from making any further comments on the legal representation question before the CCMA, but observed that:

We conclude by noting once again that it is a matter for concern that proceedings concerning an unfair dismissal in October 1998 should not have reached their final resolution some ten years later. It is not clear to us from the record before us where the blame for the delay lies (and so far as we can discern it does not lie singly), and so we can take the matter no further now.⁴⁹

5. The delay factor in Namibian courts

There are three judgments from Namibia which appear to suggest that the judges of the Supreme Court of Namibia tended not to take notice of the delays in delivering judgment in Namibian courts, even where they appeared so glaring and obvious. Notwithstanding that the Namibian Supreme Court remained mute in the face of this contravention of this basic principle of justice,⁵⁰ the Law Reform and Development Commission

46 2010 (2) SA 269 (CC).

47 *President, Ordinary Court Martial v Freedom of Expression Institute* 1999 (4) SA 682 (CC): paragraph 16.

48 *Netherburn Engineering CC t/a Netherburn Ceramics v Mudau* 2010 (2) SA 269 (CC): paragraph 10.

49 *Netherburn Engineering CC t/a Netherburn Ceramics v Mudau* 2010 (2) SA 269 (CC): paragraph 12.

50 Cf. in *Liquidator of Lesotho Bank v Expertype Secretarial and Another* LAC (2007-2008) 279: paragraph 11, where a two-year delay in delivering judgment in a matter essentially procedural in nature and not requiring particular legal research was deprecated by the Court of Appeal of Lesotho, because delays destroy public confidence in the judiciary; capable of subverting the rule of law if unchecked, and raises the issue of judicial ethics. Melunsky JA cited the English Court of Appeal in *Goose v Wilson Sandford and Co (A Firm)* [2000] EWCA Civ. 73 (14 March 2000), where that court censured an eight-month delay in delivering a reserved judgment which led to the resignation of the judge involved.

has grabbed the initiative. Meanwhile, all three cases in question concern Supreme Court judges in one way or the other. First, although Maritz J described the “issues raised in the application” as “constitutional and complex in nature and of public importance” in *Tlhoru v Minister of Home Affairs*,⁵¹ it was the same Maritz J who found himself delaying judgment in that same important case. The matter was heard on 25 August 2000, while the judgment was finally delivered on 2 July 2008, almost eight years apart. At the stage where judgment was delivered, Maritz J had been elevated to the Supreme Court so that he literally had to climb down from that court to deliver judgment in a lower court of which he was no longer a member. Surprisingly, there is no record of appeal or leave to appeal in this matter where the question of the validity of that judgment could be raised not only for the delay, but also for the jurisdiction of the court. Was the High Court at the time the judgment was delivered properly constituted with Maritz J, now substantively Maritz JA, sitting to deliver judgment in a court of which he had ceased to be a member? In effect, could the judgment delivered after such a long delay be said to have been delivered within a reasonable time and, therefore, constitutional? Again, was Maritz J’s court not *functus officio* at the time it delivered that judgment?⁵² If so, what, in law, is the effect of such a judgment?

The foregoing questions could also be raised in respect of the case of *Sebatane v Mutumba*,⁵³ not only because it involved unconstitutionality of a statutory provision, but also because Shivute CJ, as he had then become, had descended from the position of Chief Justice, left his seat in the Supreme Court, and proceeded to deliver judgment at the High Court as Shivute J on 4 October 2012 in a matter he had heard on 18 March 2003 as a Judge of the High Court.

A third illustration of the delay factor in which the courts in the Namibian jurisdiction wallow under the silent watch of the otherwise constitutionally vigilant Supreme Court of that country is *Minister of Basic Education v Vivier NO*.⁵⁴ This vicarious liability action was heard on 7 April 2008 and judgment was rendered on 29 June 2012, a whopping period of over 50 months. Unlike in the cases discussed earlier, where the South African Supreme

51 *Tlhoru v Minister of Home Affairs* 2008 (1) NR 97 (HC): paragraph 55.

52 If, as *Black’s Law dictionary* 1990:673 in defining *functus officio*, applied it to an officer whose term has expired and who has consequently no further official authority, does that not apply in an instance where, as a consequence of his/her promotion to the Supreme Court, the appointment of the judge to the High Court is thereby terminated. Such a judge would, strictly speaking, no longer be required to sit in judgment on the High Court bench, and, if s/he does, the judgment arising from that will be a nullity, that court comprising that judge is *functus officio*. For the operation of this doctrine in the administrative decision-making context, see the recent judgment of Plasket AJA, *MEC for Health, Province of the Eastern Cape NO v Kirkland Investment (Pty) Ltd t/a Eye and Laser Institute* [2013] ZASCA 58 (16 May 2013).

