Judicial case management and the adversarial mindset – the new Namibian rules of court

HJ ERASMUS*

1 *The overriding objective*

On 16 April 2014 a new set of civil procedure rules came into operation in Namibia.[1] The "overriding objective" of the rules is[2]

> "to facilitate the resolution of the real issues in a dispute justly and speedily, efficiently and cost effectively by –
> (a) ensuring that the parties are on an equal footing;
> (b) saving costs by among others, limiting interlocutory proceedings to what is strictly necessary in order to achieve a fair and timely disposal of a cause or matter;
> (c) dealing with a case in ways which are proportionate to
> (i) the amount or value of the monetary claim involved;
> (ii) the importance of the cause;
> (iii) the complexity of the issues and the financial position of the parties;
> (d) ensuring that causes are dealt with expeditiously and fairly;
> (e) recognising that judicial time and resources are limited and therefore allotting to each cause an appropriate share of the court's resources, while at the same time taking into account the need to allot resources to other causes; and
> (f) considering the public interest in limiting issues in dispute and in the early settlement of disputes by agreement between the parties in dispute."

In the so-called Oshakati Declaration[3] which followed a meeting of judges, it is recorded that the judges had resolved to reform the rules of the high court in order to infuse a new ethos in the litigation process that focuses on speedy and, as far as reasonably possible, inexpensive disposal of cases; and wresting the control and pace of litigation from litigants and lawyers and putting judges in the driving seat of litigation by assigning the active management of cases to judges from an early stage in the litigation process.

In a memorandum dated 12 November 2012 the judge president stated that this objective is to be achieved by the creation of an efficient and cost-effective civil dispute resolution service through a court-managed litigation process – judicial case management. Under judicial case management, the management of cases once filed with the court registry is the responsibility of the judiciary and not the litigants and their lawyers.

The powers of the court to manage cases are spelled out in rule 18 of the new rules. Apart from the specific powers detailed in the rule, the court is empowered in

* Former Judge of the High Court of South Africa; Research Fellow, Law Faculty, University of Stellenbosch.

1 GN 4 of 2014 in *GG* of 17-01-2014. The rules are bolstered by a comprehensive set of Practice Directions published in GN 67 in *GG* 5461 of 16-04-2014.

2 Set out in rule 1(3), which seems to be largely derived from rule 1(1) of the English Civil Procedure Rules (CPR).

3 par 2(c)(*ii*).

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terms of rule 18(2)(*f*) to take any other step or make any other order for the purpose of managing the case and furthering the overriding objective.

With reference to the similar provision in the English Civil Procedure Rules (CPR) rule 3.1(1)(*m*), Andrews has said that "the amplitude of this … phrase demonstrates that the control of civil procedure has truly moved away from the parties to the courts: the procedural centre of gravity has now shifted, perhaps irreversibly".[4]

2 *Cultural change*

Experience in other jurisdictions where the common-law procedural model applies[5] has shown that the shift of procedural control from the parties (and their lawyers) to the courts alters the traditional pattern of litigation and changes the relationship between the parties, their lawyers and the courts. My earlier interest in this process has been rekindled by the introduction of judicial case management in Namibia. The purpose of this note is to take a brief look at some of the features of this change which may be manifested in the Namibian environment. I do so with the knowledge that it is always risky for a person from another jurisdiction to intrude into a matter as place-bound as rules of civil procedure. The purpose is *not* to comment on the manner in which the Namibian judicial case management is being implemented in practice, of which in any event I have no knowledge. My comments are based upon the experience in other jurisdictions of the way in which the introduction of case management gave rise to a "new culture" and a "new ethos".

The "biggest cultural change" which the new rules will bring about arises from the obligation imposed upon the parties to co-operate with the court and with each other in the conduct of the proceedings, and the concomitant duty of the court to encourage this co-operation in order to further the overriding objective of the rules.[6] The obligation to co-operate is set out in rule 17(2), which provides: "Under these rules the control and management of cases filed at the court is the primary responsibility of the court and the parties and their legal practitioners must cooperate with the court in achieving the overriding objective."

The injunction to co-operate is re-iterated in rule 19(a), which sets out the obligations of the parties and their legal representatives in relation to judicial case management: "Every party to proceedings before the court and, if represented, his or her legal practitioner is obliged – to cooperate with the court and the managing judge to achieve the overriding objective."

