The Judicial Officers Association of South Africa (JOASA) held its annual general meeting in late January. On the evening preceding the AGM, JOASA held a gala dinner at which Chief Justice Mogoeng Mogoeng and the Deputy Minister of Justice, John Jeffery, were the speakers.

Chief Justice Mogoeng spoke on the topic ‘a single judiciary’, while Deputy Minister Jeffery spoke on the role of the Justice Department in bringing about a single judiciary.

During his welcome address the President of JOASA and magistrate, Nazeem Joemath, said that JOASA was the only association of judicial officers in South Africa that boasts membership of all judicial grades. ‘We hold membership to the two international judicial associations,’ he said, adding that membership to the two international judicial bodies was granted only when the voluntary association is free from political influences, be it executive or legislative.

Mr Joemath concluded by saying: ‘We may have a very young democracy, but we have a judicial system that we can be very proud of.’

Chief Justice calls for single judiciary

Chief Justice Mogoeng said that the judiciary was recognised worldwide as the third arm of the state, and that in many, if not all, jurisdictions, it does bear the hallmarks of oneness or unity, but not quite so in South Africa. ‘Over the years, the institutional arrangements around the judiciary were such that, barring normal litigation processes, there really was no structured relationship or form of engagement between various courts,’ he said.

Chief Justice Mogoeng said that regional courts and district courts interact because they share infrastructural facilities and because some matters have to be referred to the regional courts by the district courts, as part of the normal adjudication process. Similarly, he said, appeal and review processes were almost the only known way through which courts at different levels would interact.

The Chief Justice said that prior to the Constitution Seventeenth Amendment Act, 2012 and the Superior Courts Act 10 of 2013, which came into operation on 23 August 2013, the president of the Supreme Court of Appeal and the judges president honoured invitations to meetings convened by the Chief Justice, and programmes organised by him, out of sheer civility and recognition of some moral authority he had over them. He added that the Chief Justice was generally regarded as nothing more than the head of the highest court in the land, with little or no say in the operational matters of all other courts.

‘Similarly, magistrates attended meetings convened by a judge president of a division of the High Court out of sheer deference to a senior judicial officer in the province. Some in positions of leadership simply ignored those meetings. I know for a fact that any attempt by a judge president to get remotely involved in the operations of the magistrates’ courts was viewed with suspicion and a measure of resentment,’ he said.

Chief Justice Mogoeng said that while this was happening, all the other arms of the state have been well aligned and their operations properly coordinated at all levels, nationally and provincially. He said that it was against this background that the concept of a single judiciary must be viewed and understood in South Africa.

Chief Justice Mogoeng said that there is no doubt that a single judiciary is a constitutional injunction that must be realised. He added: ‘The provisions of chapter 8 of the Constitution, properly understood, enjoin us to ensure that the magistracy is integrated into the broader judicial system.’

According to Chief Justice Mogoeng, the Superior Courts Act was enacted and the Constitution amended to usher in an unquestionable dispensation of a single judiciary. ‘And this is the judiciary led by the Chief Justice who bears the responsibility to establish norms and standards for the operations of all the courts of this country,’ he said.

Chief Justice Mogoeng said that to be consistent with the constitutional vision to establish a single judiciary in the country, s 8(4)(c) of the Superior Courts Act gives the judges president the responsibility to coordinate judicial functions of all magistrates’ courts falling under their jurisdiction.

‘No court and no judicial officer or grouping of judicial officers may, by law, operate as if these constitutional arrangements designed to unify the judiciary and clothe the Chief Justice with certain responsibilities, do not exist. We all remain independent to take our decisions in relation to cases before us without undue influence, but never free to take as long as we want to finalise cases and deliver reserved judgments. The constitutional values of responsiveness, transparency and accountability, which apply to the judiciary as much as it does to all other organs of state, require that we not only account through our judgments, but also by delivering quality justice to all our people speedily. We therefore owe it to the judiciary as an institution and to the nation to demonstrate our capacity to run our affairs and the willingness to embrace measures that could bring about better performance, if properly implemented. We must look like and in fact operate as a unified front, able and ready to deliver quality justice to all our people,’ the Chief Justice stated.

Chief Justice Mogoeng said that judicial officers could not keep hiding behind judicial independence when greater transparency and accountability was called for, adding that the judiciary will never be as effective and efficient as it can be, as long as it is not a single unified unit as is the case in almost all other jurisdictions.

