

JUDICIAL CASE FLOW MANAGEMENT “CHECKPOINT”: HOW FAR HAVE WE GONE?¹

Selby Mfanelo Mbenenge

BJuris LLB

*Judge President of the Eastern Cape Division of
the High Court*

SUMMARY

This article examines the introduction of judicial case flow management into South African law from a historical perspective, its initial failures, resistance and fundamental principles. It sets out the judicial attempts to regulate the management of litigious matters through the Uniform Rules of Court, particularly rule 37A, and the impact of the introduction of the era of norms and standards on case flow management. Through revelations in practice of the positive progress achieved in judicial case flow management, the central argument is that a more inquisitorial role in the case flow management system is key to ensuring access to justice.

1 INTRODUCTION

What is judicial case management?² Put simply, it is a system by which control over the litigation process passes from the parties and their legal representatives to judicial officers. The following excerpt captures the essence of judicial case flow management (CFM):

“The judiciary exercises that control to promote the just determination of litigation to dispose efficiently of the business of the court, to maximise the efficient use of available judicial and administrative resources, and to facilitate the timely disposal of business at a cost affordable by the parties. In achieving these goals, case management aims to eliminate unnecessary delays in litigation. Unnecessary delay is regarded as any lapse of time beyond that reasonably required for interlocutory activities essential to the fair and just determination of the issues bona fide in contention between the parties and the preparation of the case for trial.”³

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² A term that is used interchangeably with “judicial case flow management”, or “judicial case management”, the acronym version of which, for the sake of convenience, is “CFM”.

³ Judge Ipp “Case Management and Court-Annexed Alternative Dispute Resolution: The Hoexter Commission: New Rule 37A” 1998 *Consultus* 49 49–50.

As with everything in life, CFM exists in a context. That context plays an important role in understanding the meaning and purpose of CFM.

More than two decades after the first experimental CFM in the Cape Provincial Division (CPD), and two years since the promulgation of the current version of rule 37A of the Uniform Rules of Court (the Rules), it behoves us to: trace the history behind the introduction of CFM in South Africa; take stock of how beneficial it has been; and consider the challenges that remain in its implementation, and how these challenges may be addressed.

The promulgation of the Norms and Standards,⁴ insofar as they make provision for judicial involvement in case management, attracted resistance from different corners, and for different reasons. Detractors were tempted to ask: “Why fix something that isn’t broken?” In the case of members of the Bench, the concern would have related to the addition of yet another responsibility over and above the avalanche of files piled up on their desks. For others, the objection stemmed from the common law approach to litigation, and a firm belief in the fairness of the adversarial system. On this approach, CFM was incompatible with the principle that a judge is a passive, neutral arbitrator, supposedly removed from the dust of litigation. This school of thought maintained that the judge ought to leave the parties to fight on their own, without judicial interference. The criticism went further to say that judicial control in case management made the judge both player and umpire.

To the traditionalist, it is not the judiciary’s concern what eventually becomes of a matter if the parties, on the hearing day, are ill prepared or manage the case poorly; that is a matter for the errant parties. This hands-off approach to the litigation process also does not concern itself with the finalisation rates of cases but considers costs orders for postponements and removal of matters from the roll as sufficient means for exercising control over the litigation process.

The aversion to CFM should have come as no surprise, for:

“[R]eforms [are] rendered naught largely by the legal profession’s dislike of, and resistance, to change ... Effecting a change of attitude in the lawyers is likely to be more difficult than changing the rules of court.”⁵

According to the report and findings of the Hoexter Commission,⁶

⁴ Norms and Standards for Judicial Officers issued by the Chief Justice in terms of s 8 of the Superior Courts Act 10 of 2013 read with s 165(6) of the Constitution of the Republic of South Africa, 1996 (Norms and Standards), published in GN 147 in GG 37390 of 2014-02-28.

⁵ Zuckerman “Lord Woolf’s Access to Justice: Plus Ça Change ...” 1996 59 *The Modern Law Review* 773 780.

⁶ The Hoexter Commission (the Commission) was appointed by GN R471 in GG 16336 of 1995-03-31 and mandated to enquire into and report upon and make recommendations regarding the rationalisation of the provincial and local divisions of the Supreme Court with more specific reference to, *inter alia*, the efficacy or otherwise of the existing court structure and the need for improved access to justice for civil litigants in the Supreme Court (South African Law Commission: Hoexter Commission Report *Inquiry into the Rationalisation of the Provincial and Local Divisions of the Supreme Court, Third and Final Report* (1997) ch 9 par 9.1.8 (the Hoexter Commission Report)).

“The legal profession is an inward-looking one with a strangely developed herd instinct. It has always displayed an ingrained aversion to change.”⁷

Yet, CFM had its genesis well before the promulgation of the Norms and Standards.

2 HISTORICAL PERSPECTIVE

In its report handed down in December 1997, the Hoexter Commission⁸ found that “there was widespread support for the introduction of case management to South Africa,” and that there was, without doubt, “a pressing need for reform of the way in which defended actions in South Africa are dealt with”. The Commission observed that our procedural system was too slow and too expensive “because the pace of litigation [was] dictated by the parties and their legal representatives”.⁹

The report and findings of the Commission also paved the way for the amendment of rule 37 by the insertion of rule 37A, which made provision for experimental case flow management in the Cape Provincial Division (CPD) (as it was then) as “the first tentative step in South Africa’s arduous journey towards an effective system of case management”.¹⁰

The amended rule, as implemented in the CPD from 1 December 1993 to 30 November 1995, embodied provisions relating to discovery and the availing of documents discovered on oath to any other party for inspection; the furnishing of further particulars for trial; the attendance of a conference before a judge in chambers to consider possible ways of curtailing the duration of the trial, with the judge accorded the power to give directions or make such orders she or he deemed appropriate in relation to such curtailment; the production of minutes by the parties pursuant to the

⁷ According to Legodi JP in *Nthabiseng v Road Accident Fund* [2018] ZAGPPHC 409 par 4: “When change is imminent everyone look[s] for cover and in the process turn[s] into a resistant mode.”

⁸ It is by no means suggested that the Hoexter Commission is the source and origin of CFM in our procedural law. The report of the Commission was informed principally by Lord Woolf *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1995) (Woolf Interim Report) and Lord Woolf *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996) (Woolf Final Report), and by developments that had taken place in international jurisdictions, especially English law.

⁹ Hoexter Commission Report ch 9 par 9.1.2–9.1.3. The following excerpt captures the essence of the Commission’s report (par 9.1.4–9.1.5):

“It is also beyond question that in many parts of the modern world delay in litigation has been effectively reduced by the adoption of some or other form of case management. The basic concept of case management is that the court itself, and not the parties or their lawyers, controls the pace of litigation through direct involvement in the litigation process; and the key components of case management are unremitting court supervision from the time an action becomes opposed until judgment; the determination of deadlines for compliance of the various pre-trial stages; monitoring to ensure compliance with deadlines; and strict insistence by the court on compliance with deadlines.

The Commission agrees ... that it would be quite wrong for South Africa to lag behind those jurisdictions which have adopted case management systems. Indeed, South Africa simply cannot afford to do so.”

¹⁰ Published in GN R1843 in GG 15147 of 1993-10-01. Hoexter Commission Report ch 9 par 9.1.18.

directions issued by the judge regarding, *inter alia*, facts and documents admitted by each party, and whether experts' reports were exchanged; and the summoning of the parties or their legal representatives to chambers for further consideration of whether the matters referred to in the parties' minute have been complied with.

Rule 37A(8) accorded a party the right to apply to a judge in chambers for an order against a defaulting party, dismissing the action or striking out the defence and making such order as to costs as deemed appropriate.

After the Cape rule 37A had run its course, it was substituted by another experimental rule 37A,¹¹ which made provision for judicial control and intervention in a more radical manner than had been the case previously, in line with well-established trends in other jurisdictions.

A synopsis of the amended rule was presented by Professor Hennie Erasmus,¹² who enumerated some of its features as having been the following:

- (a) management role and responsibility of a judge in the pre-trial phase of a civil case;
- (b) supervision of the time and events involved in the movement of a case through the court system from the point of initiation to disposition;
- (c) intervention by a judge at various stages to give appropriate directions, in the event of the parties not adequately promoting the progression of a case; and
- (d) removal from the list of cases awaiting trial and paving the way for ripe cases to proceed, in instances where the progression of a case was not satisfactory.