3 *The adversarial mindset*

Its adversarial character is the hallmark of the common-law system of civil litigation. During the last decade of the previous century, the excessive adversarial zeal on the part of legal representatives which the adversarial system of litigation tends to

[4] Andrews "A new civil procedural code for England: party-control 'going, going, gone'" 2000 *Civil Justice Quarterly* 19 26.

[5] Judicial case management has been "part of the landscape" in the federal and state courts of the USA for many years; in Britain court-control of civil proceedings was introduced in 1999 as a result of the well-known reports of Lord Woolf; case management in various forms also applies to civil proceedings in, for example, Canada, Australia, Singapore and Hong Kong. Court control of civil proceedings is, of course, the vogue in civil law countries, but these systems differ fundamentally from the common law procedural model.

[6] The statement in the text, including the phrase "biggest cultural change" is derived from *The White Book 2013* 859 in a note to CPR 29.4.

encourage became a matter of serious concern in several jurisdictions.[7] In 1989 a director of the Federal Judicial Centre in the United States observed: "The dead hand of the adversary process continues to rule civil litigation and holds the legal profession hostage."[8]

Concerns about the effects of excessive adversarial zeal gave rise in Australia to a review of the adversarial system by the Australian law commission.[9] In his interim report, Lord Woolf declared that in England, without effective control, "the adversarial process is likely to encourage an adversarial culture and to degenerate into an environment in which the litigation process is too often seen as a battlefield where no rules apply".[10] Lord Woolf also stressed that implementation of his proposals will require a radical change of culture for all concerned.[11]

In a 1996 note I set the characteristics of this "new culture" out as follows:[12] the aim of the far-reaching reforms to the civil justice systems of Australia, England and the United States of America in recent years has been the "substantial modification of the adversarial ethic" with the emphasis on "co-operation, candidness, and respect for truth".[13] Lord Woolf says that the theme of his report is that "an adversarial system should not be unduly combative".[14] The reforms seek to establish a culture which makes the early settlement of disputes the primary aim of civil litigation; which imposes responsibility upon judges for the way in which the case proceeds through the system to final judgment; which obliges litigants and their lawyers to pursue and defend their proceedings with efficiency and despatch, and demands from lawyers co-operation, candidness, and respect for truth.

4 *The measure of success*

In Southern Africa, in all the jurisdictions in which the common-law procedural model applies, we lagged behind these developments and the "adversarial mindset"[15] continued to dominate. In Namibia, the bold step has now been taken to infuse a "new ethos" and to foster a "new culture". What are the prospects of success? In 1995, in response to Woolf's Interim Report, Zander strongly urged that Woolf's proposed reforms of civil litigation should be rejected, and predicted that passive resistance by the legal profession could and probably would wreck them.[16] Nine years later, in 2004, in a foreword to the second edition of *Civil Procedure*[17] by Loughlin and Gerlis, Lord Justice Sedley stated: "The modern Civil Procedure Rules (CPR) pioneered by Lord Woolf are proving to be one of the real success stories in the history of English law." This view is confirmed by the research of

7 See the comprehensive study by Ipp "Reforms to the adversarial process in civil litigation" 1995 *The Australian Law Journal* 705-730, 790-821.

8 Schwarzer "The Federal Rules, the adversary process, and discovery reform" in 1989 *University of Pittsburgh Law Review* 703.

9 Australian Law Reform Commission *Review of the Adversarial System of Litigation. Rethinking the Federal Civil Litigation System* – Issues Paper 20 (1997).

10 *Access to Justice, Interim Report* 177.

11 (n 10) 18.

12 "Much ado about not so much – or, the excesses of the adversarial process" 1996 *Stell LR* 114 118.

13 (n 7) 725.

14 (n 10) 18.

15 On the "adversarial mindset" see Davies "Civil justice reform: why we need to question some basic assumptions" 2006 *Civil Justice Quarterly* 32 37-39.

16 Zander "Why Lord Woolf's proposed reforms of civil litigation should be rejected" in Zuckerman and Cranston (eds) *Reform of Civil Procedure. Essays on "Access to Justice"* (1995) 79.