53 2013 (1) NR 284 (HC).

54 2012 (2) NR 613 (SC).

Court of Appeal had expressed indignation against delays in delivering judgments by trial courts,⁵⁵ there is no such corresponding views from the Supreme Court of Namibia. For, at the Supreme Court, it took Maritz JA well over four years and two months⁵⁶ to uphold the trial judgment on the liability issue and reducing the damages awarded. These “obvious failures of justice”⁵⁷ had energised the Namibian Law Commission into drafting a Judicial Oversight Bill in 2012 to which is appended a draft Code of Judicial Conduct along the lines of the Bangalore Principles of Judicial Conduct 2002, which provides a template for judicial conduct in Commonwealth jurisdictions.

6. Nigeria’s constitutional response to the challenges of delay in delivering judgments⁵⁸

As at the time the Constitution of the Federal Republic of Nigeria 1979 was written, it was abundantly clear from the case law⁵⁹ that there were long delays in delivering judgments by trial courts in Nigeria. Classical examples of such delays could be noted through the cases of *Ozuluonye and Others v The State*⁶⁰ and *Ariori and Others v Elemo and Others*,⁶¹ where the appellants argued that the delays violated an essential component of their rights to a fair hearing within a reasonable time contrary to the provisions of the 1963 *Constitution of the Federal Republic of Nigeria*.⁶² The time during which a hearing in a case may be concluded may not lend itself to be regulated by legislation and is often left to the discretion of the judge guided by the expression “within a reasonable time”. However, the founders of the 1979 and 1999 *Constitutions* of Nigeria, respectively, were driven to the frenzy of matching a notorious habit with a drastic measure by seeking to peg the time limit within which a judge must deliver judgment after the conclusion of evidence and final addresses. Thus, this “chronic disease” was visited by “chronic cure, hence the unpalatable language of section 258(1)” of the 1979 *Constitution*.⁶³ In a unique measure and language seemingly peculiar to the Nigerian constitutional model, section 258(1) of the 1979 *Constitution* enacted that reserved judgments shall be

55 See, e.g., *New Clicks SA (Pty) Ltd v Minister of Health and Another* 2005 (3) SA 238 (SCA).

56 The case was heard at the Supreme Court on 7 April 2008, while judgment was delivered on 29 June 2012.

57 Gauntlett 2013a:112; Gauntlett 2013b:25.

58 See Okpaluba 1992:59-64; Nwauche 2001:1278.

59 See, e.g., *Awobiyi and Sons v Igbalaye Brothers* (1965) 1 All NLR 163 at 166; *Lawal v Dawodu and Another* (1972) 1 All NLR (pt 2) 207 at 219; *Akpor v Iguorigo* (1978) 2 SC 115 at 127.

60 (1983) 4 NCLR 204.

61 (1984) 5 NCLR 1.

62 For the case law concerning “a fair hearing within a reasonable time” in the Nigerian jurisdiction, see Okpaluba 1990:30-39.

63 Per Eso JSC, *Ifezue v Mbadugha and Another* [1984] 1 SCNLR 427 at 476G-H.

delivered in writing “not later than 3 months”. Under section 294(1) of the 1999 *Constitution*, such judgment shall be delivered in writing “not later than ninety days”.

In *Ifezue v Mbadugha and Another*,⁶⁴ the majority of the Supreme Court of Nigeria interpreted the provisions of section 258(1) as mandatory and not directory having regard to the historical setting and the mischief which the Drafting Committee of the 1979 *Constitution* set out to cure. That background was that “some judges” had become “notorious for very long adjournments of judgments leading to a deprivation from them of the advantage of forming fair impressions of witnesses and evaluation of evidence”.⁶⁵ In a majority judgment from which Bello JSC (Justice of the Supreme Court) dissented, Irikefe JSC had no doubt that the mischief which the constitutional provision sought to remove was the problem of delayed judgments which he said was similar to justice delayed which amounted to a denial of justice.⁶⁶ Eso JSC held that the subsection was a way in which the makers of the *Constitution* imposed on the courts what they considered to be a reasonable time to deliver judgment after the conclusion of a case. According to him:

