

A Quest for an Efficient Judicial System as a Key Towards Economic Development

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by
Hon. Chief Justice PS Shivute
Namibia

1. Introduction

Former-UN Secretary General Kofi Annan once said that “good governance is perhaps the single most important factor in eradicating poverty and promoting development”. These words ring true in both developed and developing countries around the world. In any thriving society, the rule of law remains a key aspect to the country’s ability to grow and develop. A relentlessly impartial and independent judiciary is essential for good governance and for economic development, as the fair and prompt interpretation and enforcement of economic rights will help create a climate that is conducive to our much-needed investment and growth. Without a well-enforced rule of law, investors will find it harder and riskier to invest in our economies, leaving us without the economic growth and development that our region needs. This principle holds true not only for foreign investors, but also to ensure that our own citizens are willing to engage in business ventures, both large and small.

Southern Africa has made great progress in creating a climate of fairness and respect for the rule of law, which has helped our economies grow in recent decades, helping to lift countless people out of poverty. However, though we have made great strides in legislative and judicial reform, there are still problems which hinder optimal economic growth and development.

In the decades to come, further reform is needed to maintain effective legal systems and to reduce levels of corruption, thus making Southern Africa a safer and more lucrative investment opportunity. Though it is not the role of the judiciary to actively encourage economic growth, ensuring that our judicial systems remain efficient and independent will help attract the investment that will ensure many more years of economic development across Africa.

2. Measuring the Efficiency of Judicial Systems

Article 78 of the Namibian Constitution determines that the judicial power shall be vested in the Courts of Namibia. Similar provisions are to be found in the constitutions of other countries in the region.¹ Suffice it here to note that 'judicial system' refers to Courts and their functions in terms of the laws of the respective countries. Whereas the mission of defining 'judicial system' can be achieved with reasonable precision, measuring the efficiency of a judicial system can be a rather complex undertaking.

Through his work for the World Bank, Matthew Stephenson has produced numerous writings to cultivate measurement tools of efficiency.² The first tool of measurement being, easily observable characteristics of formal institutions, such as articles that correlate the formal legal protections afforded to creditors and shareholders at investment levels. Secondly, analyzing the structure of government to determine how easy it is to change policy and using data thought to be good proxy for some aspect of institutional quality that is more difficult to measure, such as the frequency with which government has lost those cases in which it is a party. Thirdly, using expert evaluations, frequently collected by private firms specializing in providing foreign investors information on state risk, by for example surveying professionals who have done business in the country in question and asking a series of questions about the business environment; the risk of nationalization, the prevalence of corruption, the efficiency of dispute resolution procedures.

I agree with Stephenson that many aspects of judicial structures which are quite important are not easily observed. I lean more towards the second method of measurement combined with the third to measure efficiency of judicial divisions of government. The second and third instruments of evaluating efficiency are essentially intertwined as the identification of investor assessments can be used

¹ Example s 165 of the Constitution of the Republic of South Africa.

² See <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTINST> accessed on 16/06/2013.

against the backdrop of the flexibility of the system to correct any shortcomings on the institutional level.

3. The international picture

Every year the World Bank produces a report on the ease of doing business in countries around the world. First published in 2003, the report has grown in size and importance and ten years on, provides comprehensive information on the ease of doing business in individual countries, in regions and across the world.³

Of the top 50 countries which have improved their ranking for ease of doing business, **China**'s legislative process is worth mentioning – it established a new company law in 2005, a new credit registry in 2006, its first bankruptcy law in 2007, a new property law in 2007, a new civil procedure law in 2008 and a new corporate income tax law in 2008. It is critical that the judiciary works within a strong and comprehensive legislative framework, and China's steps in this regard are perhaps instructive.

Of the top ten countries which have made the most improvements, it is interesting to see that five have made it easier to address insolvency and two have also strengthened their systems for enforcing contracts. Let us look at two of the top ten improvers:

Serbia strengthened its insolvency process by introducing private bailiffs, streamlined insolvency procedures, expediting service of process and adopting a public electronic registry for injunctions. The new private bailiff system has also increased efficiency in enforcing contracts.

³ See World Bank, *Doing Business 2013: Smarter Regulations for Small and Medium-Size Enterprises*, Washington, DC: World Bank Group, 2013.

Poland introduced a new civil procedure code that, along with an increase in the number of judges, reduced the time required to enforce a commercial contract. Poland also made it easier to resolve insolvency, by updating the documentation requirements for bankruptcy filings.