17 (2004).

Peysner and Seneviratne,[18] who found that on an overall view "the culture had changed for the better". More particularly, they found that the case-management system is delivering quality (justice) at a much-improved pace but not any more cheaply, and possibly at higher cost.[19]

Genn of University College London also found that costs have increased or at least been front-loaded by the Woolf reforms.[20]

It is important to note that whatever the importance and value of statistical evaluation, the ultimate measure of the success of the system is the quality of justice delivered. Thus Bingham MR has stressed that the courts must be constantly alert to the paramount requirements of justice: justice to the plaintiff and justice to the defendant. To expedite the just despatch of cases is one thing; *merely* to expedite the despatch of cases is another.[21]

5 *Pre-trial conferences*

The centrepiece, or fulcrum, of the Namibian system of judicial case management is contained in the various conferences which in terms of the rules are obligatory steps in the management process: rules 23(1), 25(1) and 26(1) provide in peremptory terms that the managing judge "must" call a case-planning conference, a case-management conference and a pre-trial conference. The case-management conference and the pre-trial conference must be attended by the parties' legal representatives or by the parties if unrepresented.[22] In England, in regard to multi-track cases (*ie* the track in which complex cases are dealt with), Civil Procedure Rule 29.3(2) makes it clear that legal representatives who attend case-management conferences and pre-trial reviews must be (a) familiar with the case; and (b) have sufficient authority to deal with any issues that are likely to arise. The Queen's Bench Guide[23] requires the attendance of the advocates instructed or expected to be instructed to appear at the trial, at any hearing at which case-management directions are likely to be given. In *The White Book 2013* it is pointed out[24] that if "non-compliance with this sub-rule leads to an adjournment the court will expect to make a wasted costs order".

At the conferences called in terms of rules 23, 25 and 26, the managing judge addresses the parties' legal representatives, or the parties if unrepresented, concerning the course, timing and scope of pre-trial litigation. The entire future course of the litigation is determined at these conferences. It follows that the legal representatives who attend the conferences must be sufficiently familiar with the case to deal with any issues that may arise. It further follows that much of the detailed preparation of litigation is transferred up front, as are the costs of such preparation. This is a fundamental "cultural change" in the conduct of the traditional pattern of litigation.

[18] "The management of civil cases: a snapshot" 2006 *Civil Justice Quarterly* 312-326. This is an abridged edited version of a research report, "The management of civil cases: the courts and the post-Woolf landscape" (DC A Research Series 9/05) to which I did not have access.

[19] 325.

[20] Genn *Solving Civil Justice Problems What Might be the Best?* (Scottish Consumer Council "Seminar on civil justice" 19 Jan 2005). I did not have access to this work and owe the reference to Davies (n 15) 32. Genn was actively involved in the preparation of Lord Woolf's reports on Access to Justice.

[21] *Abbey National Mortgages Plc v Key Surveyors Nationwide Ltd* 1996 3 All ER 184 (CA) 186-187.

[22] rules 25(1) and 26(2).

[23] par 7.2.6.

[24] 858 in a note to CPR 29.3(2).

Time is money, and the various conferences may lead to an escalation of costs. The risk of unnecessary escalation of costs can be mitigated by the manner in which a conference is conducted by the managing judge. Furthermore, the rules create mechanisms for mitigating the costs attendant upon conferences: rule 18(2) provides that the court may schedule "a hearing by e-mail or by using any other verifiable method of direct communication". The latter would presumably include a telephone conference or video link. In England, the equivalent rule[25] is being used regularly, as it is recognised to be more cost-effective for the parties and the court to hold hearings by such means rather than require the parties to attend oral hearings at court.[26]

The manner in which the parties can reduce front-loaded costs by full co-operation in the spirit of the rules is illustrated by the English Civil Procedure Rules 29.3 and 29.4, which deal with case-management conferences and pre-trial reviews in the multi-track. Rule 29.4 provides:

> "29.4 If –
> (a) the parties agree proposals for the management of the proceedings (including a proposed trial date or period in which the trial is likely to take place); and
> (b) the court considers that the proposals are suitable;
> it may approve them without a hearing and give directions in the terms proposed."