[t]he legislator is no doubt justified in this unusual exercise and imposition having regard to the history of inordinate delays by courts in the determination of cases before them. I adopt the language of Chief Williams that what those courts did before the coming into force of the *Constitution* was to preserve and not just to reserve judgments. It has been scandalous!⁶⁷

Concurring in the majority opinion of the court, Uwais JSC saw the provisions of section 258(1) as laudable; its intention being clearly to stop judges from unnecessarily delaying the delivery of judgments, as was the case in the past. He urged the courts to endeavour to give effect to these provisions whereas “any hardship arising therefrom should be regarded as one of the hazards of litigations which parties have to endure”.⁶⁸ While holding that the subsection prohibited any adjournment of judgment *sine die*, Obaseki JSC held that it enjoined the court to fix the date of delivery of its judgment for any day within the period of three months, instead of leaving it in the air.⁶⁹ Obaseki JSC further observed:

I venture to say that the duty of adjudication is in a class by itself and should not be placed in the same category as simple executive public duties. The presumption that necessarily arises from the failure to perform the public duty of adjudication within the time

64 [1984] 1 SCNLR 427.

65 Per Aniagolu JSC, *Ifezue v Mbadugha and Another* [1984] 1 SCNLR 427 at 448H-449A-C.

66 *Ifezue v Mbadugha and Another* [1984] 1 SCNLR 427 at 454F.

67 *Ifezue v Mbadugha and Another* [1984] 1 SCNLR 427 at 476E-F.

68 *Ifezue v Mbadugha and Another* [1984] 1 SCNLR 427 at 479H-480A.

69 *Ifezue v Mbadugha and Another* [1984] 1 SCNLR 427 at 468H-469A.

prescribed is that of miscarriage of justice. Justice delayed is justice denied is a favourite song of today. Any act or conduct of a Judge which denies justice to the parties within the time stipulated by the Constitution amounts to miscarriage of justice in the determination of a case. This miscarriage cannot but be fatal to the decision and renders it null and void. Rather than bring inconvenience and injustice to parties in a case to hold null and void a decision delivered in contravention of section 258(1) of the 1979 Constitution it brings justice or an opportunity to see that justice is done to the parties.⁷⁰

Bello JSC dissented from the majority judgment which was that any judgment delivered outside the three months' limit was a nullity and of no effect.⁷¹ However, he acknowledged that the subsection was designed to stop the practice of judges reserving judgments for so long a time. But, he disagreed that the subsection should be read as if it were mandatory. Such a construction was not a guarantee for speedy administration of justice. Instead of being a vehicle for expeditious administration of justice, "it will be a shackle to the administration of justice and hinder its speed with the consequential inconveniences and inflation in the cost of litigations. On the other hand, to construe the subsection [as] directory will be a panacea for all the malaise and ills of its mandatory meaning".⁷²

Clearly, that strict interpretation to the provisions of section 258(1) of the 1979 *Constitution* adopted by the majority of the Supreme Court of Nigeria might have been right in law. But, was it in the interest of justice to approach the matter from that rigid angle, notwithstanding that the interests of one of the parties to the litigation might have been compromised? Meanwhile, the interpretative approach of the Supreme Court, which had the effect of nullifying any judgment delivered outside the time limit, became a cause for concern. It thus became necessary that it should be relaxed in the interests of justice. The remedial legislative measure came by way of section 6 of the *Constitution* (Amendment) Decree No. 17 of 1985 which amended section 258(1) of the 1979 *Constitution* by adding subsections (4) and (5). This was subsequently incorporated into section 294(1) of the 1999 *Constitution* which now provides that judgments shall be delivered within ninety days of conclusion of evidence and final addresses. It goes further to incorporate the 1985 amendments to the delay saga and how appellate courts should deal with it.⁷³

70 *Ifezue v Mbadugha and Another* [1984] 1 SCNLR 427 at 473A-C.

71 See also *Odi v Osafile* (1985) 1 NWLR (1) 17; *Kpema v State* (1986) 1 NWLR (17) 396; *Taylor v Trustees of Trinity Methodist Church* (1986) 4 NWLR (34) 136; *Ojokolobo v Alamu* (1987) 3 NWLR (61) 377.

72 *Ifezue v Mbadugha and Another* [1984] 1 SCNLR 427 at 463 E/F-G.