The addition of subrule 37A(16) was far-reaching, and is quoted in full hereunder:

- “(a) In every opposed civil action other than actions for the dissolution of marriage and actions relating to the custody of children, each party shall be required to exchange a summary of the evidence, other than expert evidence which shall be dealt with in terms of subrule (5)(g), of each witness whom such party expects to call to testify at the trial.
- (b) The purpose of delivering the summary shall be to facilitate clarification of the issues, clarification of the evidence in regard thereto and meaningful negotiations for the settlement of such issues.
- (c) The summary in respect of each witness shall—
 - (i) identify the witness by name;
 - (ii) summarise the substance of the evidence such witness is expected to give on each issue with sufficient particularity to serve the purpose for which the rule requires the summary to be given; and
 - (iii) be verified by the signature of the witness.”

¹¹ Published in GN R1352 in GG 18365 of 1997-10-10, which came into operation on 1 December 1997.

¹² Erasmus “Case Management Moves Ahead: New R 37A in Force in Cape High Court” 1998 *De Rebus* 27 27–29.

As can be gleaned from its reading, this subrule, which regulated the exchange of summaries of evidence by witnesses to be called to testify at the trial, was innovative, especially in the context of an adversarial system.¹³

The Commission acknowledged that the provisions of CPD rule 37A did not go nearly far enough to sustain the operation of an effective case management system in the High Courts. It nevertheless recommended the extension of its applicability to a division of the High Court other than the CPD, if it appeared (after due consultation between the Judge President of such division and the Chairperson of the Rules Board) that such division was ready and willing to be governed thereby. But, as is demonstrated, the availed extension bore nothing concrete.

3 THE DEMISE OF THE EXPERIMENT

According to Griesel,¹⁴ CPD rule 37A failed as an experiment. He lamented its demise stating that administering a judicial case management system under the rule, in circumstances where there was lack of infrastructure and staffed personnel in the registrar's office, was like "having a brand-new Ferrari pulled by a team of donkeys because no engine had been fitted".¹⁵

Practitioners are also on record as having not cooperated in the implementation of the experimental project. They went through the motions without any serious application of mind. According to Griesel,¹⁶ a common response from practitioners to the invitation to set out issues falling to be determined at trial was "the issues are those raised in the pleadings". Even judges, continued Griesel,¹⁷

"were by no means free from blame. Instead of pulling together in order to exercise some judicial control and leading by example, there were those who were less than enthusiastic (to put it no higher) about this innovation, which

¹³ On this subject, Erasmus "'Much Ado About Not So Much' – or the Excesses of the Adversarial Process" 1996 *Stellenbosch Law Review* 114 116 remarked:

"The exchange of witness statements has become an established feature of civil litigation in Australia, England, New Zealand and the United States of America. The exchange of witness statements has also become increasingly common in international and English domestic arbitrations. The practice was introduced into England in 1986 by the addition of rule 2A to RSC Order 38. In 1992 the practice of treating witness statements as evidence in chief was sanctioned by an amendment to the rule, and the Practice Direction of the Lord Chief Justice of 24 January 1995 supplemented the rule by providing that unless otherwise ordered, 'every witness statement shall stand as the evidence in chief of the witness concerned.' In the Woolf report, the practice of requiring the exchange of witness statements is 'firmly' endorsed, and recommendations are made to discourage certain practices in this regard which gave rise to escalation of costs. It is a salutary practice which should be adopted in South Africa."

¹⁴ Judge Griesel "Cape Rule 37A: What Went Wrong?" 2001 *De Rebus* 8 8–9.

¹⁵ Compare ch 9 par 9.1.21 of the report and findings of the Commission which reads:

"[I]t is imperative that the launch of a CM pilot project be preceded by the appointment to the court personnel of the high court concerned of an official to be designated THE CASE MANAGEMENT CONTROLLER [CM Controller]. This official will be charged with overall responsibility for administering and monitoring the CM pilot project; and at the same time, he or she will have an important function to perform at the PROGRESS CONFERENCE for which the new Rule provides."

¹⁶ Judge Griesel 2001 *De Rebus* 9.

¹⁷ *Ibid.*

placed an additional burden on them. In the result, there was a lack of consistency in the application of the rule.”

Perhaps “lack of consistency” is an understatement. Views on CFM were divergent: while Erasmus lamented the demise of CPD rule 37A, Flemming¹⁸ viewed the introduction of the rule as superfluous.¹⁹ Not only was he critical of the benefits achieved by case management in the South African setting, but he proffered reasons why CFM did not get the appropriate positive response from the parties, mentioning, among others, the following:

“I have indicated that in the Witwatersrand High Court case management takes place in many shapes which are content-directed or orientated towards problem resolution; it is done without elaborate electronic control systems; there is judicial involvement only where a need for it becomes apparent. About the advantages gained, much can be added. In the final analysis though, there is a serious negative note.

A basic problem is that practitioners receive no real training in pre-trial preparation. And among some senior counsel there is resistance to judicial involvement which is apparently perceived as an outside party telling eminent counsel to discuss his case rather than proceeding with the old style ‘trial by ambush’. This will take time to resolve itself before younger persons replace those aging ones – unfortunately too long.”

He was also of the view that rule 37 was wide enough to allow any division of the High Court to do what rule 37A spelled out, except for the consequences of non-compliance.

All this gives credence to what McQueen and Baldwin have said,²⁰ namely that different attitudes towards CFM were bound to result in a personality-based approach, as opposed to an institutionalised one with the potential to produce uneven long-range successes.

The final nail in the coffin came about when the experimental rule 37A was repealed on 20 April 2001.²¹ With its demise, rule 37 remained in the statute book as a residual case management tool, and is dealt with in the next section of this article.

4 RESIDUAL CASE FLOW MANAGEMENT

Rule 37, whose primary objectives are to curtail the duration of a trial, narrow down issues, cut costs and facilitate settlements, has always accorded the judge a limited form of case management responsibility. Rule 37(8)(a) grants a judge the power to convene, at the request of a party or *mero motu*, a conference in the judge’s chambers. In terms of rule 37(8)(c), the judge may give directions that might promote the effective conclusion of the matter, but only “with the consent of the judge and all the parties”.

¹⁸ Judge Flemming was the DJP of the Witwatersrand Local Division (WLD) (as it then was).

¹⁹ Judge Flemming “What Do We Really Want From Case Management?” 2001 *De Rebus* 9 10–11.

²⁰ McQueen and Baldwin “Caseflow Management – The New Era” attachment in electronic mail message (12 December 2012) to Hon Dressel, President, The National Judicial College.

²¹ The repeal was published in regulation GN R373 in GG 7060 of 2001-04-30.

Much as rule 37(8) gives a judge the power to call upon the parties *mero motu* to attend a conference in chambers, its weakness as a case management tool is that it provides no process to alert judges to the need for intervention. In an adversarial system, the parties are inclined to keep their cards close to their chests. This, coupled with the fact that the directions in terms of rule 37(8)(c) may only be issued with the consent of the parties, renders the discretion of the judge to invoke the subrule a rare commodity. Indeed, the writer does not, in the 22 years of his practice, recall ever invoking, or being invited by a judge in chambers who invoked, the subrule. In terms of the subrule, the responsibility of a judge to take charge of the proceedings is lacking; the parties remain dominant in the process.

Judicial control that is subject to the consent of the parties is no control at all.²² However, a supine approach towards litigation by judicial officers is not justifiable neither in terms of the fair trial requirement, nor in the context of resources.²³

On judicial control, Lord Woolf remarked:²⁴

“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. In this environment, questions of expense, delay, compromise and fairness may have only low priority. The consequence is that expense is often excessive, disproportionate and unpredictable; and delay is frequently unreasonable.”

Because of the inadequacy of rule 37, the quest for a workable judicial case flow management dispensation continued. Demonstrably, an adversarial system bereft of CFM had more demerits than merits.

At its worst, a purist adversarial system did not encourage cooperation among the parties and their legal representatives. It was not unusual to read pre-trial minutes worded, “We will take instructions and revert” or “Settlement was discussed, but not reached”, in circumstances where no *bona fide* effort had been made to elicit the outstanding instructions or engage in serious settlement talks. The minutes were generated purely with a view to going through the motions and securing a trial date. The combative nature of the system was blatant. In correspondence exchanged between parties to a litigious matter, coming across words such as “Your client has no case; our instructions are to vehemently oppose any application he may resort to and seek a punitive cost order against him” was not a rare occurrence. None of these litigation tactics benefited the litigants. Settling cases at the doors of court, in instances where the parties could have resolved their differences long before the trial date, was the norm.

It comes as no surprise that Hussain, Barnard and Hughes commented on the unsustainability of the system as we knew it, as follows:²⁵

²² Judge Griesel 2001 *De Rebus* 9.

²³ See *Take and Save Trading CC v Standard Bank of SA Ltd* 2004 (4) SA 1 par 3, where Harms JA remarked:

“[A] Judge is not simply a ‘silent umpire’. Fairness of court proceedings requires of the trier to be actively involved in the management of the trial, to control the proceedings, to ensure that public and private resources are not wasted.”