In this way, by the co-operation of the parties with each other and with the court, the expense of an oral hearing at a conference attended by the parties and their legal representatives can be avoided. Although the Namibian rules contain no equivalent provision, I am sure that in practice the same effect can be achieved by reducing the time spent on formal conferences.

6 *Role and function of judges*

Judicial case management has a major impact on the role and function of judges. The traditional role of the common-law judge is that of passive, neutral arbitrator. Case management thrusts an active, interventionist, managerial role on the judge. It has been said that on the whole judges are not good managers, nor are they trained to be, and that inefficient management of a case can increase costs. Their managerial responsibilities give judges greater power; power which is not, as an American scholar has pointed out,[27] subject to the "restraints that formerly circumscribed judicial authority", and what is more, managerial judges frequently work beyond the public view, off the record, with no obligation to provide written, reasoned opinions, and out of reach of appellate review.

The activities of the Namibian managing judge are not beyond the reach of a higher court. The striking out of a defence, the dismissal of a claim and the entering of final judgment under the provisions of rule 53(2)[28] may result in an appeal in which the orders and directions of a managing judge may be in issue. The activities of a managing judge are further subject to the review jurisdiction contemplated in section 16(1) and (2) of the Supreme Court Act 15 of 1990. Moreover, should

[25] CPR rule 3 1(2)(*d*), which provides that a court may "hold a hearing and receive evidence by telephone or by using any other method of direct oral communication".

[26] Loughlin and Gerlis (n 17) 110, who point out that many judges' chambers are provided with suitable equipment for the holding of telephone conferences.

[27] Resnick "Managerial judges" 1982 *Harvard Law Review* 376 378.

[28] Rule 53 deals with "Non-compliance with the Rules of Court, practice directions or court orders".

it be held that the functions of a managing judge are administrative rather than judicial (an interesting question on which I express no opinion), the actions of a managing judge may be subject to common law review. In any event, the functions of a managing judge are subject to the constitutional imperative of a fair trial.

Should the functions of a managing judge be subject to appeal or review, the views expressed by Sir Thomas Bingham MR[29] in a somewhat different context are perhaps of some relevance to the situation in Namibia:

> "Exhortations to trial judges to be interventionist and managerial would be futile if every management initiative by a trial judge were to be condemned as an unwarranted departure from orthodoxy. It would be most unfortunate if the Court of Appeal were to block reasonable attempts to mitigate the defects of established practice."

There then follow the words which I have cited above[30] to the effect that the court must at all times be alert to the paramount requirements of justice: justice to the plaintiff and justice to the defendant.

In England, initial fears that under the 1999 civil justice reforms, judges may "bash the parties and their lawyers"[31] were quickly dispelled. The tone was set by Woolf who, in the words of Andrews, expected that judges under his new system would "display exemplary professionalism, efficiency and fairness".[32] In *Biguzzi v Rank Leisure Plc*[33] Lord Woolf said that under the new approach the Civil Procedure Rules require that "judges have to be trusted to exercise the wide discretion which they have fairly and justly in all the circumstances".

In their managerial role, judges have to steer a course between, on the one hand, being perceived to be over-zealous, and, on the other hand, maintaining firm control of the process of management. The latter is essential for success. The former may elicit passive resistance by some of the legal profession and in the end compromise the system. Leo[34] has pointed out that one of the successes of the case management system of Singapore is "a rigorous monitoring and supervision system" and an "uncompromising but fair approach to procedural non-compliance". However, he adds an important qualification, pointing out that it should be highlighted that the rigorous monitoring and supervision system, which is central to the Singapore scheme, requires a hefty investment of money and human resources. Any attempt to emulate the Singapore experience must take cognizance of this qualification, for lack of money and insufficient human resources are seriously inhibiting factors.

7 *Discovery*

One of the overriding objectives set out in rule 1(3)(*b*) is the saving of costs by the limitation of interlocutory proceedings[35] to what is strictly necessary in order to achieve a fair and timely disposal of a cause or matter.