73 The Supreme Court of Nigeria had occasion to deliberate extensively on the 1985 constitutional amendments in *Rossek and Others v ACB Ltd and Others* [1993] 8 NWLR (312) 382 at 438-440, 461-462, 465-466, 467 and 491-492 that the amendments were directed to the two appellate courts: the Court of Appeal and the Supreme Court. It was designed to obviate the inconvenience occasioned by the *Ifezue v Mbadugha* judgment to the effect that non-compliance with section 258(1) of the 1979 *Constitution* rendered a judgment null and void

First, it sets out to ameliorate the strict interpretation given to the equivalent provision in the 1979 *Constitution* by relaxing the nullity construction of the Supreme Court. It does so by investing in the courts the discretion to examine the cause of the delay and the contribution of the complainant to the delay. In effect, section 294(5) provides that:

The decision of a court shall not be set aside or treated as a nullity solely on the ground of non-compliance with the provisions of subsection (1) of this section unless the court exercising jurisdiction by way of appeal or review of that decision is satisfied that the party complaining has suffered a miscarriage of justice by reason thereof.⁷⁴

The second amendment introduced an element linked to judicial discipline when it dropped the bombshell from the point of view of the offending judge whose matter would be sent to the National Judicial Council, an organ established in terms of paragraph 21 subparagraph (d) of the Third Schedule to the 1999 *Constitution* and assigned with the duty and responsibility to recommend suitable persons for appointment to the offices of the Chief Judges of the States and other judicial officers; to exercise disciplinary control over those judges and also empowered to

which caused inconvenience to parties who, through no fault of theirs, have had to be put to additional expense in re-litigating the whole matter, and at the same time to preserve the right to set aside a judgment where it is established that, as a result of non-compliance with section 258(1), a miscarriage of justice had occurred. See also *Oyegoke v Iriguna* [2001] FWLR (75) 448 (CA), where judgment was delivered after three months and the questions were namely, the legal consequences thereof; the nature of the miscarriage that renders the judgment void, and on who the onus of proof rested; *Benue Cement Plc v Sky Inspection (Nig.) Ltd* [2003] FWLR (142) 109 (CA), whether failure to deliver judgment within the statutory period was fatal to the case; *Alabi v Doherty* [2006] All FWLR (299) 1527 (CA), whether the delay was unreasonable, and how a court should treat the complaint of delay where the complainant contributed to the delay; *Dahiru v Kamale* [2006] All FWLR (295) 616 (CA), whether the grounds upon which a judgment delivered outside the time limit would be vitiated.

74 In posing the question of whether the inordinate delay of nine months between the close of the trial and the delivering of judgment renders the judgment voidable and whether, in the interest of justice, the court could avoid it coupled with the Court of Appeal's confirmation of it, Oputa JSC answered in *Dibiamaka v Osakwe* [1989] 3 NWLR (107) 101 at 114F-115B that, where inordinate delay between the close of the trial and the writing of the judgment apparently and obviously affected the trial judge's perception, appreciation and evaluation of the evidence so that it could easily be seen that he had lost the impressions made on him by the witnesses, then in such a case, there might be some fear of possible miscarriage of justice and there, but only there, would an appellate court intervene. The emphasis does not rest on the length of time, but on the effect it had in the perception of the trial judge. Since, in the present case, the trial judge was effectively in charge all the time, his evaluation of the evidence bore the mark of freshness, and his findings of fact were all supported by available credible evidence, there was no basis upon which the appellate court could interfere.

recommend their removal from office. Accordingly, section 294(6) of the 1999 *Constitution* provides that:

[a]s soon as possible after hearing and deciding any case in which it has been determined or observed that there was non-compliance with the provisions of subsection (1) of this section, the person presiding at the sitting of the court shall send a report on the case to the Chairman of the National Judicial Council who shall keep the Council informed of such action as the Council may deem fit.⁷⁵

7. Conclusion

Apart from the failure to deliver judgment timeously, which stands out in the judgments in this case, there is a flurry of questions, thoughts and suppositions flashing through the mind on the objective or purpose served by the publication of the information about Judge Mailula's alleged failure to write the judgment for the bench. While this article does not and should not be seen as an attempt to dabble into the merits of the alleged failure, yet, some hypothesising is inevitable. For instance, what impression would the quoted passages in the two judgments create or convey in the minds of the student of the law? Should these passages have been incorporated into the said judgments? Is it one of a bench operating in a discordant fashion or one where two members are conscientious over their duties to the individual member of the society whose liberty was at stake in a justice system that decrees speedy adjudication as against another judge who was apparently averse to these constitutional and judicial precepts? Would what the two judges said about their "absentee" colleague, amount to a "complaint" of a "dereliction" of duty on her part? Suppose for a moment that it was, the next question is whether the judgment was the proper method of laying such complaint, and the reader the person to whom it should be addressed?