In light of the above, the role of the judiciary in the economy can most effectively be assessed through the cost, time and procedural complexity of resolving a commercial lawsuit between two domestic businesses. Interestingly, **Luxembourg** is ranked as the top country in terms of the ease of resolving commercial disputes, whilst speed of resolution is fastest in **Singapore**.

The report showcases examples of countries that have taken steps to improve judicial practices – and it is interesting to see that it is often only basic changes that are needed to achieve real and sustainable change – including simple changes such as allowing litigants to file complaints electronically, and the use of computerised systems of case management.

Specialisation of the judiciary also appears to be effective - according to the report, success stories include **Liberia** which launched a specialized commercial court in November 2011 and has already appointed three new judges for the court, and **Cameroon** which has created specialized commercial divisions within its courts. Even the most basic changes – such as the appointment of additional judges - can make all the difference to the time it takes to resolve cases.

Looking at the data provided, it is pleasing to report that in the last eight years, **sub-Saharan Africa** has introduced the most changes in the area of contract enforcement. The introduction of specialised courts in seven sub-Saharan African countries has reduced the average time to resolve cases by an impressive five months.

Ensuring that investors are protected is another key area for the promotion of economic growth and, for the eighth consecutive year, **New Zealand** has provided the strongest minority investor protections. But again it is pleasing to

see that Africa has implemented some of the most comprehensive investor protection reforms. **Lesotho**, **Burundi** and **Rwanda** have all updated their company laws. **Namibia** too in this regard can be mentioned, as we recently introduced a comprehensive Companies Act⁴ consisting of 452 sections and 17 chapters to facilitate commercial transactions in Namibia for both foreign and domestic corporations. This new law gives investors more legal certainty with regard to their rights and obligations, and attempts to enhance transparency in commercial relations. Some might think that such an extensive piece of legislation can be discouraging to investors. This, however, is not the case, as the Act aims at governing every aspect of commercial transactions, thus providing a climate of certainty for all parties involved.

Taking another lesson from the success stories cited, Namibia's Law Reform and Development Commission has recently embarked on a process to revise our law on insolvency, with input from the World Bank.

To summarise my rapid précis of the *Doing Business* report – it is a 282-page document so I could go on – I would like to read one of the introductory sections about the importance of rules. I highlight it because of the role the judiciary plays as the enforcer of rules:

Private sector development benefits from clear and coherent rules: Rules that set out and clarify property rights and facilitate the resolution of disputes. And rules that enhance the predictability of economic interactions and provide contractual partners with essential protections against arbitrariness and abuse. Where such rules are reasonably efficient in design, are transparent and accessible to those for whom they are intended and can be implemented at a reasonable cost, they are much more effective in shaping the incentives of economic agents in ways that promote growth and development.⁵

⁴ Companies Act 24 of 2004 (as amended by the Companies Amendment Act, No 9 of 2007).

⁵ At 16.

Again, this shows us that the judiciary can indirectly promote economic growth by upholding and enforcing the rules governing the economic climate efficiently and impartially.

4. What Namibian investors want

According to the World Economic Forum's most recent Global Competitiveness Report,⁶ Namibia is currently ranked fifth amongst the SADC economies. Namibia's Fourth National Development Plan states that Namibia aims to become the most competitive economy in the Southern African Development Community by 2017.⁷ Whilst this is ambitious, it is potentially achievable. One positive step in the right direction is to recognise and address obstacles to our economic development in Namibia and, more broadly, other SADC countries – including problems relating to our judicial systems.

We can look to the annual Business and Investment Climate (BIC) Surveys to identify the current constraints and obstacles to business growth, to help us understand how best to foster and strengthen the enabling environment for businesses across the region. These surveys analyse the attitudes of a variety of businesses in each country, to gain insight into the current business climate.

Although the 2013 *Namibian BIC* survey⁸ presents a favourable picture of economic conditions on the whole, several key problems are apparent – notably, below-average investment by all categories and sizes of businesses has been highlighted as a major issue. This deterioration in business and investment confidence relates, at its core, to several key problems which have implications for the legal system, such as the prevalence of corruption and the enforcement of contracts and protection of property rights.

⁶ Klaus Schwab, *The Competitiveness Report 2012-2013*, Geneva: World Economic Forum, 2012.

⁷ *Namibia's Fourth National Development Plan, NDP4, 2012/13 to 2016/17*, Windhoek: Republic of Namibia, 2012.