Discovery has traditionally been a fruitful source of fruitless interlocutory skirmishing. It is not uncommon for a simple dispute about the inadvertent

[29] the *Abbey* case (n 21) 186j.
[30] See text to n 21 above.
[31] The phrase was used by May LJ at a conference of practitioners in 1998, when he made it clear that under the 1999 rules judges should not seek to "bash the parties and their lawyers".
[32] (n 4) 35.
[33] 1999 4 All ER 934 (CA) 941g.
[34] "Case management – drawing from the Singapore experience" 2011 *Civil Justice Quarterly* 143-162.
[35] In terms of rule 32(11) the costs that may be awarded to a successful party in any interlocutory proceeding may not exceed N$20 000.

disclosure of a privileged document to escalate into a drawn-out and costly opposed interlocutory process. What can case management do about this sort of situation? In a recent Australian case,[36] the high court held that discovery is a court process which the court should control so as to avoid satellite litigation, and that the court must use its case-management powers to resolve the issue of the mistaken provision of a document subject to client privilege to an opponent. The issue is not to be resolved by an expensive, adversarial interlocutory skirmish.

The provisions of rule 28 of the new Namibian rules to a very large extent meet these requirements. While the rule places the obligation to make proper discovery on the parties, control of that process is firmly in the hands of the managing judge; rule 28(8)(*b*) gives the managing judge almost unlimited powers to make proper orders at a management conference. The rule provides: "The managing judge must at the management conference give any direction as he or she considers reasonable and fair …."

Rule 28(9) makes provision for the bringing of an interlocutory application in terms of rule 32(4)[37] where the sufficiency of the reasons given for withholding a document from discovery is in dispute. The application is, however, to be dealt with within the framework of the management process by the managing judge.

Discovery, especially in complex commercial litigation, has through the years given rise to interminable problems. Many years ago Lord Steyn said:[38]

> "The discovery process often runs riot. It is the experience of commercial judges that usually 95 per cent of the documents contained in the trial bundles are wholly irrelevant and never mentioned by either side. The discovery process adds greatly to the duration and cost of litigation, and helps a defendant (or plaintiff) to put off the day of financial reckoning. It contributes to the tyranny of modern litigation."

Perhaps lawyers in Namibia will share the sentiment expressed by Mackie[39] when he said with reference to commercial litigation in England prior to the introduction of the Woolf reforms that it is very common at the end of a case when judge, counsel and clients have all gone home, for the solicitors on each side to look ruefully at each other and the mound of unopened files over which they fought so hard in the pre-trial exchanges.

The problems have become greater in recent years due to information technology increasing the volume of potentially discoverable material.[40] The extensive provisions of rule 28 are clearly aimed at enabling a managing judge somehow to put the reins on the discovery process. Indeed, as Lord Woolf has pointed out, appropriate case management is essential if there is to be control over what in the majority of cases is excessive discovery.[41]

Control of excessive discovery is no easy task for at least two reasons: (i) the parties have better knowledge and insight into the bulk and type of documentation involved in a particular case; and (ii) the relevance or non-relevance of particular

[36] *Express Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* 2013 HCA 46, noted by Clegg in "High court of Australia employs case management and 'overriding purpose' to resolve dispute of privileged documents in discovery" 2014 *Civil Justice Quarterly* 115-123.

[37] Rule 32 deals with interlocutory applications and applications for directions.

[38] In a foreword to Matthews and Malek *Discovery* (1992) cited by Mackie "Discovery in commercial litigation" in Zuckerman and Cranston (n 16) 137 141.

[39] (n 38) 141.

[40] Clegg (n 36) 115-123.

[41] in his foreword to Zuckerman and Cranston (n 16) *x*.

documents to the issues in dispute is not always self-evident at the early stages of the proceedings.

8 *Expert evidence*

The adversarial nature of expert evidence in litigation is mitigated by rules 29 and 30, in which the following principle which underpins the new civil litigation regime finds expression:[42]

> "Introduce new rules on expert evidence to as far as possible limit areas of disagreement between experts; encourage litigants to agree a joint expert report, and to prepare a joint report pointing to areas of disagreement. The Court must also be empowered to appoint court experts where the circumstances justify doing so."