The point has been made that delay or failure to deliver judgment, when it is due or within reasonable time once the hearing was concluded, raises the issue of a judge's inability to perform a vital aspect of his/her judicial function. It relates to the issue of "diligence"⁷⁶ addressed in Article 10 of the recently promulgated *South African Code of Judicial Conduct* adopted in terms of section 12 of the *Judicial Service Commission Act 1994*.⁷⁷ It is in accord with the high standard of judicial conduct that a judge should

75 Under the 1985 Amendment, the erring judge was to be brought to the attention of the Judicial Advisory Committee which was the body advising the then Military Government on the appointment and discipline of judges in Nigeria.

76 Article 10(d) provides that "diligence" includes giving judgment or any ruling in a case "promptly and without due delay". Note 10(ii) thereof states that litigants are entitled to judgment "as soon as reasonably possible" and, in Note 10(iii), it is specifically provided that "[c]riminal proceedings, especially automatic reviews, applications for leave to appeal, and matters where personal liberty is involved, must be dealt with expeditiously".

77 *Judicial Service Commission Act 9/1994*.

perform all judicial duties, including the delivery of reserved judgments, efficiently, fairly and with reasonable promptness.⁷⁸ Of course, an isolated lapse, though equally a transgression of some established and definite rule of action and a dereliction from duty,⁷⁹ may lead to some form of censure. However, it may not, in practice, be adjudged to be of the degree of misconduct or incompetence for purposes of imposing a more serious sanction.⁸⁰ On the other hand, a persistent pattern of such behaviour can trigger the initiation of the dreaded (judge's nightmare), but constitutionally laid down procedure⁸¹ for the removal of the judge for incapacity.⁸² It cannot be doubted that a cumulative case of judicial perversity by a judicial officer tending to lower the dignity of his/her office and thereby constituting a nuisance to the community could also amount to misconduct.⁸³

Public confidence is a *sine qua non* of an efficient and successful administration of justice. It is a factor emphasised in every *Code of Judicial Conduct* since the *Bangalore Principles* was adopted in 2001. Thus, in paragraph 7 of the preamble to the *South African Code of Conduct*, it is stated that "it is necessary for public acceptance of its authority and integrity in order to fulfil its constitutional obligations that the judiciary should conform to ethical standards that are internationally generally accepted, more particularly as set out in the *Bangalore Principles* of

78 What has been provided for in *Codes of Judicial Conduct* or *Judicial Codes of Conduct* as it is known in some jurisdictions has now been incorporated into the newly promulgated (31 January 2013) *Constitution of Zimbabwe* as one of the principles guiding the judiciary in that Republic. Among the constitutional injunctions in section 165(1) of that *Constitution*, it is provided that: "(b) justice must not be delayed, and to that end members of the judiciary must perform their judicial duties efficiently and with reasonable promptness".

79 See *Black* 1990:999. In *Anyah v Attorney General of Borno State and Another* (1984) 5 NCLR 225 (FCA) at 231, Karibi Whyte JCA of the then Federal Court of Appeal of Nigeria (later JSC) defined "misconduct" in the removal of a judge from office under the 1979 *Constitution of Nigeria* to mean "any unlawful behavior by a public officer in relation to the duties of his office, wilful in character. The term embraces acts which the office holder had no right to perform, acts performed improperly and failure to act in the face of affirmative duty to act". See also *Montagu v Lt Governor and Council of Van Diemeans Land* (1849) 6 Moo PC 489.

80 Article 2(3) of the *Code* does not speak to persistent conduct, but about "any wilful or grossly negligent breach of this Code is a ground upon which a complaint against a judge may be lodged in terms of section 14(4)(b) of the Act".

81 Section 177, 1996 *Constitution*.

82 See per Gray J, *Clark v Vanstone* (2004) 81 ALD 21: paragraph 85; per Lord Scott, *Lawrence v Attorney General of Grenada* [2007] 1 WLR 1474 (PC): paragraph 23; *Hearing on the Report of the Chief Justice of Malta* [2009] UKPC 43 (PC): paragraphs 203, 261. See also *Stewart v Secretary of State for Scotland* 1998 SC (HL) 81). On the standard of misbehaviour that will warrant removal of a judge from office, see: *Wilson v AG* [2010] NZHC 1678; *Madam Justice Levers Case* [2010] UKPC 24 (PC); *Meerabux v Attorney General of Belize* [2005] 2 WLR 1307 (PC).