⁸ Klaus Schade, *Namibia Business and Investment Climate Survey 2013 ("namBIC")*, Windhoek: Namibian Chamber of Commerce and Industry, Namibian Manufacturers Association and Institute for Public Policy Research, March 2013.

Namibia's 2003 Anti-Corruption Act,⁹ which came into force in 2005, is aimed at combating corruption and promoting accountability in Namibia. We also have a new statute on the Prevention of Organised Crime, which came into force in 2009.¹⁰ These new laws are only beginning to make their impact, with several recent cases having tested their terms and procedures. It is their effective application by our judiciary which will determine their role in practice.

Another problem highlighted by the 2013 *namBIC* report as hindering economic growth is the deterioration of perceptions on the enforcement of contracts and property rights.

This is a particular problem for businesses operating in the informal sector, which play a significant role in economies across the SADC, as these entities are not registered and therefore face more challenges when seeking legal help in the event of disputes.

The absence of small claims courts in Namibia exacerbates this problem, and this is an issue which we have under investigation. Additionally, the establishment of Alternative Dispute Resolution (ADR) mechanisms should be encouraged.

In **the Netherlands**, for example, the judiciary encourages reconciliation and mediation mechanisms to help resolve investment and commercial disagreements. Foreign investors gain exponentially from the dynamic number of dispute resolution mechanisms as arbitration, reconciliation and mediation bodies may also provide remedies for these actors. Furthermore, the active roles of ADR bodies have shown to impact the judiciary positively as well. The lack of what may be perceived as a monopoly on conflict resolution by judiciaries means that the judicial system has to compete against these other bodies by maintaining and improving its own efficiency to manage cases in an appropriate

⁹ Anti-Corruption Act 8 of 2003, brought into force by GN 37/2005.

¹⁰ Prevention of Organised Crime Act 29 of 2004, brought into force by GN 77/2009.

manner. Hence, both the judiciary and investors are influenced positively from the functionality of ADR bodies within countries.

In Namibia, the Labour Act¹¹ promotes the use of Alternative Dispute Resolution mechanisms to resolve labour disputes, and parties to labour disputes frequently take advantage of these.

However, the 2013 *namBIC* highlights the current high cost of enforcing contracts in Namibia - up to 35.8% of the disputed value - as a highly worrying contributing factor to Namibia's place on the World Bank report, as this acts as a deterrent for businesses to enforce contracts and hence impacts negatively on economic growth. Mining companies were noted as being more concerned than other companies with the issue of the enforcement of contracts and property rights.

On the other hand, Namibia has an Expropriation Act¹² which is applied and respected in practice – and I could cite numerous cases where issues such as disputes over tender awards, mining and prospecting licences and the Constitutionality of professional tariffs have been resolved by the courts, with the case outcomes providing clarity and certainty. The legislative environment is important, but it would not be very useful without meaningful enforcement by forums which are accessible and outcomes which are respected.

5. What does this all mean for the judiciary – Suggested solutions?

As previously emphasised, the role of the judiciary is not to work for businesses by actively seeking to court investment; the judiciary must remain impartial

¹¹ Labour Act 11 of 2007.

¹² Expropriation Act 63 of 1975, inherited from South Africa but still applicable in independent Namibia. See also the Agricultural (Commercial) Land Reform Act 6 of 1995.

under all circumstances. However, as experience will tell, the real-life impact that the work of the judiciary has on our society can nevertheless shape it in a way which makes it more conducive to doing business.

For example, the section of the World Bank “Doing Business Report” entitled “Enforcing Contracts”¹³ demonstrates a correlation between countries with lengthy, inaccessible and corrupt legal proceedings and a reduction in the availability of the vital financing required for economic development.

In a positive example of how to resolve this, the World Bank cites the way in which **Chile**’s judiciary has, since the turn of the new millennium, increased its transparency and improved case-management techniques as a means of introducing lasting reforms. Foreign investment funds, previously withheld due to a fear of slow and prejudiced judicial behaviour, now flow much more freely into Chile as there is reassurance that independent, well-functioning courts keep check on government corruption, maintain the rule of law and ensure far swifter, more even-handed processing of contracts and litigation than before.