²⁴ Woolf *Interim Report* ch 3 par 4–5.

“Our Courts are certainly moving in this direction through the introduction of case management. Of importance to attorneys is that there is a need to recognise that there has to be a shift in the culture of dispute resolution. There has to be a change of mind-set. Attorneys have to move away from litigation that is excessively adversarial and combative. The focus must be on resolving the dispute and remaining focused on the litigant client. It is not about the lawyers!!

Litigation no longer shifts focus from the parties to their lawyers. The object is to resolve disputes rather than drive a wedge between the parties thereby incurring disproportionate costs.”

In other jurisdictions, winds of change have blown and yielded positive results. Here, too, change is inevitable, to some extent, influenced by principles gleaned from those jurisdictions.

5 FUNDAMENTAL PRINCIPLES OF CFM

The following features are common to every effective case management system,²⁶ namely:

- embodiment of the system in the Rules;
- unfettered discretion on the managing judge to issue directives considered appropriate for the circumstances of any particular case;
- imposition of sanctions by the judge in the event of failure by a party to comply with case management directives;
- allocation of a case file to a single judge for management from pleading stage to pre-trial stage, to avoid forum shopping and inconsistencies in the approach;
- certification by the party entering the matter that: all necessary parties have been joined; pleadings are closed and no amendments will be sought; discovery is complete; an advice on evidence has been obtained; if expert evidence is to be led, there has been an exchange of reports; and, most importantly, the party entering is ready to serve witness summaries;
- once the matter has been entered for trial, deeming that the other parties are ready for trial if they did not apply within a specified time for the entry to be countermanded;
- hearing of all relevant interlocutory applications by the case management judge;
- assessment by the managing judge of the length of the trial including a consideration of whether issues should be separated; and
- introduction of court-annexed alternative dispute resolution/mediation as a means to reducing the number of cases on the trial roll.

To be added to these features is a culture of avoiding postponing cases *sine die* or of removing them from the roll (without placing the parties on terms

²⁵ Hussain, Barnard and Hughes “Case Management in Our Courts: A New Direction” 2016 *LEAD Guide* 1 40.

²⁶ Judge Ipp 1998 *Consultus* 49–50.

regarding the filing of outstanding documents) once cases have been enrolled or become subjected to case management.

6 THE NORMS AND STANDARDS ERA

The Constitution ushered in section 165(6),²⁷ which fortified judicial case management. The section provides:

“The Chief Justice is the head of the judiciary and exercises responsibility over the establishment and monitoring of Norms and Standards for the exercise of the judicial functions of all courts.”

Since the advent of the constitutional dispensation, and by virtue of section 173 of the Constitution, Judges President of the various divisions have had the power to promulgate directives that have the same force and effect as the Rules.²⁸ One can conceive of no basis on which such directives could not also deal with CFM.

At the opening of a CFM workshop held at Port Alfred in the Eastern Cape on 19 July 2012, former Chief Justice Mogoeng Mogoeng made the following remarks concerning the benefits of CFM:

“At present, our system first provides the opportunity for the judicial officer to look at the case when it has reached the adjudication stage. This sad circumstance means that there is little room for judicial intervention while the case goes through the numerous hoops provided by our rules. The judge does not drive the matter to finality. The judge relies on the actions of the litigants themselves, or ... the actions of their legal representatives. This is a source of constant frustration.

It is for this reason that modern legal systems are moving away from litigant driven case management to judicial management of case flow. The judicial officer should take over the responsibility to drive the case to resolution. In this position, the judicial officer is able to set and enforce time limits specific to the case to ensure that there are no unnecessary delays. The judge’s familiarity with the development of the case gives him or her unique insight into the needs of the case and the issues in dispute. This allows the judge to promote the effective resolution of the matter which is impossible through the kitchen-sink mill system that operates at present.”

Pursuant to section 165(6) of the Constitution (read with section 8(2) of the Superior Courts Act),²⁹ the Chief Justice issued the Norms and Standards,³⁰ the objective of which is stated as being, *inter alia*, to ensure the effective,

²⁷ This section must be read together with s 8(2) of the Superior Courts Act 10 of 2013, which reiterates the headship of the Chief Justice, who has the power to exercise responsibility over the establishment and monitoring of Norms and Standards for the exercise of the judicial functions of all courts.

²⁸ *National Pride Trading 452 v Media 24 Ltd* 2010 (6) SA 587 (ECP) par 31; *Rossitter v Nedbank Ltd* [2015] ZASCA 196, cited with approval in *Bisha v Minister of Police* [2021] ZAECMHC 24.

²⁹ 10 of 2013.

³⁰ Norms and Standards for Judicial Officers issued by the Chief Justice in terms of s 8 of the Superior Courts Act 10 of 2013 read with s 165(6) of the Constitution of the Republic of South Africa, 1996 (Norms and Standards), published in GN 147 in GG 37390 of 2014-02-28.

efficient and expeditious adjudication and resolution of all disputes through the courts.³¹

To that end, paragraph 5.1(ii) of the Norms and Standards makes it incumbent on every judicial officer to dispose of their cases efficiently, effectively and expeditiously. Paragraph 5.2.4, in relevant part, provides:

- “(iv) Judicial Officers shall take control of the management of cases at the earliest possible opportunity.
- (v) Judicial Officers should take active and primary responsibility for the progress of cases from initiation to conclusion to ensure that cases are concluded without unnecessary delay.
- (vi) The Head of each Court shall ensure that judicial officers conduct pre-trial conferences as early and as regularly as may be required to achieve the expeditious finalization of cases.
- (vii) No matter may be enrolled for hearing unless it is certified trial ready by a Judicial Officer.
- (viii) Judicial Officers must ensure that there is compliance with all applicable time limits.”

A further provision of the Norms and Standards worthy of note is paragraph 5.2.5, which deals with the finalisation of all matters before a judicial officer. It enjoins judges to finalise civil cases within one year³² from the date of issue of summons.³³

In line with the notion that the judiciary ought to take control of the management of cases, and that trials be finalised when judgment is delivered, paragraph 5.2.6 of the Norms and Standards is also of significance. It reads:

“Judgments, in both civil and criminal matters, should generally not be reserved without a fixed date for handing down. Judicial Officers have a choice to reserve judgments *sine die* where the circumstances are such that the delivery of a judgment on a fixed date is not possible. Save in exceptional circumstances where it is not possible to do so, every effort shall be made to hand down judgment no later than 3 months after the last hearing.”

The inclusion in the statute book of misconduct based on failure by a judicial officer to hand down judgments timeously is an important step towards giving expression to CFM. To this end, article 9(c)(i) of the Code of Judicial Conduct³⁴ (“the Code”) provides that “[a] judge must manage legal proceedings in such a way as to expedite their conclusion as cost-effectively as possible,” and article 10(ii) reads:

- “A judge must deliver all reserved judgments before the end of the term in which the hearing of the matter was completed, but may—
- (a) in respect of a matter that was heard within 2 weeks of the end of that term; or
 - (b) where a reserved judgment is of a complex nature or for any other cogent and sound reason and with the consent of the head of the court, deliver that reserved judgment during the course of the next term.”

³¹ Par 2 of the Norms and Standards.

³² Nine months in the case of magistrates.

³³ The Norms and Standards also make provision for the finalisation of criminal cases, but more about that will be mentioned towards the end of this discourse.

³⁴ The Code is adopted in terms of s 12 of the Judicial Service Commission Act 9 of 1994.

In terms of article 3 of the Code, any wilful or grossly negligent breach of the Code is a ground upon which a complaint against a judge may be lodged in terms of section 14(4)(b) of the Judicial Service Commission Act.³⁵

In *Pharmaceutical Society of South Africa v Tshabalala-Msimang; New Clicks South Africa (Pty) Limited v Tshabalala-Msimang NO*,³⁶ Harms JA emphasised the litigants' entitlement to enquire about the progress of their cases and, if the enquiry attracts no satisfactory response, to lodge a complaint. The judicial cloak, he continued, is not an impregnable shield providing immunity against criticism or reproach.³⁷

According to the Code, the delivery of judgments is an integral part of the civil process. In any process, as the adage goes: "Better is the end of a thing than its beginning."³⁸ In promoting the just determination of litigation to dispose efficiently of the business of the court, the judiciary takes charge of the litigation process by, *inter alia*, ensuring that there is compliance with all applicable time limits. A case flow management system that frowns upon litigants and practitioners who do not observe the time limits stipulated by the rules, directives or orders, but winks at a delay in delivering judgments would lack credibility.