Chief Justice Mogoeng highlighted three points that have been identified as the main features of a single judiciary, namely:
• The establishment of a single governance framework for judicial officers of the superior courts and the lower courts under the Chief Justice as the head of the judiciary.
• The application of a uniform complaint-handling mechanism.
• Streamlining the courts to establish a unitary court system, which consists of superior and lower courts, in accordance with the hierarchy of the courts envisaged by the Constitution.

Chief Justice Mogoeng said that when the judiciary operates as a single entity it bears the collective responsibility for the underperformance of any court, at any level. He added that judicial officers needed to reflect on how they could possibly be undermining the integrity, dignity and independence of and the trust in the judiciary, which could in turn compromise efforts to transform the judiciary into a truly united and single institution.

Chief Justice Mogoeng advised JOASA to recognise and work very closely with the existing statutory leadership of the magistracy to avoid a multiplicity or duplication of engagements and judicial projects. ‘The state of being a unified judiciary requires that we shy away from the fragmentation of the judiciary by operating as several independent pockets of judicial structures or leaders, … to do otherwise, would compromise the efficiency and effectiveness of the judiciary and its leadership,’ he said.

The Chief Justice concluded by saying that the Constitution institutionalises a single judiciary and added that so much more needed to be done to address several concerns that affect the magistracy. ‘The dignity of magistrates must be enhanced, their remuneration packages and employment benefits must match the enormous responsibilities they bear and significant improvement is required in the provision of the resources necessary to raise their performance levels.’

Importance of the magistracy in a unified judiciary

Deputy Minister Jeffery said that the importance of magistrates cannot be overstated, adding: ‘As we celebrate 20 years of democracy this year, let us reflect on the role of our judicial officers, particularly our magistrates, in bringing about change in our society, upholding the values of our Constitution and making justice a reality for our people.’

The Deputy Minister explained that to understand the level where the judiciary is today, one needed to understand where it comes from. He said that the role played by judicial officers prior to the advent of democracy was often not a positive one. ‘In 1998, former Judge President of the Western Cape, Judge John Friedman, apologised for the judiciary’s role in upholding apartheid, saying that the judiciary itself had helped to maintain the status quo, whether willingly or unwittingly, by upholding laws that they knew to be unjust,’ he stated, adding that today we can proudly say that South Africa’s judicial officers truly reflect and embrace the vision of the Constitution. ‘We are well on track in creating a judiciary that does, indeed, broadly reflect the race and gender composition of our country, a judiciary that has brought about much-needed change in the lives our people through a variety of ground-breaking judgments.’

Deputy Minister Jeffery explained what a single judiciary is by saying: ‘The term “single judiciary” would commonly refer to a process through which the magistrates’ courts and magistrates are integrated to form part of a unified court system. This unification is informed by the history of the judicial system which provided for a hybrid system in terms which judges enjoyed a larger degree of independence, compared to the magistrates.’

Deputy Minister Jeffery said that freeing the magistracy from executive control has been a gradual process. He said that the Magistrates’ Courts Act 32 of 1944 is based on the pre-1993 judicial
dispensation where the magistracy was part of the civil service and magistrates were senior civil servants, who performed both administrative and judicial functions. They were appointed by the then Department of Justice and were predominantly appointed from the ranks of prosecutors and they exercised their powers and functions under the direction and control of the director-general.

According to Deputy Minister Jeffery the Magistrates’ Commission was established in 1993, signalling the start of the de-linkage of the magistracy from the executive. Deputy Minister Jeffery said that the removal of magistrates from the public service was necessary for the independence of the judiciary.

New Acts

Deputy Minister Jeffery said that the Constitution Seventeenth Amendment Act and the Superior Courts Act, have brought us closer to realising the goal of a single judiciary. ‘The Constitution Seventeenth Amendment Act, in particular, affirms the independence of the courts and acknowledges the Chief Justice as the head of the judiciary who exercises responsibility over the establishment and monitoring of norms and standards for the exercise of judicial functions of all courts. The Superior Courts Act not only rationalises and consolidates the laws relating to the Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa, but provides for a uniform framework for the judicial management, by the judiciary, of all courts, including the magistrates’ courts.

‘In terms of the Superior Courts Act, the judge president of a division is now also responsible for the coordination of judicial functions of all magistrates’ courts falling within the jurisdiction of that division. The Act spells out the nature of judicial functions in respect of which judges president exercise judicial oversight over magistrates and this may include any matter affecting the dignity, accessibility, effectiveness, efficiency or functioning of the courts, including case-flow management,’ he said.