83 *Anyah v Attorney General of Borno State and Another* (1984) 5 NCLR 225 (FCA).

Judicial Conduct (2001) as revised at the Hague (2002)". Further, Note 8(i) to Article 8 states clearly that "the legitimacy of the judiciary depends on the public understanding of and confidence in the judicial process". In light of the role public confidence plays in evaluating a fair administration of justice, it seems appropriate to ask: What confidence will the opinions expressed in the *Myaka* judgments inspire in the minds of members of the public⁸⁴ or the reasonable observer who listened to these judgments delivered in open court⁸⁵ or those who come across them in the Southern African Legal Information Institute website or in the Law Reports when they are published? Would such readers, knowing how the judicial system works, not likely conclude that the restraint principle has been breached in the circumstances. Such reader might think that the proper channel for bringing to the attention of the Judge President of the Division or the Chief Justice the conduct of an erring judge was not followed in this case.

It is submitted that the *Myaka* case has presented the legal fraternity with a bizarre situation. In other words, the legal fraternity is confronted, in judicial parlance, with the proverbial "washing" of "one's dirty linen in public". And, from whatever angle one examines this case, the inevitable conclusion is that two issues of judicial ethics of varying degrees are implicated; the main being the delay factor in delivering judgment, while the subsidiary is the restraint factor in relation to courtesy and collegiality towards a judicial colleague. Diligent and conscientious judges must be spared the dilemma with which the two judges were faced in *Myaka's* case. There is no doubt that ample articulation of the need to give judgments or rulings promptly, expeditiously and without undue delay has been made in the *Code of Judicial Conduct*. It is perhaps too early to speculate as to what effect those provisions would have on the subject matter. In any

84 That public expectations from the judge are very high was captured by Gonthier J in *Therrien v Canada (Ministry of Justice)* (2001) 200 DLR (4th) 1 (SCC): paragraph 111, when he spoke of the public demanding "virtually irreproachable conduct from anyone performing a judicial function". This is because "what is demanded of them is something far above what is demanded of their fellow citizens". Speaking in similar vein, Lord Phillips said in the *Hearing on the Report of the Tribunal to The Governor of The Cayman Islands – Madam Justice Levers (Judge of the Grand Court of The Cayman Islands)* [2010] UKPC 24 (29 July 2010) paragraph 50 that: "The public rightly expects the highest standard of behaviour from a judge, but the protection of judicial independence demands that a judge shall not be removed for misbehaviour unless the judge has fallen so far short of that standard of behaviour as to demonstrate that he or she is not fit to remain in office. The test is whether the confidence in the justice system of those appearing before the judge or the public in general, with knowledge of the material circumstances, will be undermined if the judge continues to sit. If a judge, by a course of conduct, demonstrates an inability to behave with due propriety, misbehaviour can merge into incapacity".

85 Particular attention should be paid to Article 11 on "restraint", where emphases are placed on "courtesy and collegiality towards colleagues" as "indispensable attributes of a judge" and judges are thereby enjoined not to make "personal criticism" of a colleague "unless it is necessary during the course of appeal proceedings".

event, it would appear that the platitudes in the *Code* alone can hardly spur an indifferent judge into coming out of slumber and acting expeditiously or promptly. It would seem appropriate that adequate measures be put in place to prevent the reoccurrence of the *Myaka* situation. To this end, judicial education under the auspices of the newly established South African Judicial Education Institute should be mounted with emphasis on judicial ethics based on the *Bangalore Code*, other international instruments and the local *Code of Judicial Conduct*, and a study of the jurisprudence from other jurisdictions where there are precedents on what constitutes “incapacity”, “grossly incompetent” conduct and “gross misconduct” on the part of a judge in terms of section 177(1)(a) of the *Constitution*;⁸⁶ or “wilfully or grossly negligent breach of the Code”. These are the generic terms upon which complaints against a judge may be lodged in terms of section 14(4)(b) of the *Judicial Service Commission Act* 1994. A more stringent intervention is, therefore, needed to curb the malaise of delays in delivering judgments in South African courts. A system of graduated sanctions to go hand-in-hand with each breach of the *Code* would seem appropriate and, ultimately, or as a last resort, the invocation of the procedure set out in section 177 of the *Constitution* for the removal of the erring judge.

86 Section 117(1)(a) of the 1996 *Constitution*.

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