Not so long ago, the then-Judge President of the Gauteng High Court lodged a complaint with the Judicial Service Commission (JSC) against certain judges who were alleged to have reserved judgments for a period well beyond 12 months. The judges concerned were found guilty of misconduct,³⁹ and were each directed to issue an unconditional apology to the Judge President and the litigants involved in all the cases in relation to which the judgments had been delayed. They were reprimanded for their shortcoming. In the imposition of an appropriate sanction, consideration was given to the systematic challenges brought about by the lack of resources –

³⁵ 9 of 1994. The section provides that one of the grounds upon which a complaint against a judge may be lodged is the wilful or grossly negligent breach of the Code, including any failure to comply with any regulation referred to in s 13(5).

³⁶ 2005 (3) SA 238 (SCA) 260H–262C.

³⁷ The learned judge added (par 39):

"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, namely that 'justice delayed is justice denied' will become a mere platitude. Lord Carswell recently said:

'The law's delays had been the subject of complaint from litigants for many centuries, and it behoves all courts to make proper efforts to ensure that the quality of justice is not adversely affected by delay in dealing with the cases which are brought before them, whether in bringing them on for hearing or in issuing decisions when they have been heard.' (Emphasis added.)

In *Goose v Wilson Sandford and Co*, the Court of Appeal censured the judge for his delay in delivering his reserved judgment and said:

"Compelling parties to await judgment for an indefinitely extended period ... weakened public confidence in the whole judicial process. Left unchecked it would be ultimately subversive of the rule of law."

³⁸ The adage is based on the Bible verse, Ecclesiastes 7:8.

³⁹ Not amounting to gross misconduct.

human and infrastructural – under which they were expected to discharge their judicial functions; the enormous workload that characterises the division in which they had been appointed; and intervening illness that prevented them from exercising their judicial functions.⁴⁰

In its quest to promote the speedy delivery of judgments and transparency to all the relevant constituencies, the Office of the Chief Justice circulates a quarterly report of reserved judgments on the judiciary website,⁴¹ with an indication of judgments reserved for longer than three months and those longer than six months. The report is prefaced with the following questions frequently posed by journalists with a view to preparing for possible media enquiries:

- What steps has the Head of Court taken to manage judges with long-outstanding judgments?
- Have any judges been reported to the JSC for reserved judgments?
- What are the reasons for the delay in delivery of specific judgments?
- Was consent sought from the Head of Court, as contemplated in article 10 of the Code?
- What measures have been put in place to ensure that there is compliance with the Norms and Standards or article 10?

It is hoped that the issuing of the report will serve as a constant reproach and reminder that justice delayed is justice denied, so that the incidence of delayed judgments will decrease.⁴²

However, it is a matter of concern that the period of three months referred to in the Norms and Standards is not compatible with that mentioned in article 10(2) of the Code. The period mentioned in the Code may, in certain circumstances, prove shorter than the period in the Norms and Standards.⁴³ It might be that the Code is in need of amendment to bring it in line with the

⁴⁰ *Judge President B M Ngoepe v Judge M M Mavundla* JSC (unreported) 2020-10-09 Case no JCT01/2013, where the JSC remarked:

“It is fundamental to our democratic project that Judges must judge cases brought before them. The public is entitled to an effective judicial system that is effective and efficient in resolving disputes. The Constitution demands that there be effective judicial authority. If Judges fail on this primary duty and obligation, the entire institutional fabric will be dismantled – and this is something which our fledging constitutional project simply cannot afford. It is accordingly worth repeating the truism that ‘justice delayed is justice denied.’ The importance of judges executing their judicial functions with expedition can therefore not be over emphasised. The failure of Judges to execute their judicial functions timeously imperils, if not tarnishes, the reputation of the Court.”

⁴¹ The official website from which this information may be accessed is www.judiciary.org.za; see The South African Judiciary “Amended Reserved Judgments Report for the Chief Justice” (31 December 2022) www.judiciary.org.za (accessed 2023-05-08).

⁴² According to the quarterly statistical report, at the beginning of term 1 of 2023, there were a total of 901 reserved judgments. 720 (80%) were reserved for less than six months and 181 (20%) for longer than six months.

⁴³ A case in point is *MEC for Health, Eastern Cape v Aktar Mousomi* ZAECBHC (unreported) 2023-15-06 Case no 367/2017. The appeal was heard on 20 March 2023, which fell in the last week of the first term, 2023. According to the Norms and Standards, judgment had to be delivered by 20 June 2023 – a date falling outside of the second term. In terms of the Code, absent the grant of the exemption referred to in the Code, it had to be and was in fact delivered on 15 June, which was the last day of the second term. Delivering the judgment on 20 June 2023 would have brought the case within the ambit of article 10(2) of the Code.

threshold period in the Norms and Standards. This is especially evident if one has regard to the responsibility added to the judges' workload by CFM.

The Norms and Standards inform the current system of CFM, elaborated upon next.

7 THE CURRENT CFM DISPENSATION

Despite numerous false starts and challenges, the introduction of various amendments to the Uniform Rules on 1 July 2019 confirmed that CFM under the direction of the Judges President is here to stay.⁴⁴

The amended rule 36 extends the period for delivery of a notice by a party intending to call an expert witness to testify, and allows the parties to endeavour, as far as possible, to appoint a single joint expert relating to the same area of expertise. This goes a long way towards ensuring that notices are filed timeously, with the result that the possibility of unnecessary delays or postponements when parties intend calling expert witnesses is eliminated. Costs are also saved.

Rule 37A introduces a judicial case management system at any time after notice of intention to defend has been delivered. The Judge President of a division determines the category of defended actions to which CFM should apply by practice note or directive. Provision is made for CFM invocation before and after the close of pleadings. The registrar plays a pivotal role during the first stage by, *inter alia*, directing compliance letters to any party that fails to comply with the time limits for the filing of the pleadings or any other proceedings in terms of the Rules. After the close of pleadings, the process relies primarily on a judge to manage case flow. The rule also prescribes the requirements for a pre-trial conference to be convened by the parties to a case before a judge at various stages before the commencement of the trial. Where a case is subject to judicial case management, no trial date may be allocated unless the case has been certified trial ready by a judge.

By virtue of rule 37A(1)(b), judicial case management may apply "to any other proceedings in which judicial case management is determined by the Judge President, of own accord, or upon the request of a party, to be appropriate".

In terms of rule 37A(2)(c), CFM shall be construed and applied with due regard to the principle that, notwithstanding the provisions providing for CFM, "the primary responsibility remains with the parties and their legal representatives to prepare properly, comply with all rules of court, and act professionally in expediting the matter towards trial and adjudication". It is submitted that the subrule confers the primary responsibility on the parties without necessarily detracting from the power of a judge to manage the litigation process.

⁴⁴ See GN R842 in GG 42497 of 2019-05-31, which came into operation on 1 July 2019, insofar as it substituted rule 37, inserted rule 37A, and substituted rules 36 and 30A of the Uniform Rules.

In its amended form, rule 30A extends the provisions dealing with non-compliance with the Rules, or with a request made on notice, to orders or directions made in a judicial case management process.⁴⁵ Upon a proper interpretation of the rule, there will no longer be any room for contending that a directive issued pursuant to the CFM process lacks the force of a court order.⁴⁶

Rule 41A, directed at requiring parties to consider a non-adversarial resolution to a dispute that is already before courts was introduced.⁴⁷ In terms of rule 41A(3)(b):

“A Judge, or a Case Management Judge referred to in rule 37A or the court may at any stage before judgment direct the parties to consider referral of a dispute to mediation, whereupon the parties may agree to refer the dispute to mediation.”⁴⁸

The purpose of rule 41A is to alleviate the case load on the courts and to ensure that matters are capable of being resolved without recourse to the judicial system.⁴⁹

Rule 37B⁵⁰ has introduced “administrative archiving” in an instance where none of the parties apply for the allocation of a trial date within 24 months of issue of the summons. According to the rule, if after the expiry of the period of 24 months the matter is not ready for referral by the registrar to judicial case management in terms of rule 37A, the registrar shall, after giving the parties (thirty) 30 days’ written notice, and subject to subrule (2),⁵¹ remove

⁴⁵ Rule 30A provides:

- “(1) Where a party fails to comply with these Rules or with a request made or notice given pursuant thereto, or with an order or direction made ... in a judicial case management process referred to in rule 37A, any other party may notify the defaulting party that he or she intends, after the lapse of 10 days from the date of delivery of such notice, to apply for an order—
- (a) that such rule, notice, request, order or direction be complied with; or
 - (b) that the claim or defence be struck out.
- (2) Where a party fails to comply within the period of 10 days contemplated in subrule (1), application may on notice be made to the court and the court may make such order thereon as it deems fit.”

⁴⁶ Compare *Skom v Minister of Police, in Re: Singatha v Minister of Police* [2014] ZAECBHC 6, where Roberson J held that directives issued pursuant to case flow management in terms of the Norms and Standards were not merely facilitative but had the force of an order of court; otherwise, justice would be hampered.