The Deputy Minister said that a complete overhaul of the Magistrates’ Courts Act was long overdue, adding that a new Act was necessary to establish fully integrated lower courts as part of the judicial system. The envisaged Act will mirror the Superior Courts Act. ‘A concept framework document with a view to facilitate dialogue on this important aspect of our transformation agenda will be finalised soon,’ he said.

Court statistics

Deputy Minister Jeffery said that since 2008/9, court hours had declined. In 2008/9 the average hours in the district court were three hours and 52 minutes, which has dropped to three hours and 29 minutes. ‘The hours in the regional courts have dropped from three hours and 49 minutes to three hours and 35 minutes and the average hours in the High Courts from three hours and ten minutes to three hours and seven minutes.

This has resulted in a total reduction across all courts from three hours and 50 minutes to three hours and 30 minutes,’ he said. ‘[M]ore needs to be done to improve the overall productivity of courts so that backlogs and delays do not occur and that justice is administered swiftly. We need to collectively look at how to address this,’ he added.

Deputy Minister Jeffery stated that optimal court utilisation and full court hours were essential. He said there were large numbers of people in prison pending the finalisation of their cases. As of 21 January 2014 there were more than 2 500 remand detainees who have been incarcerated for more than 21 months, of these, 144’s cases have been on the court rolls for more than five years.

‘This situation should be noted against the backdrop that we have removed administrative functions from the workload of the presiding officers, we have instituted case backlog courts to assist with capacity at lower court level and the general inflow of cases into the courts have dropped,’ he said.

Deputy Minister Jeffery added: ‘For example, new criminal cases to courts have continued to drop on an annual basis from 1 058 210 in 2008/9 to 916 917 in 2012/13. One would have expected that courts would thus have performed better as fewer new cases have been coming in, but the fact is that criminal cases disposed of have also declined – from 1 070 435 in 2008/9 to 949 397 in 2012/13. Fortunately, on the positive side, there has been an increase in the number of finalised cases, from 431 819 in 2008/9 to 466 800 in 2012/13.’

Deputy Minister Jeffery said that there were 2 026 magistrates in total, which was significantly more than judges. ‘[T]o extend the remuneration of judges to magistrates and/or to extend benefits, such as a salary for life, to all magistrates is simply not feasible from a financial point of view.’

Deputy Minister Jeffery urged magistrates to engage with the Public Office Bearers Remuneration Commission. He said that magistrates were no longer civil servants as they, like judges, were not employees. Deputy Minister Jeffery said that any industrial action undertaken by judicial officers was improper and unbecoming the role and position of a judicial officer. ‘Strike action does not promote and maintain the rule of law. Judicial officers are not employees and therefore the Labour Relations Act [66 of 1995] that provides for the protected participation in strikes or industrial action does not apply, making any such strike illegal,’ he said.

According to Deputy Minister Jeffery there are 761 magistrates’ courts of which 387 are seats of the courts, 103 branch courts and 271 periodical courts. All district magistrates’ courts have either a court manager or in smaller courts, such as branch and periodical courts, an office manager per court. He said that in total there are 298 court managers, with 56 vacancies.

Deputy Minister Jeffery said that after job vacancy advertisements in 2012 the selection committee of the Magistrates’ Commission noted that the majority of candidates who were short-listed for posts of magistrate and regional magistrates had more than ten years’ applicable post-university court experience and it was for this reason that the committee recommended that the experience requirement be raised to seven years’ post-university experience in respect of posts of magistrates and to ten years’ post-university experience in respect of posts of regional magistrates.

Deputy Minister Jeffery said that they are pleased to note that there is certainly no shortage of suitably qualified candidates who wish to serve as judicial officers; for the 308 positions that were advertised in November 2013, 2 500 applications were received and are currently being considered.

The Deputy Minister said that other issues that are on the table and that are receiving the Justice Department’s ongoing attention include matters such as the policy for the appointment of acting magistrates, the remuneration dispensation for the lower court judiciary and the progress and timeframes for the Lower Courts Bill.

He concluded by saying: ‘We may not agree on all issues, but what is important is that all parties keep the channels of communication open and that all role-players engage, in good faith, to find solutions that are mutually beneficial. The crux of the matter really is this: There are many issues which affect all of us, all the various role-players, on one level or another. Issues can and should be resolved by way of constructive engagement, not industrial action.’

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