In theory, the prime function of an expert is not to espouse and further the cause of a particular party, but to assist the court in coming to a proper decision in technical and scientific matters.[43] In practice, though, the position is that many expert witnesses, perhaps even subconsciously, tend to favour the cause of the party who calls him or her.[44] The fundamental change wrought by the new rules is that the practice of having one's "tame" experts is no longer acceptable.[45] And the array of experts which sometimes feature in certain types of litigation will be a thing of the past in Namibia.[46]

9 *Conclusion*

Judicial case management represents a fundamental departure from the traditional view that civil disputes are essentially private matters in which the law and the mechanisms provided by the state for supporting the enforcement or application of law are reluctantly engaged.[47] The departure from the traditional view is spelled out in the Oshakati Declaration,[48] in which it is made clear that Namibia's new rules are based upon the recognition that the provision of a state-funded litigation process is a public service just like any other and that it is not immune from considerations of economy.

The words of Scott provide a fitting conclusion to my note:[49]

> "It is no exaggeration to say that the two broad views spring from different political and legal conceptions (1) of the nature of law (one seeing law as a private enabling and empowering resource and the other as the 'language of the state'), (2) of the role of law in society and, indeed, (3) of the nature of the state itself. These are deep and muddy waters for the judge who believes that his job is to get on with the business of faithfully adjudicating according to law and for the practising lawyer who is seeking to understand caseflow management whilst endeavouring to make a living out of exercising the difficult and socially useful skill of the litigator."

[42] Principle (iv) as set out in the judge-president's memorandum of 12 Nov 2012.
[43] *S v Huma (1)* 1995 2 SACR 407 (W) 410j-411a.
[44] *Slavin's Packaging Ltd v Anglo African Shipping Co Ltd* 1989 1 SA 337 (W) 345I.
[45] Loughlin and Gerlis (n 17) 455.
[46] In the last personal injury case I heard before my retirement from the bench as judge of the Western Cape High Court, the parties were in agreement on the conclusions in the reports of a number of experts; agreement could not be reached in respect of the reports of ten experts, six of whom eventually gave evidence at the trial.
[47] Scott "Caseflow management in the trial court" in Zuckerman and Cranston (n 16) 1 29.
[48] par 2(c)(i).
[49] Scott (n 47) 29.

SAMEVATTING

REGTERLIKE SAAKBESTUUR EN DIE ADVERSATIEWE INGESTELDHEID – DIE NUWE NAMIBIESE HOFREËLS

In Namibië het 'n nuwe stel hofreëls op 16 April 2014 in werking getree met betrekking tot die siviele proses. Die oogmerk met die reëls is om die beslegting van die werklike geskilpunte te vergemaklik en in die proses met inagneming van billikheid jeens alle betrokkenes dié oogmerk so snel moontlik te bereik sonder onnodige vertragings en tegniese tydverspilling. Die oogmerk word nagestreef deur 'n gerigte saakbestuursprogram waarin die regters as voorsitters die beheer oor die proses neem en behou en die ontvouing van die proses nie langer aan die grille en tegniese geslepenheid van die praktisyns én die litigante uitgelewer kan wees nie.

Deur die beheer van meet af in die hande van die voorsittende regter te plaas, word die oogmerk van 'n sneller afwikkeling van die proses bereik. Regterlike beheer van die bestuur van die verloop van die proses verteenwoordig 'n grondliggende verskuiwing in die vertrekpunte van die siviele proses soos dit van ouds in die plaaslike litigasiekultuur beoefen is en ingeburger geraak het. Grondliggend is 'n wegbeweeg van die adversatiewe benadering tot die proses waar die funksies van die regter en die onderskeie regsverteenwoordigers streng afsonderlik gehou word. Sodanige wysiging vereis 'n verstelling van die ingesteldheidswissels van benewens die regters ook die betrokke regspraktisyns en hul mandante. Uiteraard bring die verstelling van die vertrekpunte 'n omwenteling in die ingesteldheid van die regters as voorsittende beamptes mee want hulle word hierdeur verplig om van meet af aktief betrokke te wees in die hele litigasiegebeure en kan nie langer hulself die "luukse" van 'n passiewe toehoorder veroorloof nie, maar sal gedwonge wees om van meet af ten volle vertroud te wees met elke moontlike faset van die litigasie en alles wat dit behels waaronder inbegrepe is die bevoegdheid om te enige tyd 'n aktiewe ingrypende rol te vervul.

Die outeur plaas in oorweging dat die Namibiese voorbeeld vir die Suid-Afrikaanse prosesreg navolgenswaardig is.