⁴⁷ Rule 41A was inserted by par 2 of the Schedule to the Amendment of the Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa published in GN R107 in GG 43000 of 2020-02-07.

⁴⁸ Rule 41A(1) defines mediation as a voluntary process entered into by agreement between the parties to a dispute in which an impartial and independent person, the mediator, assists the parties to either resolve the dispute between them, or identify issues upon which agreement can be reached or explore areas of compromise or generate options to resolve the disputes, or clarify priorities, by facilitating discussions between the parties and assisting them in their negotiations to resolve dispute.

⁴⁹ See general discussion on rule 41A by Spilg J in *Kalagadi Manganese (Pty) Ltd v Industrial Development Corporation of South Africa Ltd* [2021] ZAGPJGHC 127.

⁵⁰ Inserted by GN R2133 GG 46475 of 2022-06-03, which came into operation on 8 July 2022.

⁵¹ Subrule (2) reads:

“Any party in a case to whom notice has been given by the registrar in terms of subrule (1) and who has not taken any steps referred to in subrule (1) may apply to a judge in

the file from the administrative record of pending matters and archive the court file. The subrule, whose advent is commended, discourages parties from adopting a lackadaisical approach to litigation which often results in artificial backlogs and bad statistics of pending cases.

Rules 37 and 37A have provided a uniform template upon which CFM prescripts will be generated. Much as there are general rules in the various divisions of the High Court that may be tailored to meet the needs of a particular division, the Eastern Cape CFM dispensation is discussed next, on a broad basis.

8 THE EASTERN CAPE CFM DISPENSATION

A detailed discussion of the CFM regime applicable in the Eastern Cape is not intended; only the salient features of the applicable dispensation are discussed.

Pursuant to the amendment of the Rules of Court in 2019,⁵² the Practice Directive on Judicial Case Management, Eastern Cape, was issued on 25 June 2019.⁵³ The directive came into operation on 1 July 2019, and replaced all previous directives relating to judicial case management. It provides that CFM, as envisaged by rule 37A, applies to all damages claims against the Road Accident Fund and to those founded on alleged medical negligence.

The directive draws a distinction between cases to which CFM must be applied in terms of subrules 37A(1)(a)⁵⁴ and (b),⁵⁵ and those in which judicial oversight of conferences is not compulsory unless the parties have agreed to adopt the CFM regime.

Templates (Form 1(a) and Form 1(b)) were generated to facilitate compliance with rules 37A and 37, respectively. These templates embody checklists designed for use by litigants who have applied for a trial date and include questions that aid in determining the trial readiness of a matter.⁵⁶

Once cases, either pursuant to Form 1(a) or Form 1(b), have been certified trial ready, the registrar creates a provisional roll of such cases for hearing in four weeks' time, and these are placed before a judge to conduct the roll call in court on a Friday.⁵⁷ Each of the files listed on the provisional

chambers for an extension of time within which to render the matter ready for an application to be made for the set down of the matter for trial."

⁵² See GN R842 in GG 42497 of 2019-05-31, which came into operation on 1 July 2019, insofar as it substituted rule 37, inserted rule 37A, and substituted rules 36 and 30A of the Uniform Rules.

⁵³ See *Tyibilika v Member of the Executive Council for the Department of Health, Eastern Cape Province* [2021] ZAECBHC 38 par 5.

⁵⁴ These are defended actions to which CFM applies as determined by the Judge President in a practice note or practice directive.

⁵⁵ These are cases to which CFM applies as determined by the Judge President of her or his own accord or upon the request of the parties.

⁵⁶ The template forms are available at the registrar's office at all the Eastern Cape High Courts.

⁵⁷ Of course, this differs from court to court in the Eastern Cape. For example, in Gqeberha, at least for now, roll call is done in Chambers.

roll is accompanied by another checklist (in terms of Form 2),⁵⁸ which the judge must use to satisfy herself or himself that the files are ripe for hearing, in which event the registrar draws up a final court roll. Most importantly, and as part of ensuring trial readiness, Form 2 requires the parties to file a joint practice note addressing or containing:

- (a) the position of each party with regard to the trial readiness of the matter;
- (b) any outstanding matter(s), procedurally or otherwise, that may potentially prevent the matter from proceeding to trial;
- (c) whether the matter is capable of settlement and should remain on the trial roll for that purpose;
- (d) a clear and concise statement of any outstanding issues for determination;
- (e) as contemplated in rule 37A(10)(e), an identification of witnesses each party intends calling and, in broad terms, the nature of the evidence to be given by each such witness; and
- (f) whether the outstanding issues are capable of determination without the hearing of oral evidence, in which event, if the parties agree that the matter be determined without hearing oral evidence, they shall be required to set out a statement of the agreed facts upon which oral argument is to be addressed.

Forms A and B, which serve to guide the registrar and the litigants when managing cases after the closure of the pleadings and upon receipt of an application for a trial date, respectively, were also introduced.

In essence, Form A steers the plaintiff towards compliance with the provisions of rule 37A and to complete the process provided for in rules 35(1) and 36(9) within 90 days from closure of pleadings, failing which the defendant may apply to have the matter subjected to active judicial case management.

Besides inviting the parties to attend a case management conference in chambers and, to that end, hold a pre-trial meeting before the conference at which the issues identified in rule 37A(10) must be considered, Form B requires the parties to deliver a detailed statement of the issues, which must identify:

- (a) the issues that are not in dispute and in respect of which, by reason thereof, no evidence shall be allowed at the trial; and
- (b) the issues in the case that are in dispute, describing—
the exact nature of the disputes of facts and disputes of law and the exact contentions of each party in respect of such issues.

Form B concludes by urging the parties to particularise, in their minute, the agreement or respective positions on each of the issues identified in rule 37A(10) and, to the extent that further steps remain to be taken to render the matter ready for trial, to identify explicitly the issues and set out a timetable

⁵⁸ Form 2 is a roll call preparation checklist. In essence, it poses the same questions raised, with suitable adaptations, as in Forms 1(a) and 1(b), but, most importantly, affords the parties the opportunity to state whether any judge is disqualified from hearing the matter in terms of rule 37A(15), by reason of having previously been involved in case management.

according to which they propose, upon a mutually binding basis, that such further steps will be taken.

The pronouncement in *Economic Freedom Fighters v Manue*⁵⁹ resulted in undefended unliquidated claims being referred to the trial court.⁶⁰ In the wake of this, Form C has been generated and constitutes a checklist for the setting-down of undefended illiquid claims on the trial roll.

The Form:

- elicits whether any order has been granted in terms of rule 33(4) and, if so, requests that a copy of the order be furnished;
- establishes whether the plaintiff intends to rely upon any documentary evidence and to provide the names of witnesses, including expert witnesses, who will be called to testify at the hearing; and
- seeks an indication regarding the estimated duration of the hearing.

Form C is helpful to practitioners when pursuing undefended illiquid claims. The Form is also an important tool in the hands of the registrar when these claims are being set down and the relevant roll is drawn.

9 CFM IN PRACTICE

The test for the value of CFM is in its application. The following examples of CFM in practice make it demonstrably clear that CFM has averted a postponement or removal of a matter from the roll in many cases, bringing matters closer to finality.

- Perusal of pleadings by a CFM judge revealed that the pleadings were excipiable, a fact that the defendant's or the plaintiff's legal representative, as the case may be, had not noted. This provided an opportunity for the matter to be removed from the roll timeously, thus paving a way for other deserving matters to be enrolled. This is important because any evidence tendered by the errant party in an instance where the pleadings are excipiable will be irrelevant⁶¹ and thus a waste of time and other resources.

⁵⁹ 2021 (3) SA 425 (SCA). In this matter, the court considered the process for prosecuting unliquidated claims for damages and reiterated the long-standing position that, because oral evidence is required before an award is appropriately made, motion proceedings are particularly unsuited to the prosecution of such claims.

⁶⁰ Directions Governing the Setting Down of Undefended Unliquidated Claims for Damages issued by the Judge President on 12 April 2021 (as amended on 19 July 2021); also see *Bisha v Minister of Police supra* par 23–24, where, the court, in relation to the directions, held:

“In all the circumstances, the conclusion reached by the court is that it is inappropriate to set down applications for default judgments in motion court where the claims are based upon unlawful arrest and detention and seek the recovery of unliquidated damages. The directive is applicable to such applications.

There having been no adjudication upon the merits or the quantum of any of the matters before the court, it would be appropriate to order that they simply be removed from the roll. The further conduct thereof shall be guided by the provisions set out in the directives.”