Indeed, the report indicates that the bonuses brought to countries by such judicial efficiency as has recently been achieved in the example of Chile have a beneficial economic impact beyond simply attracting investors. It states, and we agree, that an efficient judiciary benefits the economic activities of everybody in society. It protects the land-titling institutions and property rights which enable ordinary citizens to use their capital to make further investments; enforces contracts, breathing confidence into aspiring entrepreneurs; opens up opportunities for rich and poor alike by offering accessible justice; and holds those in business and in government responsible for misdemeanours which might negatively impact the fortunes of others.

In the same vein, in 2011, Namibia introduced a new case management system at the High Court, which will ultimately be rolled out to all of our courts. The

¹³ See International Finance Corporation/World Bank, “Enforcing contracts”, 2012 data, available at www.doingbusiness.org/data/exploretopics/enforcing-contracts.

introduction of case management was seen as a response to problems of case backlog, ever increasing costs and delay in the finalization of cases. The central feature of case management is the control of litigation by the court rather than by the parties, their lawyers or the registrar. The results by and large are positive in that:

- Tactical delays have been reduced as judges seek to expedite the completion of cases;
- Trial dates are less often lost due to unpreparedness;
- Legal practitioners tend to consult with clients earlier than before;
- Settlements have increased because trial preparation occurs much earlier than before and parties are required to seek more earnestly to limit issues and areas of dispute;
- Issues for adjudication are more clearly defined than before; and
- Trial dates are now seldom vacated because judges tend to discourage postponements.

Although these results are encouraging, remaining areas for concern include the following:

- It remains to be established if the objective of reducing costs has been achieved;
- There is a lack of uniform application of case management by the judges, which needs to be refined; and
- Legal practitioners' resources and time are being stretched because of the exponential increase in case management activity.

In addition, new High Court Rules which are currently in the final stages of revision will provide for more use of electronic communications in litigation, which can also be introduced at the Supreme Court level in due course if it proves to increase efficiency as we hope. I must be frank by conceding that Namibia has struggled with time frames for reserved judgements in the past, but a concerted effort to tackle this problem is already bearing fruit with a substantial reduction in outstanding judgments.

In fact, the “Doing Business” 2013 report confirms that Namibia is on the right track, as it is rated as one of the fastest countries in the world when it comes to enforcing contracts, taking an average of 270 days - far below the OECD high-income country average of 510 to complete contract-based litigation processes.¹⁴ As ever, there is room for improvement; however, this is an encouraging testament to the efficiency of our Namibian judicial system.

Sub-Saharan Africa, more generally, is also worthy of praise for the fact that it has implemented more contract enforcement reforms per year since 2006 than any other part of the world, demonstrating that our legal systems overall are sensitive to the need to promote economic development with an effective legal climate.

Another essential feature for judicial efficiency is a country’s ability to allow for speedy debt collection mechanisms. The effectiveness of enforcing debt collecting is another paramount concern to investors since bad debts are an inherent risk of any business venture. In the globalized world, stakeholders must have confidence in the judicial and enforcement mechanisms to feel secure that they can have assistance from state bodies to potentially collect debt. One of the more efficient models displayed by the Austrian state, emphasises simplifying state enforcement assistance for debt collectors by providing one centralized body that handles such disputes and having them exclusively resolve debt collection matters. Thus, the investment and commercial relations are also encouraged by transparency in state systems to understand how debt collecting may take place and the assistance of bailiffs or sheriffs and centralized agencies that help private actors recover their debts.

5. Conclusion

¹⁴ See summary of data from World Bank, *Doing Business 2013* by country and region at www.doingbusiness.org/data/exploretopics/enforcing-contracts.

Preserving and protecting the rule of law is vital for everyone in society, not just for companies and investors. But investors and businesses, perhaps even more than other members of the public, want to know that they are acting in a stable legal environment, where parties will be bound by lawful agreements, where disputes can be adjudicated fairly promptly and at a reasonable cost, and where court judgements will be respected and enforced.

Improving access to justice should be an imperative for economic growth in any country. In addition to being an independent right, access to justice provides a means for people to protect and enforce other rights – including economic rights and interests. Certainly, litigation is not the only means to enforce economic rights, but the courts are a key tool for keeping the political branches of government accountable to the rule of law – which is necessary for a fair economic environment that is conducive to entrepreneurial activities and business confidence. Thus, an efficient judicial system is vital for development as well as democracy.

Our countries' most important tool for improving our economic growth is our own willpower to strive for efficiency and monitor our progress closely. Above all tools, one of the most significant factors in contributing to judicial efficiency remains our own motivation to achieve change and growth to aid this fundamental goal.