⁶¹ See *Barclays National Bank Ltd v Thompson* 1989 (1) SA 547 (A) 553G, where it was held that “the main purpose of an exception that a declaration does not disclose a cause of

- A preliminary issue of law (for example, lack of substantive jurisdiction or non-joinder) had not been raised by a party. A CFM directive was issued pointing to the shortcoming and resulted in a withdrawal of the case and a tender of costs. In the case of non-joinder, the directive resulted in timely joinder of the necessary party before the hearing date, thus avoiding a postponement of the matter and the incurring of costs on the hearing date.
- The CFM judge picked up a shortcoming in the parties’ agreement as to the incidence of the onus and the duty to begin. The judge flagged the error and thus averted a situation where the matter would have been postponed because witnesses had been lined up on the understanding that the one party, and not the other, bore the duty to adduce evidence first.
- An attorney of record had filed a notice of withdrawal and the CFM judge observed that the notice did not comply with rule 16(4). This would invariably have meant that on the hearing date, the matter would not proceed because the litigant concerned would not have been served with the notice and was thus oblivious of the hearing date. The CFM judge would then have issued a directive pointing to the shortcoming, ensuring that there was either proper service of the notice, leaving it to the litigant to instruct another attorney and avert a postponement.

In addition, the relevance and need for CFM is best illustrated through a number of case studies, the details of which are furnished below.

9 1 ***AM v MEC for Health, Western Cape***⁶²

This was a claim for recovery of damages brought by AM and SM, in their personal and representative capacities⁶³ against the Member of the Executive Committee, Health of the Western Cape (the MEC), arising from a serious brain injury sustained by J. It was alleged that the injury was caused by the negligent conduct of the medical staff, particularly Doctor Horn, who treated J at the Trauma Unit at Red Cross Memorial Hospital. The action was unsuccessful before the Western Cape High Court and ended up, with the leave of the High Court, before the Supreme Court of Appeal (SCA). The sole issue that fell to be determined was whether Doctor Horn had been negligent. A majority (four of five) judges of the SCA dismissed the appeal, exonerating the respondent from any liability towards the appellants.

Before the court *quo*, the case hinged largely on the testimony of expert witnesses. In its conclusion, the SCA dealt with the objective of rule 36(9)(b) and the approach to be adopted when inferences are to be drawn from expert testimony. The court was critical of the manner in which the appellants’ case had been presented, pointing out that the eventual argument, that Doctor Horn negligently diagnosed J with a minor injury, was predicated on a basis that was not pleaded; was not reflected in the expert’s

action is to avoid the leading of unnecessary evidence at the trial”; also see *Opti Feeds (Pty) Ltd v Raymond Glynn Keeny t/a Raynel Ranches* [2016] ZANWHC 10.

⁶² 2021 (3) SA 337 (SCA).

⁶³ On behalf of their son, J.

summaries; was not debated at the pre-trial meetings between the experts; was referred to in passing during counsel's opening address; and first emerged, fully formed, in the evidence of one of the doctors on the fourth day of the trial.⁶⁴

The litigants were criticised for not having used the provisions of rules 37 and 37A, which, if invoked, would have avoided many of these problems and enabled the trial to proceed and finish in the estimated three to four days, instead of taking 10 days spread over three months. The observation was also made that the 10 pre-trial meeting minutes, or progress certificates in relation to such meetings, showed that the "meetings" were conducted telephonically or by way of correspondence, without any engagement on the nature of the disputes between the parties or any real endeavour to classify and limit the issues. According to the court, the impression was overwhelming that these were seen as nothing more than a necessary formality in order to secure a trial date. What should have happened in an endeavour to narrow the issues, said the court, was that witness statements should have been delivered by both AM and Dr Horn as contemplated in rule 37A(10)(e), in keeping with case management norms adhered to in many jurisdictions.⁶⁵ Had effective intervention been made by the court *a quo* during case flow management, the shortcomings noticed by the SCA would have been detected.

9 2 *Nthabiseng v Road Accident Fund*⁶⁶

In this case, Judge President Legodi was concerned that the Mbombela Circuit Court of the Mpumalanga Division was seeing a trend of more cases on the weekly civil roll being settled or postponed on the trial dates because of non-compliance with pre-trial directives, arising from a general lackadaisical stance towards case management. He said:

"It is worth mentioning that in this Division no matter is enrolled ... [for] trial ... unless such a matter was laid before a Judge during a pre-trial conference and a trial date was allocated or determined by the Judge during pre-trial conference. Firstly, cases are enrolled as speedily as possible. Secondly, parties are given the opportunity to set out time frames for themselves and therefore to ensure that ... litigation is not allowed to move at a snail's pace.

Failure by an officer of the court to comply with pre-trial directives given by court, or judge during pre-trial conference, amounts to wanting conduct, unless good and acceptable explanation is offered when an opportunity is so given."⁶⁷

9 3 *NM obo NM v MEC for Health, Eastern Cape Provincial Government*⁶⁸

This case is a classic example of how litigants sometimes abuse the case management process. The claim was for payment of damages brought by

⁶⁴ *Barclays National Bank Ltd v Thompson supra* par 23.

⁶⁵ *Barclays National Bank Ltd v Thompson supra* par 24.

⁶⁶ [2018] ZAGPPHC 409.

⁶⁷ *Nthabiseng v RAF supra* par 13–14.

⁶⁸ [2019] ZAECMHC 44.

the plaintiff on behalf of her minor child, who was suffering from quadriplegic cerebral palsy and developmental delay. This condition, according to the plaintiff, resulted from a breach of contract by the defendant. A special plea was raised, predicated on sections 3 and 4 of the Institution of Legal Proceedings Against Certain Organs of State Act.⁶⁹ Condonation for such non-compliance was applied for and granted without any opposition from the defendant’s camp. A pre-trial conference, during which the parties agreed that the merits of the matter were ripe for hearing and that none of the parties intended amending its pleadings, was held. The same stance was adopted at case management stage, with the defendant indicating that one lay witness and six expert witnesses would be called. According to the relevant checklist, no interlocutory issues were anticipated at trial stage. Against this background, the matter was set down for trial on 26 August 2019.

Ten days before the trial date, the defendant delivered an amended plea embodying the same contentions raised in the initial special plea. The defendant insisted that the matter was not ready to proceed because the plaintiff had not dealt with the defendant’s special plea insofar as it related to service of the section 3(1) notice on the relevant department in terms of section 3(1) of 40 of 2002. The matter was subjected to further case management, whereupon the parties opted for a stated case for a determination of whether the issues raised in the amended plea remained an issue between the parties.

The court (per Jolwana J) engaged in an interpretative process and found that the defendant was being disingenuous, opportunistic and extremely insensitive to the plight of the minor child who had been frustrated a number of times in having her case heard in court.

9 4 *Minister of Police v Bacela*⁷⁰

The matter came before Lowe J as an opposed motion, supposedly in terms of rule 30A. In the view of the court, the application ought to have been brought as a rule 30 application, and was dismissed. Had the matter been placed before a CFM judge, the parties could have been directed to the relevant issues and the difficulties assessed. Although these difficulties were apparent from the papers, it seems that, as is often the case, the real considerations are only appreciated very close to the hearing.

9 5 *Bobotyana v Dyantyi*⁷¹

In this case, the Eastern Cape High Court held that, by virtue of paragraph 5.2.4 of the Norms and Standards, read with rule 37A(1)(b) and (2)(a), there is no logical reason why case management should not also be applied to motion proceedings.⁷² In keeping with this principle, opposed motion court

⁶⁹ 40 of 2002.

⁷⁰ [2020] ZAECBHC 19.

⁷¹ 2021 (1) SA 386 (ECG).

⁷² Also see *Petra Nera Body Corporate v Sekgala* [2020] ZAGPJHC 195 par 6–7, where the respondent had challenged the competence of the court to hear a sequestration application

files are routinely allocated to judges for perusal before the hearing date to ensure that shortcomings that sometimes beset the progress of cases are brought to the attention of the parties and are remedied timeously, long before the hearing date.⁷³

Since the implementation of case management in opposed motions, the finalisation rate of opposed motions has improved.⁷⁴ In some instances, the issuing of directives at case management stage has culminated in the settlement of opposed motions before the hearing date, which brings expression to what the former Chief Justice once said, namely:

“Many a time, a judge realises when the matter is finally allocated to him or her for hearing that the matter could have resolved a long time before had a judge been involved in time. The flurry of settlement negotiations at the door of the courts bears testimony to the fact that not enough effort is being put in to resolve matters.”⁷⁵

9 6 *Nongezile Kozana v Nolwazi Kozana*⁷⁶

This case illustrates the beneficial effects of case management in the context of opposed motions. The applicant sought an order in the form of a *mandament van spolie* for the return of a Toyota Hilux LDV (a motor vehicle) of which she was allegedly dispossessed by the respondent. She alleged that she had been in peaceful and undisturbed possession of the motor vehicle and that the respondent had unlawfully deprived her of such possession. The respondent, on the other hand, denied that the applicant was in possession of the motor vehicle or that she had unlawfully deprived the applicant of the motor vehicle. While the respondent admitted that she had been in possession of the motor vehicle when the application was launched, she contended that the applicant's son, who was in control of the motor vehicle at the time of the impugned dispossession, agreed to her taking possession of the motor vehicle.

The relevant case file was delivered to the writer for CFM on 1 September 2021, a week prior to the hearing date. A directive was issued on the following day, calling upon the parties to deliver supplementary written submissions, by 8 September, addressing, *inter alia*, the following:

on the grounds, *inter alia*, that the court had referred the matter to case management under rule 37A which, it was contended, was limited to trial matters. This argument received short shrift, with Spilg J pronouncing that “[a] comparison between the wording of sub-rules [37A](1)(a) and [37A](1)(b) immediately reveals that the latter covers all other court proceedings which are not ‘defended actions’ ... [and that] all motion proceedings, of which sequestration applications is one, therefore are covered under sub-rule [37A](1)(b)”.

⁷³ *Petra Nera Body Corporate v Sekgala supra* par 20.

⁷⁴ See *Bobotyana v Dyantyi supra* par 23, where it was stated:

“Prior to the implementation of case flow management, the finalisation rate of opposed motion was unsatisfactory and subject to non-compliance with the Rules by one or both parties, resulting in the matters being removed and finality delay accordingly. Sometimes, despite the Judge having read the papers and heads of arguments (often lengthy), a postponement or removal of the matter would ensue, purely because of the technical reasons that no rule 15A practice note has been delivered. This meant that on occasion by no means all of the opposed matters would then have to be set down again.”

⁷⁵ *Bobotyana v Dyantyi supra* par 25.

⁷⁶ ZAECMHC (unreported) (undated) Case no 3504/2020.

- “2. Does the value of the motor vehicle ... not render it justiciable in the Magistrate’s Court, as well? If so, does that factor not have a bearing on the scale of costs to be awarded in these proceedings?”
3. The remedy sought in these proceedings is in the nature of a *mandament van spolie* and thus, strictly speaking, a matter that concerns the spoliator and the person in whose possession the motor vehicle was when it was allegedly seized.⁷⁷ However—
 - 3.1 is it not common cause that the motor vehicle belongs to the estate of the deceased; and
 - 3.2 if so, is the speedy resolution of this matter not dependent on the parties engaging in serious consultative talks for the surrender of the motor vehicle to the Master of the High Court or person appointed by the Master in terms of section 18(3) of the Administration of Estate Act 66 of 1965?
4. In any event—
 - 4.1 is there no dispute of fact that is irresolvable on the papers;
 - 4.2 if so, was the dispute not foreseeable; and
 - 4.3 if it was foreseeable, what should become of the application?
5. In the event of the application being referred for the hearing of oral evidence what, in the interim and in the light of the question posed in paragraph 4, should become of the motor vehicle?”

Three days before the hearing date, on 6 September, the directive attracted a response effectively disposing of the application. The letter, penned by both parties’ attorneys, referred to settlement talks that had been held pursuant to the directive, and acknowledged that the motor vehicle belonged to the estate of the deceased and that both parties were heirs to the estate; and that continued litigation would have a negative impact on future family relations. The parties recorded that the respondent was willing to hand over the motor vehicle to the executor of the estate, and that there should be no order as to costs. On the hearing date, the settlement proposal was made an order of court. Had the concerns expressed in the directive been raised at the hearing of the application, adversarial tendencies would probably have resulted in a postponement for the taking of instructions or other point-scoring tactics detrimental to the estate of the deceased and thus the heirs.⁷⁸

The case examples discussed above show that CFM is beneficial in a variety of ways in civil matters, but leaves the question of whether CFM could also benefit criminal proceedings.

⁷⁷ Ordinarily, the court would have had to enquire into the act of spoliation and, upon finding that there was, restore possession of the spoliated item before any enquiry into the lawfulness of the person despoiled is conducted (see *Ngqukumba v Minister of Safety and Security* 2014 (5) SA 112 (CC) par 10–13).

⁷⁸ Which is what occurred in *Obena v Minister of Police* [2021] ZAEMHC 11 par 45, where the court remarked:

“We are here dealing with a scramble for possession of items belonging to a deceased estate by the litigants concerned in their personal capacities. Both parties ought to have known that the items in this dispute formed part of the estate of the deceased, but they allowed their personal contest to cloud their judgment, resulting in an application that could and should have been avoided.”

10 CRIMINAL PROCEEDINGS AND CFM

In considering whether CFM should be made applicable to criminal proceedings, we should remind ourselves of what was said long ago by Curlewis JA:

“A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and a judge’s position in a criminal trial is not merely that of an umpire to see that the rules of the game are observed by both sides. A judge is an administrator of justice, he is not merely a figure head, he has not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done.”⁷⁹

These remarks lend support to the invocation of CFM in criminal proceedings under the rubric of administration of justice.

Pursuant to the provisions of rule 37A(1)(b), CFM has also been made applicable to criminal proceedings. A prescript may need to be developed to provide guidance on how CFM is to be applied to criminal proceedings. The directive that follows, given by Tokota J, sheds light. The directive reads:

“Whereas the above matter is pending before the East London Circuit Local Division;

Whereas in terms of rule 37A(1)(b) of the Uniform Rules of Court the Judge President of the Eastern Cape Division has determined that the above proceedings be subjected to judicial case management;

Whereas pursuant to such determination a case management conference was held on 22 September 2021;

Whereas the following issues were identified, namely, that–

- (a) accused numbers 10 and 11 have launched an application for separation of trials in terms section 157 of the Criminal Procedure Act 51 of 1977 (the Act) which was served on the State on 9 September 2021;
- (b) accused number 14 has indicated that he intends launching an application for separation of trials in terms of section 157 of the Act;
- (c) it is not practically possible to commence trial proceedings during the course of this year;
- (d) the trial of the main case may last as long as the full term and the parties have agreed that the matter be set down for trial during the second term in 2022;
- (e) the issue of separation has to be dealt with prior to the commencement of the trial and the same ought to be determined before the plea proceedings;
- (f) all parties participating at this conference agree that it will be convenient to have the trial conducted at the Bhisho High Court;
- (g) the plea proceedings should be held at the East London Circuit Court, whereafter the matter shall be transferred to Bhisho for trial;
- (h) the application for separation of trials should be heard and disposed of during the 4th term, 2021;
- (i) the matter has been set down for 5 October 2021 in East London Circuit Court and on that date the matter will be postponed to a provisional date 19 January 2022;
- (j) on 19 January 2022 the matter will be postponed to a date within the first term with a view to commencing and finalising the plea proceedings; and

⁷⁹ *R v Hepworth* 1928 AD 265 277.

- (k) all things being equal, the next judicial case management conference is to be held on 22 October 2021.

Now, therefore, the following directive shall issue:

1. The 14th accused is ordered to deliver his application for separation of trials, if any, by 5 October 2021.
2. The State shall deliver an affidavit in answer to affidavits already filed in support of the application for separation, including that of the 10th and 11th accused, by 19 October 2021.
3. The applicants shall deliver their replying affidavits, if so advised, by 29 October 2021.
4. The applicants shall deliver their heads of argument by 29 October 2021.
5. The State shall deliver its heads of argument by 15 November 2021.
6. The application for separation of trials shall be heard on 23 November 2021.
7. All the parties are directed to attend the next judicial case management meeting to be held at 10h00 on 22 October 2021.⁸⁰

This directive shows the obvious benefits of the application of CFM to criminal proceedings.

11 PRACTITIONERS’ PERSPECTIVE

The benefits and efficacy of any procedural dispensation cannot be discussed without factoring in the views of practitioners. That goes for judicial case management too, as is evidenced by what follows.

A colleague favoured the writer with a letter penned by both attorneys involved in a matter whose process the colleague had managed.⁸¹ The letter makes plain that the acceptance of CFM among practitioners is gaining momentum. The material part of the letter reads:

- “2. The parties address this letter to your Lordship jointly, primarily for purposes of requesting a special allocation of the consolidated matter. The parties also request a directive concerning the case management of the matter. The reasons for the request are set out hereunder:
- 2.1 the papers in the consolidated application are in excess of 2000 pages;
 - 2.2 it is anticipated that the hearing of the matter will take 2 days;
 - 2.3 intervention by the Deputy Judge President in this regard is required to progress the matter; and
 - 2.4 a further delay will not be in the interests of either party.
3. The events leading to the consolidation of the application are indicative of the fact that the parties in this matter have benefitted from case management.”

The Eastern Cape Society of Advocates has echoed the same sentiments.⁸² The relevant part of the Society’s letter reads:

⁸⁰ *S v Phumzile Mkolo* ZAECMHC (unreported) (undated) Case no CC40/2021.

⁸¹ *Eastern Cape Development Corporation v Price Water House Coopers* ZAECELHC (unreported) (undated) Case no 620/2020.

⁸² See letter dated 25 August 2021 penned by the Chairperson of the Society to the writer hereof.

- “1. It is universally accepted by practitioners in this division that the introduction of case flow management has been hugely successful and effective. It is the view of this society that it has become indispensable for the furtherance and disposal of the types of matters to which it is applied.
2. Case flow management promotes and ensures good and thorough preparation of matters by practitioners. In most cases when a matter enters the case flow management process, at least from the view of the plaintiff, it is ready for trial. The process thus ensures a more prompt trial readiness.
3. Complications previously experienced by practitioners to ensure compliance with the provisions of the rules, such as rules 35, 36 and 37 have almost completely been eliminated by the introduction of case flow management. The introduction, as part of the process, of a checklist has secured much stricter compliance with these and other rules. Compliance with the checklist as part of the process has, for instance, ensured that amendments to pleadings are timeously sought and precludes late, “tactical” amendments, which are designed solely to engineer a postponement.
4. Case flow management has ensured that when matters come to trial for the first time, they are in fact trial ready, and they are disposed of at the time of their first appearance on trial. The system has largely eliminated interminable postponements of matters, which were the inevitable result of practitioners not having prepared matters timeously.”⁸³

While applauding the introduction of case management as having contributed greatly to the smooth running of the courts and the effective disposal of matters, all of which advance the interests of justice, in the letter, the Chairperson of the Society constructively remarks:

- “5. Practitioners request that the judges administering the system do so in terms of uniform guidelines, which ensure consistency. So, for instance, where a party undertakes to revert on an issue it is suggested that a universal approach be adopted in terms of which the party undertaking to revert is required to do so within a specified period. Another example of occasional inconsistency is the refusal by some judges to declare matters trial ready in the absence of an actuarial report, whilst others are prepared to certify trial readiness on an undertaking that the report will be available by a specified date. Judges must also guard against agreements between the parties that matters are ready where they are in fact not so ready.”

When afforded the opportunity to comment on the efficacy of CFM, the Wild Coast Attorneys Association assured the writer that CFM was embraced even before the insertion of the new rule 37A, but expressed concern that CFM should be implemented:

- at the commencement of the proceedings, and not only after the close thereof; and
- in a manner that resonates with other rules.

These are but some of the instances indicative of the momentum gained in the Eastern Cape Division in the implementation of CFM. It does not seem that there will be any turning back.

⁸³ An accolade to the same effect was received from the chairperson of the Mthatha Society of Advocates embodied in a letter dated 6 October 2021. The letter also cries out for a return to the roll call system suspended owing to the declaration of the National State of Disaster and the Directions issued pursuant thereto.

12 THE WAY AHEAD

Since the advent of CFM, the landscape of South African procedural law has been enhanced in a remarkable way. In no way does this suggest that CFM is free from challenges.

Much as practitioners have embraced CFM and seem enthusiastic about its implementation, there are some who have yet to be convinced of its usefulness. One still finds checklists defining the issues for determination at trial as “merits and quantum” or “as defined in the pleadings”, albeit seldom. This is a clear failure on the part of the practitioners concerned to appreciate the import of CFM. It is hoped that this attitude does not arise from a calculated subversion of judicial control by those who remain averse to the system and that it is not motivated by economic interest.

Relatively speaking, CFM is a new system for both members of the Bench and practitioners. It was never part of the syllabus at the theoretical and practical law schools from which they budded as lawyers. They were schooled in the old style, the pure adversarial system. Adjustment to embedding a more inquisitorial approach to the litigation process will require ongoing education. Much as CFM is a procedural device, the depth of the CFM participants knowledge of the relevant substantive legal principles applicable to the case being managed will determine the effectiveness of the implementation of CFM. The solution is for all lawyers, including members of the Bench, to keep abreast with developments in the legal field. In any event, a good lawyer is one who knows where to find the law.

What seems clear, however, is that with an appropriate implementation of CFM, there will be more chamber work for judges than there will be court-going cases. It remains to be seen whether, as a result, more judges will need to be appointed.

At another level, the efficacy of CFM may be negated by the different styles or approaches adopted by judges. While it is incumbent on all judges to be committed to the task, it is an open secret that some judges may be less passionate than others about conducting CFM. A duty is nonetheless cast on judges managing the flow of cases not to place reliance solely on the checklist, but to scrutinise the papers enclosed in the relevant files. CFM is not about control for the sake of control, but rather about ensuring that the real dispute, if not settled during the CFM process, is brought properly before court. Were that to take place, the finalisation rate of cases would increase. However, one must always guard against a focus on statistics⁸⁴ at the expense of the quality of the disposition.

Lessons may be learned from jurisdictions where a case is assigned to a single judge at launch stage and managed by him or her to completion stage, including the hearing of all related or incidental interlocutory applications. This practice, which commends itself as beneficial, is lacking in our system, in that at the different stages of CFM, cases move from one judge’s desk to that of another. With different approaches adopted, the initial theme might be lost. The criminal review process provided for in section 304

⁸⁴ The number of cases disposed of.

of the Criminal Procedure Act⁸⁵ is worth emulating. Where possible, the judge who raises a query should be the one who eventually writes the judgment, after the magistrate, whose proceedings are under review, has proffered answers to the judge's query; the review file should not be passed on to another judge, as often happens in the CFM realm.

It is not uncommon for one party to the proceedings to drag their feet and be uncooperative with the other in signing documents, effectively delaying the matter from being declared trial ready. A device worth emulating, invoked in other jurisdictions, is the one that shifts the onus to the defaulting party by providing: "Once the matter has been entered for trial, the other parties will be deemed to be ready for trial if they do not apply within a specified time for the entry to be countermanded."⁸⁶

Finally, in exercising control over the litigation process, judges must strike a balance between what might be perceived as overzealousness and maintaining firm control of the case management process while facilitating an active role on the part of the litigants concerned. Whereas maintaining firm control of the process is essential for the success of CFM, overzealousness runs the risk of eliciting a negative attitude and passive resistance by some practitioners.

It is well established, as a matter of constitutional principle, that litigants are entitled to reasons from a court for its orders.⁸⁷ Given that CFM is conducted in chambers (beyond public view), off the record, with no obligation to provide written reasons for the orders or directives issued, an issue that may, from time to time, rear its head is whether the orders and directives should be subject to appeal.⁸⁸ In other words, what safeguards do litigants have for protection from abuse of the authority that comes with judicial control of the litigation process? The answer may lie with what Lord Woolf has counselled, namely, that under the new approach the civil procedure rules require that judges "be trusted to exercise the wide discretion which they have fairly and justly in all the circumstances".⁸⁹ How far that trust will go is another matter.

This article has made it abundantly clear that rule 37, on its own, is not wide enough to achieve what rule 37A has achieved. Instead, it remains to be seen whether the promulgation of rule 37A has not rendered redundant the CFM dispensation bereft of judicial control enshrined in rule 37(8). Rule 37(8) may need to be repealed.

13 CONCLUSION

This contribution has offered a detailed account of the progress achieved in judicial case flow management. It is hoped that it has invalidated the maxim "why fix something that isn't broken?" Case flow management was

⁸⁵ 51 of 1977.

⁸⁶ Judge Ipp 1998 *Consultus* 50.

⁸⁷ See *Mphahlele v First National Bank of South Africa Ltd* 1999 (2) SA 667 (CC).

⁸⁸ A concern expressed by Judith Resnik in her article Resnik "Managerial Judges" 1982 96(2) *Harvard Law Review* 374 378.

⁸⁹ See *Biguzzi v Rank Leisure* 1994 4 All ER 934 (CA) 941g.

introduced in order to correct shortcomings in the system that were prevalent at the time. Delays in the finalisation of cases, and the clogging of court rolls, often led to obstructing access to justice and costly litigation. Even if there was nothing “broken” with our procedural system, the quest to augment the efficiency of systems that are thought to be functioning well is human. Life would otherwise be static.

From a reading of the Woolf Report, it becomes clear that the author envisioned a move away from an adversarial system to a more inquisitorial one, a system that CFM promotes.

While various milestones have been attained, the journey continues. Considering the challenges and shortcomings highlighted, it might take some time before our system attains a fair balance between securing access to justice for the citizenry through judicial case flow management and the role of practitioners in advancing their clients’ case. That is the ultimate checkpoint, and one that will eventually be achieved.